



Neutral Citation: [2023] UKFTT 00421 (TC)

Case Number: TC08819

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2019/08844 (V)

Value Added Tax Act 1994. Appeals against VAT assessments made under section 73 and a penalty assessment made under Schedule 24 to the Finance Act 2007. Requirement in section 83A to offer review. Rejection of appeal by administrative action. Whether to permit appeals to be made late.

Heard on: 15 December 2022

Judgment date: 20 December 2022 (summary)

15 May 2023 (full)

Before

TRIBUNAL JUDGE RACHEL PEREZ

Between

P.R.B. TRADING LIMITED

Appellant

and

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

Respondents

Representation:

For the Appellant: Mr Howard Watkinson of counsel

For the Respondents: Mrs Helena Perrett of HMRC

DECISION

1. The appeal against the assessment notified by the notice dated 12 November 2018 was made on 14 November 2018 and so was in time.
2. The appeals against the other input tax assessments were also made on 14 November 2018. So they were 344 days late, 64 days late, 64 days late and 63 days late. The appeal against the penalty was made on 29 October 2019 and so was 306 days late.
3. By a summary decision on 20 December 2022, I permitted all of those late appeals to be made out of time. At HMRC's request, I now give my full findings and reasons. I apologise for the delay in producing these; it has taken over three months from when the request was passed to me.
4. A note for the administrative team: there is no need to resurrect the reference number allocated to the appeal that was made on 14 November 2018. Everything can proceed under the appeal number at the top of this decision. Thank you.

REASONS

A. INTRODUCTION

5. This is an application by P.R.B. Trading Limited under section 83G(6) of the Value Added Tax Act 1994, for permission to make late appeals against the following assessments—

Date of Assessments	Period assessed	Amount	Date appealed		How late	
			acc to appellant	acc to HMRC	acc to appellant	acc to HMRC
Section 73 VATA 1994						
02/11/2017	04/15-07/17	£1,517,156.00	14/11/2018	29/10/2019	-----	696 days
or 6/11/2017					Just short of a year	-----
13/08/2018	08/17-11/17	£288,266.49	14/11/2018	29/10/2019	2 months & 2 days	412 days
13/08/2018	01/18	£72,661.33	14/11/2018	29/10/2019	2 months & 2 days	412 days
14/08/2018	12/17	£39,172.00	14/11/2018	29/10/2019	2 months & 1 day	411 days
12/11/2018	02/18	£70,596.80	14/11/2018	29/10/2019	Not late	321 days
Schedule 24 Finance Act 2007: penalty						
26/11/2018	01/02/2015 to 31/01/2018	£1,629,658.09	29/10/2019	29/10/2019	306 days	307 days

6. The reason the entry for the first assessment, for £1,517,156.00, refers to both the 2 and the 6 November is because the parties disagree on whether an HMRC letter dated 2 November 2017 was the notification of assessment that started time running for appealing. That difference makes four days' difference to how long the delay is by each party said to be. The parties also differ as to when the appeals were made. The appellant says the appeals were all made on 14

November 2018, except for the appeal against the 26 November 2018 penalty assessment: the appellant accepts that that appeal was made on 29 October 2019. HMRC say all the appeals were made on 29 October 2019. Those differences as to when the appeals were made make a significant difference to how late the appeals are said by each party to be.

7. The respondents' 13 March 2020 Notice of Objection to the appeals being made late was broadly on the ground that the evidence provided by the appellant to support its explanations was inadequate. The appellant has provided more evidence since then, and says there would be no prejudice to HMRC in permitting the appeals to be made late.

B. FACTUAL AND PROCEDURAL BACKGROUND

8. The appellant, P.R.B. Trading Limited, was incorporated on 18 August 2014. Its director then, as now, was Mr Patrick Boland. The appellant by its agent made a voluntary application for VAT registration on 1 October 2014 (page 320). The agent specified in the application was Stephen Chesney of Pendragon Business Consultants (page 329).

9. The following are some of the events leading up to this application. There was more than this in the helpful detailed chronology at pages 64 to 70. But the below includes "*the main events*" as summarised by HMRC, as well as events to which Mr Watkinson drew my attention for the appellant (I have included events that post-date the latest of the appeals for the relevance of those events to the tribunal's consideration of all the circumstances). Where I say that a telephone call took place or an email or letter was sent, I am making a finding of fact that it took place or was sent and that it said what I say it said. As to whether I find as a fact that what it said was true, I do so find unless I indicate otherwise in relation to the event in question in the following subparagraphs—

- (1) The appellant submitted repayment returns for periods 04/15 to 05/18.
- (2) On 4 May 2017, HMRC wrote to the appellant, saying HMRC wished to check its VAT returns. This letter was sent to "P.R.B. Trading Ltd" at Perry Mill Farm, and came from Christopher Glen, VAT Assurance Officer (page 116).
- (3) On 1 August 2017, Officer Glen wrote to the appellant to arrange a visit. This letter was sent to "P.R.B Trading Ltd" at Perry Mill Farm (page 119).
- (4) On 21 August 2017, Officer Glen wrote again, proposing a visit for 12 September 2017. This letter was sent to "PRB Trading Ltd" at Perry Mill Farm (page 122).
- (5) On 8 September 2017, so before the date of the arranged visit, Mr Chesney the appellant's agent telephoned HMRC and spoke to Officer Glen. The note of that telephone call said (page 125)—

"Phone call received from Mr Stephen Chesney, who identified himself as the agent (this is supported by the VAT1, but there is no 64-8 in place). Mr Chesney advised that Mr Boland will be unavailable on Tuesday as he is currently on the emergency waiting list for an operation. I asked if there was anyone else available to complete the visit with. Mr Chesney advised that he could take the meeting as all the records were held with him anyway.

I accepted this, but advised Mr Chesney that I would need a 64-8 to be completed ahead of the meeting. Mr Chesney confirmed that he would have one for the visit.

Visit now to be held at the agents [sic] premises - Pendragon Business Consultants, 246 Court Oak Road, Harborne, B32 2EJ (this is the same address as the registered office)".

- (6) On 12 September 2017, Officer Glen visited Mr Chesney and did an inspection. Officer Glen took away with him "*ALL paperwork up to date of inspection*" relating to the appellant. This is seen from Mr Chesney's email of 29 August 2018 to Mr Boland,

supplied by Mr Boland to Sajid Javid’s assistant Danelle Johnston Jones in an email headed “Fwd: VAT Complaint” (page 176).

(7) On 20 October 2017, instead of writing to Mr Chesney, Officer Glen wrote to Mr Boland, requesting further documents (page 127). The letter started with “*I write with reference to my ongoing VAT enquiry*” (a phrase which also featured in later letters after assessments had already been notified).

(8) By letter dated 24 October 2017, Officer Glen notified assessments for £1,618,282.00, for periods 4/15 to 7/17 (pages 130 to 134). The letter began by saying (page 130)—

“Dear Sir

Notice of VAT assessments

I believe that you have not declared or we have not assessed the correct amount of VAT due for the periods shown on the enclosed schedule. I explained this in my letter dated 20 October 2017.

I have made assessments of VAT due under section 73 of the VAT Act 1994. This letter and enclosed schedule is our notice of those assessments.”

It was common ground that this 24 October 2017 notification of assessments offered a review (as well as mentioning the right of appeal). That text was on page 130.

(9) On 2 November 2017, Officer Glen wrote to “Mr Patrick Boland PRB Trading Ltd Perry Mill Farm” saying that, having taken further advice, Officer Glen was taking a different course of action (page 135)—

“Dear Mr Boland

I write with regards to my recent assessment dated 20 October 2017 [sic]¹.

Having taken some further advice, the correct course of action is actually to disallow the input tax on the basis that until you can demonstrate that you have made supplies as you have previously claimed - including providing me with all the evidence I requested in my previous letter - then I cannot be sure that the input tax is an expense appropriate to a taxable supply.

Please find enclosed all of the appropriate paperwork to withdraw my previous assessment and raise the assessment for the input tax. As you will see this reduces the amount due back to HMRC from £1618212².00 to £1517156.00.

As previously discussed, should you provide me with any further evidence, then I will happily consider all paperwork you are able to provide. As discussed with your accountant, I still wish to visit the business at its actual trading address and discuss with you some of the details about the working of the business that your accountant was unable to answer in our meeting. Please contact me to arrange this meeting.

Whichever method you choose to contact us about this check, you need to quote the case reference CFS-1394032 and any other references shown above. If you write you need to use the address shown above. If you send documents you must tell us if you want them returned as we may securely destroy them after 50 days.

¹ No point was taken as to this referring to the 20 October rather than 24 October, when it was the latter which notified the assessments.

² The assessments notified by the letter dated 24 October 2017 had actually said £1,618,282, but no issue appears to have been taken with this narration error.

Yours sincerely”.

(10) It can be seen that, as well as referring to a replacement assessment, this letter also said Officer Glen “*will happily consider all paperwork you are able to provide*” if Mr Boland were to provide Officer Glen with any further evidence.

(11) It was common ground that this 2 November 2017 letter did not contain the offer of review (or the reference to appealing) that had been in the assessment notification that was going to be replaced.

(12) On 6 November 2017, a letter headed “Notice of VAT assessments” was sent to Mr Patrick Boland at “PRB Trading Ltd Perry Mill Farm”. It began by referring back to the 2 November 2017 letter. It was common ground that this 6 November 2017 notice did offer a review (and mention the right of appeal) (page 137)—

“Dear Mr Boland

Notice of VAT assessments

I believe that you have not declared or we have not assessed the correct amount of VAT due for the periods shown on the enclosed schedule. I explained this in my letter dated 2 November 2017.

I have made assessments of VAT due under section 73 of the VAT Act 1994. This letter and enclosed schedule is our notice of those assessments.

Summary

As a result of these assessments, the total VAT due is £1,517,156.00.

Default interest

We may charge you default interest. See the section ‘What happens next’, for more information.

What happens next

We will shortly send you a computer generated confirmation of the assessments. This will also show the amount of any default interest charged. Please pay any amount due as soon as you receive the confirmation.

What to do if you disagree

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

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

You can find out more about tribunals on the Tribunals Service website. Go to www.gov.uk/tax-tribunal

More information

If you have any questions, please contact me using the phone number or address shown at the top of this letter.

I have sent a copy of this letter to your adviser Mr Stephen Chesney.

Whichever method you choose to contact us about this check, you need to quote the case reference CFS-1394032 and any other references shown above. If you write you need to use the address shown above. If you send documents you must tell us if you want them returned as we may securely destroy them after 50 days.

Yours sincerely

Christopher Glen

VAT Assurance Officer”.

(13) On 24 January 2018, Mr Chesney wrote responding to the reference in Officer Glen’s 2 November 2017 letter to providing further evidence and paperwork. This letter from Mr Chesney said it was impossible to get the necessary paperwork and information to HMRC. The letter is undated but it is common ground that it was sent on 24 January 2018 (page 141)—

“Dear Sirs

We again enclose a full set of documents re the above case. This is now the third set we have forwarded to you to no avail.

Please acknowledge receipt.

We sand [sic] ready to provide you with all necessary paperwork / information, but are finding it impossible to get the said information to yourselves.

As you can see the paperwork is far too large to attempt forwarding by Email due to your restricted size Email facilities .

Yours faithfully

S.R. Chesney

For and on behalf of Pendragon Business Consultants Llp”.

Mrs Perrett did not dispute the assertion that it was the third set of documents that Mr Chesney had forwarded to HMRC and I find that it was. As to whether documents had been submitted “*to no avail*”, I accept that, apart from the 6 November 2017 assessment notice, Mr Chesney had not heard from Officer Glen since receiving Officer Glen’s 2 November 2017 letter.

(14) Included with Mr Chesney’s 24 January 2018 letter was an undated document from Mr Boland (pages 142 and 143)—

“COVERING LETTER

As you can see, hopefully we have tried our best in providing you with information supporting your requests from questions 1-6.

We have approached Drac logistics that we worked with during business with Africa, along with contacting the European companies that we supplied our goods to after Africa. We have obtained some of the documentation that we have requested, showing the goods *were* received on dates after export.

When working with Africa, we received bills of laden [sic] to confirm and support exportation of stock. You have obtained this information from us.

Drac logistics did the majority of our transport, and have sent us a brief email covering the chief system that they use. This system is to enter the exports on behalf of us, along with confirming that proof of export is the bill of Ladens [sic]. we have not provided you with the original bill of Laden' [sic], as they go to the customer.

With Europe, most of the companies have responded back and confirmed receipt of the goods with relevance to the invoices.

All of this has been very difficult as you hold all of the documentation on behalf of all the transactions that we have completed over the last 3 years, so we have had to try and sort through this with the hope that customers would work with us on this issue.

Luckily Drac logistics have been very helpful, and provided us with a reasonable amount of documentation. However when you request copy bill of Laden's [sic] from many shipping lines, this can take a while.

We have provided a number of documents, however Drac logistics are awaiting further documentation from certain shipping lines. With reference to this, you do have every bill of laden [sic] with every invoice.

With reference to registering our exports, unfortunately we are beholden on the transport companies for this. We thought that European transport companies because they were exporting on behalf of us would provide the service of registering the exports on the CHIEF system (CUSTOMS HANDLING OF IMPORT AND EXPORT FREIGHT).

With Africa, we have confirmation that the exports have been registered with the chief system on every point of export. And I am very shocked to learn that these have not been registered. Unless you are looking on a different system to what they use (CHIEF SYSTEM).

We have tried to answer all of your questions and to provide you with detailed documentation available within this [sic] time period given.

We have never received a term of contract from Drac logistics; we have only ever received a confirmation of the shipping rates. However you can speak with them directly to confirm the terms of contract.

Drac Logistics: 01785 815655 Points of contact-Andy Hopkins & James Potter.

We hope the information that we have been able to provide will be sufficient, if you need any further documentation please do not hesitate calling or writing to us. This is a matter of urgency for our company and is holding us back.

This along with the amount of VAT owing has created me to have many sleepless nights and extremely worried me.

Regards

Patrick Boland
PRB TRADING LTD".

(15) I make no findings as to the truth of what is said in that document from Mr Boland, except that I accept that he spoke to Drac Logistics, provided documents to HMRC, and had many sleepless nights and was extremely worried. The accuracy of the rest of the document will be for consideration on the appeal.

(16) On 30 January 2018, Mr Chesney made a telephone call to Officer Glen. Officer Glen's note of that call said this (page 144)—

“Notes

30/01/18 - Phone call received from agent (Mr Stephen Chesney) to advise that he has sent some documentation in response to my assessment. Mr Chesney advised that he was just checking that I had received them.

I confirmed to Mr Chesney that I had received the documents (all in Caseflow) and I would be working through analysing them. Mr Chesney agreed that there was an awful lot of documentation contained within his letter and would await my response”.

I accept that Officer Glen said this and I accept that he had received the documents. I need make no finding as to whether it was indeed his intention at the time of that call to work through analysing the documents.

(17) There were then telephone calls on 6 and 14 March 2018 between Mr Chesney and Officer Glen, about the type of information that Officer Glen wanted. I accept Officer Glen's note of those calls, whose content was not challenged and said (page 145)—

“06/03/18 - Phone call received from agent Mr Chesney, requesting update. I advised that there were several outstanding issues. Mr Chesney asked for meeting to discuss. Agreed 16/03/18 and requested that trader attends.

14/03/18 - Call received from agent, discussed the types of things I wanted to discuss. Agreed that I would send a letter out to summarise the issues that need discussing during the meeting - in an attempt that if legitimate explanations exist then evidence can be provided there and then.

(18) On 14 March 2018, Officer Glen wrote to Mr Chesney at his business address, Pendragon Business Consultants, setting out issues which Officer Glen still wanted explained by evidence. Officer Glen went on to say (page 146)—

“Having examined all of the documentation provided, these kind of issues appear to run throughout all of the stated sales and purchase evidence provided. If you are able to provide evidence to explain the above issues, then this should go a significant way to answering the concerns I have with your client's business affairs.

As you will no doubt be aware I am also withholding the repayment of VAT returns submitted since I opened my enquiries. In order to speed up the process of verification of the returns for P08/17 to date, please have available the paperwork for these periods”.

(19) On 15 and 19 March 2018, there were two further telephone calls by Mr Chesney to Officer Glen. I accept Officer Glen's note as to the content of those calls. And I accept that Mr Boland had indeed advised Mr Chesney that Mr Boland would need some time to get some answers together. Among other things, the note shows Officer Glen agreeing that Mr Chesney would need the records to answer some of HMRC's queries (page 145)—

“15/03/18 - Call received from agent. Mr Chesney advised that he has sent the letter to his client, who has advised that he will need some time to get some answers together. Agreed that agent would need the records to answer some of the queries - agreed a meeting at 13.00 on Tuesday (20/03/18) - where I would return records and the agent would provide records for pre-cred periods.

19/03/18 - Phone call received from agent to advise that he has failed to get hold of the records required (for the recent pre-cred periods). Arranged for alternative date for record collection (and return).”.

(20) On 22 March 2018, at 1.00pm, Mr Chesney or someone from his partnership delivered documents to Officer Glen at his office. I accept the assertion to that effect from Mr Chesney's note to Mr Boland on page 156; it is so specific that it would be easy to contradict if untrue, and Mrs Perrett did not challenge it for HMRC.

(21) On 5 April 2018, Officer Glen returned records to a Chris Phapps, who collected them on Mr Chesney's behalf (page 153). Mr Chesney later said, in his 29 August 2018 email (page 176) that only photocopies had been returned to Chris Phapps on that occasion. Nothing turns on whether what Chris Phapps received was only photocopies and I make no finding as to whether he received only photocopies.

(22) Also on 5 April 2018, in the same visit by Chris Phapps, Chris Phapps on behalf of Mr Chesney (page 176)—

“delivered all the recent VAT claims (September 2017 onwards - together with the main letter(again) to Christopher Glenn in Birmingham” (email 29 August 2018).

(23) That Chris Phapps delivered further documents in the 5 April visit is borne out by Officer Glen's note of that visit on page 153, and I accept that Chris Phapps did so.

(24) I accept from Mr Chesney's undated note on page 156, that – apart from the return of records on 5 April – between 22 March 2018 when Mr Chesney delivered paperwork to Officer Glen at his office, and 30 May 2018 when Mr Chesney prepared a timeline for Mr Boland (see below), Mr Chesney was able to make contact with HMRC to chase matters, but not with Officer Glen (page 156)—

“we have been unable to remake contact with Mr Glenn who we have been told has moved his position within VAT. Having been told this we asked to speak to his manager to find out who had taken Mr Glenn's caseload and with whom to talk to move forwards. The manager concerned (no name given) was on holiday in Turkey until last Wednesday but would certainly contact us on the day of his return”.

(25) On 9 May 2018, according to a note dated 17 May 2018, Alan Williams, HM Inspector of Taxes sent a letter and enquiry notice in respect of the appellant. According to that note, Mr Chesney telephoned and spoke to Mr Williams (page 154). Neither party referred to these two transactions in this application, so I take it that they are not considered relevant and mention them only for completeness.

(26) Shortly before 30 May 2018, Mr Boland met with his MP, Sajid Javid (page 155)

(27) On 30 May 2018, Mr Boland's MP, Sajid Javid, wrote to HMRC's Chief Executive, Jon Thompson (page 155)—

“Dear Jon

I recently met with my constituent, Patrick Boland, who owns a company called PRB Trading Limited, Ascot House, 246 Court Oak Road, Harborne, Birmingham, England, B32 2EG.

I enclose a sequence of events set out by Mr Boland's accountant listing the problems they have had with HMRC and his VAT.

I am very concerned to read the difficulties he and his accountant have encountered trying to address this matter, and I would be most grateful if you could have Mr Boland's case looked into as a matter of urgency to see what can be considered. I am sure you will appreciate Mr Boland's need to have his repayments reinstated sooner rather than later.

I look forward to hearing from you.

Yours sincerely”.

(28) There is then an undated note from Mr Chesney to Mr Patrick Boland with a timeline which I accept records the position as at 30 May 2018. I say that because, as

Mr Watkinson said, the last thing it records is Mr Chesney's delivery of documents on 22 March 2018, and the note is appended to a letter of 30 May 2018 from Sajid Javid MP to the HMRC chief executive. The note records Mr Chesney's frustration at attempts to supply records to HMRC (page 156)—

“• At the beginning of December PRB and ourselves tried to contact Christopher Glenn on • 03000 570163 for an update. His phone just clicked to answerphone saying the number was unobtainable. — We tried on over 50 times during the next month and I am aware PRB tried on numerous occasions too.

• Having heard nothing, and in desperation, as the Company had now been forced to stop trading due to cash flow we were continually being given the "run around" — people were on holiday, not at their desk etc eventually we were given the number of Mr. Ian Mackie on 03000 591358 who whilst being in registrations was anxious to help get hold of Mr Glenn.

• Following the above Mr Glenn contacted us (giving no explanation for his absence) and agreed to us getting paperwork back from him and we giving some later to him (exchange of info) to enable this to proceed. He also agreed to, and I quote "draw a line in the sand" and assuming the last 8 months returns were in the format they required he would look favourably on releasing these repayments to enable the Company to continue trading whilst the earlier issues were addressed.

• We delivered all paperwork to him at his office — City Centre House, 30 Union Street, Birmingham. B2 4AG, at 1.00pm on 22nd March. To date we have been unable to remake contact with Mr Glenn who we have been told has moved his position within VAT. Having been told this we asked to speak to his manager to find out who had taken Mr Glenn's caseload and with whom to talk to move forwards. The manager concerned (no name given) was on holiday in Turkey until last Wednesday but would certainly contact us on the day of his return”.

I make no finding as to the number of telephone calls that Mr Chesney made to Officer Glen's telephone number from the beginning of December and in “*the next month*”, or as to whether Mr Boland made any calls to that telephone number in that period. But I accept that Mr Chesney tried several times between the beginning of December and 24 January (when he wrote to Officer Glen). Whether it was 50 times or less than, for example, 10 times makes no difference to my decision.

(29) On 31 May 2018, despite having moved on (according, at least, to what Mr Chesney had been told), Officer Glen wrote to Mr Chesney saying, among other things (page 158)—

“I write with reference to my letter dated 14 March 2018.

As of today I have still not had any response to this letter, and must therefore assume that your client accepts my assessments of 01 [sic] November 2017”.

I find that what the letter said was inaccurate to the extent that it made no reference to the delivery of documents – which I have accepted took place – by Mr Chesney (or someone from his office) to Officer Glen on 22 March 2018 or to the delivery of documents by Chris Phapps on 5 April 2018. That may well be because Officer Glen did not regard that delivery as a response to his letter.

(30) On 12 June 2018, “*a ministerial complaint was received*” by HMRC (page 82, paragraph 12³).

(31) Officer Glen’s statement went on to say, in the same paragraph, that “*In he [sic] team responding to this complaint advised Mr Boland of his right to appeal if he disagreed with the decision*”. This response must have gone via the minister and it is unclear whether it was received by Mr Boland before Mr Chesney received Officer Glen’s 14 June 2018 letter which I mention below. In any event, despite that statement by Officer Glen that the team had advised Mr Boland of his right to appeal, Officer Glen wrote to Mr Chesney on 14 June 2018 saying the VAT enquiry was “*ongoing*”: see subparagraph (32) below.

(32) On 14 June 2018, Officer Glen wrote to Mr Chesney apologising for the delays and saying HMRC are still looking into the details of the repayment claims (page 160)—

“Dear Mr Chesney

PRB Trading Ltd

I write with regards to the ongoing VAT enquiry into your client named above.

I apologise for the delay in getting a response to you, we are currently still looking into the details of the repayment claims made by your client. This matter is being dealt with as a matter of importance and you will be notified as soon as a decision has been reached.

Whichever method you choose to contact us about this check, you need to quote the case reference CFS-1394032 and any other references shown above. If you write you need to use the address shown above. If you send documents you must tell us if you want them returned as we may securely destroy them after 50 days.

Yours sincerely”.

(33) On 27 June 2018, HMRC’s Chief Executive wrote to the MP, Sajid Javid, saying among other things that on 2 November 2017, HMRC had raised assessments “*until PRB could evidence the supplies*” (page 161).

(34) On 2 July 2018, Sajid Javid wrote to Mr Boland or Mr Chesney (I could not find the letter in evidence, but it seemed to be common ground that he had). Mr Chesney said of this (page 176)—

“Despite the situation with Sajid Javid and his secretary's holiday there was indeed a letter from him dated 2nd July when Through Jon Thompson - Chief Executive of HMRC they appear to be denying all purchases even given their delivery as previous. They also stated they returned the documents at the meeting with Chris ..They did not. It was selected photocopies - they still hold the originals”.

I take this to refer to the 5 April 2018 meeting between Chris Phapps and Officer Glen at the latter’s office building. I have already said above that I make no finding as to whether it was photocopies or originals that were returned to Chris Phapps on that occasion.

(35) In Officer Glen’s unsigned witness statement dated 5 August 2021, he said (page 82)—

“13. On 3rd July 2018 I wrote to the agent to try to get the information on how payment had been received for the supplies the business was claiming to have made.” (page 82, paragraph 13).

I could not see that letter in evidence and make no finding as to whether that letter was sent. In any event, Officer Glen received further documents from Mr Chesney on 5 July: see subparagraphs (36) and (37) below.

³ Officer Glen’s unsigned witness statement of 5 August 2021.

(36) After 2 July and shortly before 5 July 2018, Mr Chesney sent further documents to Officer Glen by recorded delivery (page 176⁴).

(37) On 5 July 2018, that further documentation was received by HMRC, according to Royal Mail's Track and Trace, which showed it as having been delivered and signed for at 5.01am (page 178).

(38) On 2 August 2018, Mr Boland emailed Danielle Johnston Jones, assistant to MP Sajid Javid, saying (page 179)—

“Hi Danielle,

Following our correspondence some weeks ago regarding your kind offer to forward on my file with the answers to hmrc queries, I am saddened to inform you that I now find it necessary to accept your offer of help on this issue. Unfortunately despite my account [sic] sending the file to hmrc by courier several weeks ago, neither my accountant or I have received any form of correspondence or communication from them. In fact they have not even acknowledged receiving the file. Therefore I am sending you not only that file but also all related paperwork to confirm my explanations. I hope you can ensure that it is forward onto The [sic] chief executive of hmrc. I would very much appreciate it if Sajid could request an explanation for their lack of response whilst hopefully agreeing that this [sic] far below the standards expected of the civil service. I once again find myself indebted to you and Sajid.

P.s PDF to follow

Best Regards

Patrick Boland”.

(39) On 8 August 2018 at 11.45am, Mr Chesney telephoned Officer Glen's telephone number. Mr Chesney described the call as follows (page 177⁵)—

“On the 8th August at 11.45 I rang Christopher Glen's phone on the off chance of speaking to someone who knew where he was ...⁶normally the phone is turned off, as I have found on dozens of previous attempts to contact. However a lady answered and informed me that Mr. Glen was walking past the very desk, he spoke to me and informed me he now had the case back and was issuing a conclusion letter which after some prompting (rang three times for copy) we received by email on 14th August. To date we have not received a posted copy. This letter/Email seems to take no cognisance of any documentation forwarded. As we have often repeated we are willing to provide all paperwork again BUT only by specific delivery to Christopher Glenn [sic] and him signing a detailed receipt for it. If you wish to go down that route please let us know” (emphasis in original).

(40) On the same day, 8 August 2018, and apparently in consequence of that telephone call, Officer Glen emailed a colleague within HMRC (page 163)—

“From: Glen, Christopher (ISBC T&SC SWW&WM)
Sent: 08 August 2018 12:17
To: Lester, Lisa (ISBC T&SC SWW&WM) <lisa.lester@hmrc.gsi.gov.uk>
Subject: PRB Trading - Sensitive case
Lisa,

Further to our earlier discussions with regards to the sensitive case....⁷

Case name: PRB Trading Limited
Caseflow Ref: CFS-1394032

⁴ Mr Chesney's 29 August 2018 email.

⁵ Mr Chesney's 29 August 2018 email.

⁶ Dots in original.

⁷ Dots in original.

This morning I received a phone call from the agent for PRB Trading. During the course of conversation about how the case is progressing, Mr Chesney advised that his client Mr Patrick Boland is suicidal. Given this, I feel this case meets the criteria within the sensitive case guidance for both Mr Boland being a potentially vulnerable person and the case has the potential for HMRC to be brought into disrepute.

I understand that this case now gets listed for further monitoring, so if any further information is required please let me know.

Thanks for your help with this.
Chris”.

(41) On 10 August 2018, two days after emailing his HMRC colleague saying the case meets the criteria within the sensitive case guidance, Officer Glen wrote to Mr Chesney (page 164)—

“I write with reference to my letter dated 14 March 2018.

As of today I have still not had any response to this letter, and must therefore assume that your client accepts my assessments of 01 [sic] November 2017.

Furthermore, I have now completed the analysis of the VAT repayment claims that have been selected for checking prior to any repayment.

[...]

Given all of this basket of evidence, the only conclusion I can come to is that PRB Trading is not actually under taking [sic] any taxable activity. The evidence provided so far has failed to demonstrate that the business has purchased what it claims, sold what (or to whom) it claims and that it has received the money it claims to have received.

[...]

Therefore without a taxable business, all input tax claims are invalid. Meaning that all input tax claims made by the VAT registration must be denied.

Please find enclosed copies of the official notification of the required corrections that I have sent to your client.

Whichever method you choose to contact us about this check, you need to quote the case reference CFS-1394032 and any other references shown above. If you write you need to use the address shown above. If you send documents you must tell us if you want them returned as we may securely destroy them after 50 days”.

(42) This 10 August 2018 letter did not offer a review (or mention appeal rights). As to whether it was accurate in saying that, as of 10 August 2018, Officer Glen had not had a response to his 14 March 2018 letter, that seems to depend on the view that is taken of subsequent documents and communications sent to HMRC (but it was at least inaccurate in failing to refer to the delivery of documents on 22 March and 5 April 2018).

(43) It also seems that, on 14 June 2018, Officer Glen took the view that he had what he needed, from his letter to Mr Chesney of that date (page 160)—

“I write with regards to the ongoing VAT enquiry into your client named above.

I apologise for the delay in getting a response to you, we are currently still looking into the details of the repayment claims made by your client. This matter is being dealt with as a matter of importance and you will be notified as soon as a decision has been reached”.

I find that the 10 August 2018 letter was inaccurate to the extent that it contradicted the implication in the 14 June 2018 letter that Officer Glen had what he needed.

(44) In a later unsigned witness statement dated 5 August 2021, Officer Glen said (page 83)—

“14. On the 10th August 2018 I raised further VAT assessments to reduce the input tax to nil for the further VAT returns received, because there was still no evidence of a bona fide business. This letter contained details of his right to appeal within 30 days”.

That last sentence was not true, as became common ground at the hearing. The letter contained no details of his right to appeal (nor an offer of review).

(45) By six letters dated 13 August 2018, HMRC notified six assessments covering periods 08/17 to 11/17 and 01/18 (pages 98 to 109). I have reproduced text from the first of them below. Each of the other five had the same text as the first, but for different VAT periods and with different amounts. By quoting the assessments, I am not of course making a finding that they are accurate or justified; that will be a matter for the substantive appeal—

“Change to amount claimed on VAT return

We have looked at the amounts declared on your VAT return for the period 08/17.

As a result of our checks we believe that there are inaccuracies in this return, which means that the amount of VAT claimed for the period 1 August 2017 to 31 August 2017 is incorrect. I explained this in more detail in my letter dated 10 August 2018.

The table below shows which boxes of your return contain these inaccuracies. It also shows the amounts that you have declared as well as the adjusted amounts that your return would have shown if it had not contained these inaccuracies. This decision is based only on the checks we have made.

VAT return box number	Amount declared on your return	Adjusted amount
Box 3 Total VAT due	£ 0.00	£ 0.00
Box 4 VAT reclaimed on purchases and other inputs	£81,346.49	£ 0.00
Box 5 Net VAT	£81,346.49	£ 0.00

[...]

What to do if you disagree

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

So all six notification letters dated 13 August 2018 contained the paragraph headed “What to do if you disagree”, which offered a review. It was common ground that it was these six letters, and not that of 10 August 2018, that were the notices of assessments for the periods covered by those letters⁸.

(46) On 14 August 2018, Officer Glen wrote to the appellant. He said in the first part of the letter (page 172)—

⁸ HMRC Notice of Objection, paragraph 4, page 37.

“Dear Sir

I write with reference to my ongoing VAT enquiry.

You will find enclosed a copy of the letter I have sent your accountant detailing my findings with regards to my assessment and your requests for repayments.

As you will see there are no repayments due. Enclosed is also the official paperwork notifying you of the reductions.

If there is any further evidence that you wish to provide for me to reconsider my decision, I will need to receive it by 13 September 2018.

Penalties for inaccuracies

Where there are inaccuracies in returns or documents we may charge a penalty.

We need some further information from yourself to decide if a penalty is due. Please explain how the errors occurred”.

(47) On 14 August 2018, HMRC notified an assessment for the period 12/17. It was common ground that it was this letter, and not that of 10 August 2018, which was the notice of assessments for the period mentioned in the 14 August 2018 letter⁹.

(48) On 29 August 2018, Mr Chesney emailed to Mr Boland “*a timeline for the debacle with Christopher Glenn [sic]*”. In the final paragraph, Mr Chesney said (page 176)—

“HMRC wrote to us on 14th June saying they were still reviewing, but did not state who was doing the review”.

(49) On 6 September 2018 at 00.49, Mr Boland emailed Danielle Johnston Jones at Mr Boland’s MP’s office, recording despair at Officer Glen’s actions and the “*saga with HMRC*”, and saying that that “*this has impacted on my mental and physical health*” (page 175)—

“Hi Danielle,

I am going to forward on to you an e mail from my accountant Mr Steven Chesney, this e mail shows the ludicrous response from Christopher Glenn [sic] to the saga with HMRC. My accountant can clearly demonstrate that the claim by Mr Glenn [sic] that he has received no correspondence from us in the last six months is completely wrong.

I now formally request that Sajid Javid sends my previous email containing answers and evidence that I had previously sent to you, to the chief executive of HMRC Mr Thompson without delay along with the email form my accountant. I am now facing the threat of a winding up order on my company, I truly despair at the unfair and even vindictive actions by Mr Glenn [sic]. I feel only Sajid can help me on this issue and spare myself and family any further stress. I cant [sic] begin to tell you how this has impacted on my mental and physical health.

I have been a servant of my queen and crown only to be treated in the most unreasonable way. I plead with sajid [sic] to help in any way he can”.

(50) A few minutes later on the same day, 6 September 2018, Mr Boland emailed to the same person, Danielle Johnston Jones, the timeline email that Mr Chesney had sent to Mr Boland on 29 August 2018 (page 176).

⁹ HMRC Notice of Objection, paragraph 4, page 37.

(51) On 7 September 2018, Sajid Javid MP wrote to HMRC’s Chief Executive Mr Jon Thompson enclosing Mr Chesney’s email of 29 August 2018 to Mr Boland, and asking Mr Thompson “*to review Mr Boland’s case with some urgency*” (page 174).

(52) On 13 September 2018, a further complaint was according to HMRC’s timeline made for the appellant. But the page number for that in the bundle index – page 174 – led to the complaint dated 7 September 2018 by Mr Javid. So I take it that there was no additional complaint by him just six days after that.

(53) On 28 September 2018, HMRC’s Chief Executive wrote again to the MP, Sajid Javid. The Chief Executive explained that Officer Glen disconnects his number from the telephone system when out of the office. The letter set out the current position as the Chief Executive saw it (page 184)—

“On 10 August 2018, we wrote to the agent telling them that PRB had not made any taxable supplies and is not entitled to the VAT claimed on their tax returns.

In our letters about our assessments and reduced VAT repayment claims, we told PRB what they can do if they disagree with our decision. Mr Boland can find more information about the appeals process at www.gov.uk/tax-appeals”.

The second of those two paragraphs was accurate in that some of the letters had told the appellant what it could do if it disagreed with HMRC’s decision. But the 10 August 2018 letter had not said that. It was common ground by the time of the hearing that neither the 2 November 2017 letter nor the 10 August 2018 letter had informed the appellant of how to appeal (or offered a review).

(54) On 12 October 2018, Mr Chesney applied for the appellant to take part in Alternative Dispute Resolution for all of the assessments, that is, the one notified in November 2017 and those notified on 13 and 14 August 2018 (page 186).

(55) On 19 October 2018, HMRC rejected the ADR application because there was no appeal pending (page 188).

(56) On 23 October 2018, according to HMRC’s chronology on page 67, Mr Chesney telephoned HMRC Debt Management asking for collection to be suspended because a formal complaint was in place. Debt Management advised him to appeal. I was not taken to a note of this call and could not find one in the bundle. But the assertion in the chronology was not challenged and I accept that the call took place and that it included the content recorded in the chronology on page 67.

(57) Also on 23 October 2018, after that telephone call, Mr Chesney sent an email to the person he had been talking to – Ami – in Debt Management, containing a document which Mr Chesney referred to in that email as “the complaint” (page 189). HMRC made the point in their chronology on page 67 that “*This was a copy of the rejected ADR application*”. I accept that, while it was not in the exact format seen in the actual ADR application on page 186, the content of the 23 October 2018 email looked similar to the ADR application.

(58) On 24 October 2018, HMRC’s Debt Management telephoned Mr Chesney “*and advised that the complaint was about the conduct of the officer not the debt. He was told to appeal to the tax tribunal*”. I was not taken to a note of this call either (and again could not find one in the bundle). But the assertion in the chronology was not challenged and I accept that this call took place and that it included the content recorded in the chronology on page 67.

(59) On 24 October 2018, HMRC notified the appellant of an intention to charge a penalty in the sum of £1,629,658.09 (page 191). The notification said (pages 194 and 195)—

“Penalty schedule 1

Inaccuracy penalty charged under Schedule 24 Finance Act 2007

Type of tax, duty or levy: - VAT

Description of the: - Inaccuracy

You have fraudulently claimed VAT repayments for a non-existent business.

[...]

We consider that the behaviour was deliberate and concealed. This is explained below.

You have produced false invoices to support the fraudulent claim to input tax. This must be seen as an attempt to conceal your fraudulent behaviour. Given that you would have been aware that there was no business, you must have been aware of the errors. Therefore the behaviour behind this error must be seen as deliberate and concealed.

The disclosure was Prompted because you didn't tell us about the Inaccuracy before you'd reason to believe that we'd found out about it, or were about to find out about it.

For this deliberate and concealed Inaccuracy with a prompted disclosure, the minimum penalty percentage is 50% and the maximum penalty percentage is 100%.

This means that the penalty range is from 50% to 100%” (emphasis in original).

(60) On 30 October 2018, according to the chronology on page 67, the respondents began proceedings in the High Court to recover the debt. A petition was served on the company.

(61) On 12 November 2018, HMRC made a final amendment to the VAT return, assessing the period 02/18 (page 215).

(62) The assessments of 13 and 14 August and 12 November 2018, together with the assessment of November 2017 (whether 2 or 6 November), cover periods 04/15 to 02/18 with no gaps.

(63) On 13 November 2018, Mr Chesney telephoned HMRC’s Debt Management. He was advised in that call to take the matter to the tax tribunal (HMRC’s chronology, page 67). I make no finding as to whether he asked what action he should take, as the chronology asserts.

(64) On 14 November 2018, Mr Chesney filed with the tribunal on the appellant’s behalf a Notice of Appeal. It is undated but it is common ground that it was submitted on 14 November 2018 (page 205). In answer to “*What is your dispute about?*”, Mr Chesney had chosen “*HMRC claim you owe money*” (page 205). Under “*What is the amount of tax?*”, Mr Chesney had entered “*£1502427.50*” (page 205). As to whether the appeal was in time, Mr Chesney said in the notice, “*I am not sure*”. Mr Chesney went on to give the following grounds of appeal in the notice (pages 205 and 206)—

“Grounds for appeal

2015/2017

Dispute details:

HMRC have raised VAT Officers [sic] Assessments for 26 periods despite having full details of returns and back up documentation. On 10 August we were advised that PRB had not made any taxable supplies. This being despite A [sic] full copy of all sales and purchase invoices being made available to Mr Glenn [sic] and we would maintain complies exactly with section 2.9 of VAT Notice 701 (If you only supply goods or services abroad.) We further maintain that Mr Glenn [sic] despite having received full documentation from ourselves and is to date still holding some, has made no effort at all to address the issues and has just disallowed all purchases. This has meant PRB Trading Ltd have had to cease operations pending this being resolved. He refused to admit having the information (even though he later returned some to us)

Reasons:

All trust and communication with Mr Glenn [sic] has broken down. He has failed to return more than 50 of our telephone calls and when we last spoke to him on the 8th & 14th August he again stated he was getting a "conclusion Letter" to be issued ..¹⁰this letter did not appear to take any of the purchases into consideration. It has been impossible since then to contact him as his telephone is switched off. Client had no option but to contact his local MP, The Rt Hon Sajid Javid who contacted the head of HMRC Mr. John [sic] Thompson but the reply issued on 28th September 2018 was hardly in the form of a review, more a brief statement of facts. Because of this and the comment by Mr Thompson That [sic] PRB had made no taxable supplies we feel we have to apply to the First Tier [sic] Tribunal.

Each of the 26 periods 31/08/2015 through 21/08/2018 that the Officers [sic] Assessments relates [sic] to have full details made available to HMRC and indeed paperwork to this effect is still held by HMRC as when the VAT inspection was concluded they removed a large quantity of paperwork, unfortunately the receipt was less than specific.

We maintain that there is [sic] no net monies owed to HMRC and that there is a substantial repayment due to PRB Trading Limited for the periods above. With the paperwork still held by HMRC it is difficult to contest the figures used in the Petition to wind up the company".

I make no finding as to how many calls Officer Glen failed to return, nor as to the length of time, or the periods, for which his telephone was switched off, though I accept that it was switched off on a significant number of occasions when Mr Chesney tried calling. I accept that Mr Chesney felt that all trust and communication with Officer Glen had broken down. I of course make no findings, either, as to the merits of the appeal.

(65) In the part of the Notice of Appeal headed "Representative details", Mr Chesney had entered (page 206)—

"Steve Chesney
Pendragon Business Consultants LLP
69 Upton Close
Barnwood
Gloucester, GL4 3EX
United Kingdom
Tel: 01452862821
Email: StephenChesney@AOLCom

The representative is an accountant".

¹⁰ Dots in original.

(66) Also on 14 November 2018, “[the] Letter (NPPS100) of 24 October sent to the Appellant’s PPOB was returned by the Post Office?” according to HMRC’s chronology on page 67.

(67) On 26 November 2018, HMRC issued a penalty notice (page 112), further to the letter dated 24 October 2018 advising of their intention to charge the penalty.

(68) On 28 November 2018, the First-tier Tribunal wrote not to Mr Chesney who had filed the appeal and was noted as the representative in the Notice of Appeal, but to Mr Boland, asking for the original decision notice (page 258)—

“Without further information we are unable to register and process your appeal. If you wish to continue your appeal please provide additional documents or information as detailed above.

I have also added a T239 "authorise your representative" form. ...”.

It is common ground that this tribunal letter was sent to the appellant’s registered office address. It was not common ground that neither Mr Boland nor Mr Chesney saw the letter (Mr Chesney is recorded as saying so in an internal HMRC email of 25 June 2019, see below). I accept that Mr Boland, the appellant’s director, was in poor health at the time and was also dealing with the consequences of a failed property purchase which meant that he and his family had urgently to relocate. The combination of Mr Boland’s ill health, the family’s relocation and the fact that he had entrusted the appeal to his accountant meant – I accept – that Mr Boland did not for some time visit the appellant’s registered office, where the letter had been sent. That he did not visit it for some time is borne out by the returned mail (subparagraph (66) above) and by what Officer Glen said in his 30 November 2018 letter (page 218): see next subparagraph below. The date on which the appellant or Mr Chesney finally became aware of the tribunal’s 28 November 2018 letter is immaterial, in light of my other findings.

(69) Also on 28 November 2018, according to the respondent’s chronology, the petition was considered at a High Court hearing, HMRC asked for dismissal without consideration of the merits, and the case was dismissed with no costs pending the outcome of the appeal to the tribunal (page 67).

(70) On 30 November 2018, Officer Glen wrote to Mr Boland, PRB Trading Ltd, but at a different address from Perry Mill Farm (page 218)—

“Dear Mr Boland

I write to you with regards to the ongoing VAT enquiry into P.R.B Trading Ltd.

In the last month there has been some correspondence sent to your principal place of business that has been returned, the reason given to HMRC for this is that the business is no longer trading from there.

Therefore I am writing to the last known personal address for you, to ensure that you receive copies of all of the correspondence.

The letters you will find enclosed are dated 24 October 2018, 12 November 2018 and 26 November 2018.

Please ensure that the address for any correspondence to the business is updated on the VAT system and any other appropriate HMRC systems you may use ...”.

(71) On 25 January 2019, the tribunal wrote to Pendragon Consultants saying the appeal had been closed because the tribunal had not received further correspondence. The letter was not in evidence, but it was common ground that that was what it had said. It was also common ground that there had been no unless order and no formal striking out of

the appeal, and that this January 2019 letter was the only communication purporting to end the appeal.

(72) By a second petition, dated 16 April 2019, HMRC petitioned the High Court for the winding-up of the company (pages 243 to 249). This was served on the appellant on 28 May 2019 according to the chronology on page 67.

(73) On 12 June 2019, the first hearing took place in the winding-up proceedings. A note by Jack Quinlan of HMRC to his colleague Mrs Perrett (email 10 August 2021) described it thus (emphasis in original, page 241)—

“First Hearing 12/06/2019

- Sought UCO
- Company were granted an adjournment for company to settle undisputed balance and seek legal advice”.

I have used HMRC’s own descriptions of the High Court hearings, taken from Jack Quinlan’s note at pages 241 and 242, for the relevance of those descriptions to whether HMRC were aware that there was a tribunal appeal having been made and going to be made.

(74) On Tuesday 25 June 2019 at 10.36, Norman Draper of HMRC emailed his colleague Lisa Lester of HMRC (page 221)—

“Subject: A phone call for one of Chris Glen's old cases

Morning Lisa,

One of my team took a phone call from a Steve Chesney, Pendragon Business Consultants, the agent for PRB Trading Ltd. CFS-1394032.

He has been trying to contact Chris Glen and his phone disconnects.

Its regarding a winding up process and the judge has adjourned the case for 4 weeks for his client to resolve.

The agent needs to speak to someone from HMRC to discuss and has been unable to do so.

Can you take this forward?

Regards”.

(75) On the same day, 25 June 2019 at 11.03, Lisa Lester of HMRC emailed her colleague Jasprit Gandhi (page 220)—

“Subject: FW: A phone call for one of Chris Glen's old cases

Hi Jas,

As discussed, can you give Steve Chesney a call please – their number is 427-1114.

Thanks.

Lisa”.

(76) Later the same day, 25 June 2019 at 15.54, Jasprit Gandhi emailed her colleague Officer Glen (page 220)—

"Gandhi, Jasprit (ISBC T&SC SWW&WM)" <jasprit.gandhi@hmrc.gov.uk>
Sent: 25 June 2019 15:54:20
To: "Glen, Christopher (ISBC T&SC SWW&WM)" <christopher.glen@hmrc.gov.uk>
Cc: "Lester, Lisa (ISBC T&SC SWW&WM)" <lisa.lester@hmrc.gov.uk>
Subject: ACTION: Phone call received from PRB Trading Agent [OFFICIAL-SENSITIVE]

Hi Chris,

Hope you enjoyed your annual leave.

You have had several phone calls from Steve Chesney agent acting on behalf of PRB Trading Ltd. He would like a call back on your return, I have advised you are not back till Thursday so he would not get a call back immediately. The issue is that Steve claims there was a tribunal last year and he is unsure of the outcome as nobody has ever responded to him. He claims that PRB Trading had a court date set at High Court on 12 June 2019, but the judge adjourned this for 28 days, so now the next court date is 09 July 2019.

Steve explained that the trader disagrees with the VAT assessments but trader has said he will pay CT assessments before court date. Steve would like to speak to you regarding the multiple VAT assessments. He said that he has tried to call you for over a year but phone is disconnected. I check [sic] the number he had which was correct and advised this was surprising as the number still works. He also said that you are in possession of the invoices and financial paperwork. Steve believes that if he can arrange a meeting with you and come to an agreement then Trader will not need to attend the High Court. I asked Steve if he had any new evidence from when the case was ongoing and he stated there was no new evidence to produce.

His contact numbers are below.

[Landline number redacted by tribunal]

[Mobile number redacted by tribunal]

[Other landline number redacted by tribunal]

Thanks

Jasprit Kaur Gandhi

CT/ITSA Higher Officer

ISBC T&SC | SWW&WM

3rd Floor | City Centre House | Birmingham | B2 4AD

03000 591 495

07971 562 652

Jasprit.gandhi@hmrc.gsi.gov.uk".

(77) Three days later, on Friday 28 June 2019, there were at least three telephone calls between Officer Glen and Mr Chesney. Officer's Glen's note of the calls was as follows (page 222)—

“Note of telephone calls

From Chris Glen to Mr Chesney

13:24 28/06/2019 – Phone call made to 01452 862 821. No answer

13:30 28/06/2019 – Phone call made to 07727 553 720. Spoke to Mr Steve Chesney (agt). Mr Chesney advised that the judge had ordered him to speak to me to sort the issues with regards to the VAT assessments out. I asked Mr Chesney if his client disagreed with the

VAT assessment. Mr Chesney advised that he did. I asked why he had not appealed against the assessment. Mr Chesney stated that the case had gone to a First Tier [sic] Tribunal in 2018 but he had not been notified of this. I asked Mr Chesney why his client had failed to provide any response to the numerous queries posed to him over the course of my enquiry. At this point the phone went dead.

13:38 28/06/2019 – Phone call made to 07727 553 720. Mr Chesney answered and apologised for phone cutting out. He stated he was unsure if it was my phone or his. I asked Mr Chesney if he had received my letter dated 10 August 2018. He advised that he had but did not have it to hand. I advised that in this letter was listed all of the reasons for my assessment and no response has been received. Mr Chesney asked that I call him next week to discuss this further. I agreed a time of 14:00 on 01/07/19 for phone call”.

As to the record of the second of those calls, I make no finding as to whether Mr Chesney did or did not say that “*he had not been notified of this*” or as to what he meant by that if he did say it. I make no finding either as to when the telephone went dead.

(78) On 3 July 2019, Mr Chesney emailed to Officer Glen a letter dated 3 July 2019, which said (pages 236 and 237)—

“Dear Mr Glen

We write further to our letter of yesterday and the telephone call this morning. You asked us to specifically address the letter of the 10th August 2018 and this, of course, we are happy to do:

As you are aware the 10yth [sic] August letter was a follow on from th [sic] 14th March letter with, as far as we can tell no cognisance being taken for our client's letter to you addressing all 11 points of that letter.

The 10th August letter makes some specific comments particularly on pages two and three that, we believe, can only be addressed in a meeting between yourself, our client and ourselves. Please would you as a matter of urgency agree to a meeting to resolve and move forwards. Please further advise when would be a convenient time and suggest a place to meet, you are, of course very welcome to meet at our offices in Birmingham if that is more convenient.

Yours sincerely”.

(79) On 5 July 2019, Officer Glen wrote to Mr Chesney. In his letter, Officer Glen asked for further evidence to suggest that his conclusion was incorrect, and recorded that ADR had been refused because HMRC had never received any appeal against Officer Glen’s decision (pages 238 and 239)—

“The answers provided to my letter of 14 March 2018 (which I must note that the first time you have given me these answers is 03 July 2019) are incomplete – with questions 5, 6 7, and 9 all being ignored. The partial response provided is not supported by any kind of evidence. It would be reasonable to expect that there would be some sort of audit trail if the person the goods are being delivered to is different to the one being invoiced. The answers provided actually raise more questions, for example the response to Question 10 suggests that there was actually more purchased from John Sharpe than the records originally suggest, calling into doubt once again the purchase records.

For me to begin the process of reconsidering my decision I need some sort of evidence that suggests my conclusion is incorrect.

[...]

In HMRC’s letter of 19 October 2018 you were advised that Alternative Dispute Resolution was not appropriate because you had not appealed the decision. This remains the case – HMRC has never received any appeal to my decision. If you consider that your

client now wishes to appeal my decision you will need to consider the fact sheet *HMRC Decisions – What to do if you disagree*. You can find this at www.gov.uk and search ‘HMRC1’ or get a copy by phoning our orderline on **0300 200 3700**. As well as notifying me of the reasons why you are appealing, I will need to consider if I will accept such a late appeal. So, if you do decide you wish to appeal then please provide me with an explanation of why it has taken such a long time from the original decision (and numerous subsequent letters) to submit the appeal” (emphasis in original).

I make no finding as to whether the views Officer Glen expressed in that 5 July 2019 letter were accurate.

(80) On 30 July 2019, the appellant instructed ASW Legal Limited T/A ASW Solicitors (page 251)¹¹.

(81) On 31 July 2019, the third hearing took place in the winding-up proceedings. The note by Jack Quinlan of HMRC recorded that (page 241, emphasis in original)—

“Third Hearing 31/07/2019

- Sought UCO as we had no contact or payment from company.
- Company granted an adjournment for claims of a FTT appeal and for HMRC to consider the appeal”.

(82) On 28 August 2019, Matthew Whyatt of ASW Solicitors (“ASW”) made his first witness statement in the winding-up proceedings (page 250)—

“Background

4. My instructions from the Debtor are that, prior to ASW being retained, its accountant (Mr Steve Chesney of Pendragon Business Consultants LLP, 69 Upton Close, Barnwood, Gloucester, GL4 3EX (“the Accountant”)), lodged an appeal in respect of VAT via the Gov.UK website on or around 14 November 2018 [MW1/1-3]. This Appeal was lodged by the Accountant following service of a Winding Up Petition presented by HMRC in respect of VAT liabilities. The Winding Up Petition was listed to be heard on 28 November 2018.

[...]

14: Following this, in an email dated 22 August 2019 [MW1/9], Mr Glen asked Tiberius¹² how they would like the copy correspondence to be provided. In light of this, I am drawing a reasonable inference that the appeal lodged by the Accountant on or around 14 November 2018 (ref no: TC/2018/07274) has not been accepted by the Tribunal; however, as I have been unable to contact the Debtor's Accountant, I cannot confirm whether this is the case or whether the further information and/ or documentation was in fact provided. What this does show is that Mr Glen appears to accept that the enquiry stage is not only still open but progressing towards a conclusion which might itself be the subject of (a) an independent review and/ or (b) a formal appeal to the First Tier Tax Tribunal.

Conclusion

15. In all of the circumstances highlighted above, I strongly believe that the Winding Up Petition has been presented prematurely by HMRC. The Company ought really to have the opportunity, plainly being afforded to it by HMRC, to finalise any and all outstanding queries without a premature Winding Up Petition hanging above its head, not least because of the difficulties and implications generally of *Section 127 Insolvency Act 1986*.”.

¹¹ Matthew Whyatt’s witness statement, 28 August 2019, paragraph 7, page 251.

¹² Tiberius Solutions, a company that P.R.B. Trading Limited had instructed as tax specialist, in addition to instructing ASW Solicitors.

(83) Also on 28 August 2019, the fourth hearing was held in the winding-up proceedings. The note by Jack Quinlan of HMRC described it thus (page 241)—

“Fourth Hearing 28/08/2019

- Sought UCO as we had no contact or payment from company nor was there a request for appeal or FTT submission.
- Company granted Adjournment for HMRC to take a look into companies [sic] witness statement” (document sent to his colleague Mrs Perrett on 10 August 2021).

(84) On 4 September 2019, the appellant’s new representative, ASW, emailed the appellant’s previous representative, Mr Chesney. ASW asked him, among other things: for information about the appeal that he had made to the tribunal in November 2018, whether he had responded to the tribunal’s request for further information and for HMRC’s final decision letter. The email asked Mr Chesney to respond as a matter of urgency (pages 279 and 280).

(85) On 9 September 2019 at 11.38, Jessica Whyatt of ASW emailed Officer Glen, saying, among other things (page 274)—

“We understand from Mr Mann that you have experienced difficulty in sending the documents requested by him in his letter dated 20 August 2019 to him [sic]. We are surprised that you have experienced any such problems, as we assume that HMRC are often asked to provide large quantities of documents. In any event, the documents are to be sent to the following address without delay:-

ASW Solicitors
Unit 27 Hub Squared
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We frequently receive large batches of documentation via an on line file transfer platform called 'We Transfer'. This is a secure way of sending documentation by way of electronic file transfer. If there is to be any sort of delay in posting the documentation to this firm, then please provide the same by way of electronic transfer as a matter of urgency”.

(86) On 11 September 2019 at 09.49, Officer Glen replied by email saying (page 273)—

“Dear Ms Whyatt,

Thank you very much for your email.

I will get the required paperwork sent to your offices immediately.

Before I can do that, however, I must ask that you send the 64-8 in another file format please. I have been unable to open the file in the format that you have sent it, so I have been unable to verify the appropriate completion.

Regards,

Chris Glen”.

(87) On 11 September 2019 at 11.21, Jessica Whyatt of ASW replied by email to Officer Glen, enclosing the 64-8 form in PDF format (page 272).

(88) On 11 September 2019 at 11.23, Officer Glen replied by email saying (page 272)—

“Thank you Ms Whyatt.

That format has worked.

I will get the letter in the post to you now”.

(89) On 17 September 2019 at 13.11, Jessica Whyatt of ASW emailed Officer Glen referring to the email chain that had ended with Officer Glen's email of 11 September 2019 at 11.23. Jessica Whyatt was chasing the promised letter (page 271)—

“Dear Mr Glen,

I refer to the below email exchange.

Please confirm whether the letter and enclosures have been sent and, if so, please provide any tracking information by return.

As I have explained previously, our Client requires the requested information/documentation as a matter of urgency and so I would be grateful if you could confirm the above by return.

We look forward to hearing from you.

Yours sincerely,

ASW SOLICITORS

Jessica Whyatt”.

(90) By a letter dated 11 September 2019, but not received by ASW until after 17 September 2019 (see immediately preceding subparagraph above), Officer Glen wrote to the new representative, ASW, enclosing all correspondence relating to the enquiry into this appellant. The final paragraph mentioned the possibility of a late appeal (page 277)—

“Should your client wish to make a late appeal then your client must explain why the appeal is being made outside of the 30 day appeal window from the date of the assessment. Alternatively, he can appeal to the tribunal directly.”.

(91) On 24 September 2019, Matthew Whyatt of ASW made his second witness statement in the winding-up proceedings. Paragraphs 8 to 15 chronicle Mr Whyatt's attempt to contact Mr Chesney (page 267)—

“8. As I explained previously in Paragraphs 9-11 of my First Witness Statement, the Company had instructed its accountant, Mr Steve Chesney of Pendragon Business Consultants LLP, 69 Upton Close, Barnwood, Gloucester, GL4 3EX ("the Accountant"), to lodge an appeal of the VAT assessments on its behalf. Regrettably, the Company and/or ASW are still not in a position whereby it can explain to the Court what became of the Appeal that was lodged by the Accountant on or around 14 November 2018 as the Accountant has still not provided the information and/ or documentation requested by the Company and, more recently, by ASW.

9. An email was sent to the Accountant by ASW on or around 4 September 2019 asking for the documentation to be provided without delay [MW2/10-11]. ASW expressed the urgency of this request and explained that there was an adjourned winding up petition hearing due to take place 28 days from the date of the previous hearing and, in light of this, asked for the documentation relating to the Company, and specifically to the Appeal, to be provided by no later than 5 September 2019.

10. The Accountant called my colleague, Jessica Whyatt, on 9 September 2019, apologised for the delay in responding and promised to send an email to Mrs Whyatt 'tomorrow' (namely 10 September 2019) with copies of any and all documentation requested.

11. No email has been received from the Accountant and ASW has received no further contact from him since this telephone call.

12. Upon explaining the above to the Debtor, we were advised by the Director, Patrick Boland, ("Mr Boland") who is understandably frustrated by the conduct of the Accountant, that he would attempt to meet with the Accountant's business partner to explain the above situation in respect of the Accountant's unsatisfactory conduct and to ask that he assist in getting the information and/ or documentation to ASW without delay.

13. Regrettably, on the day that Mr Boland was due to meet with the Accountant's business partner, Mr Boland was advised that a family member had been taken to hospital and had been diagnosed with terminal cancer. Understandably, Mr Boland was unable to meet with the Accountant's business partner that day and has since requested that we have as little contact with him as possible during this difficult time, albeit he wishes to progress this matter as quickly and efficiently as possible. I am informed that, should the Court require evidence of this regrettable news received by Mr Boland, then that can and will be provided to provide the appropriate comfort.

14. We have instructed Counsel to draft the Appeal documentation on behalf of the Debtor to be lodged as soon as possible; however, without the information from the Accountant, we are unsure as to what happened with the previous Appeal lodged by the Accountant on 14 November 2018. As we do not have this information, and the Accountant is not forthcoming with the same, Counsel is limited in the explanation he can give as to why a late Appeal is being lodged by the Debtor. It is anticipated that Counsel will lodge the Appeal and then, should the information be provided by the Accountant at a later date, we will likely issue an appropriate Application under the relevant rules within the First Tier Tribunal to amend the Grounds of Appeal in the usual way.

15. We would be grateful if the Court could assist in ordering disclosure from the Accountant so that our Client is able to lodge his Appeal with as much supporting evidence as possible. If the Court is not minded to Order such disclosure, which it acknowledged would need to be accompanied by an appropriate Application Notice and supporting evidence, then in any event, we will have to explore any other avenues available to our Client to obtain the information and/or documentation from the Accountant.”.

(92) On 25 September 2019, the fifth hearing in the winding-up proceedings was held. The note by Jack Quinlan of HMRC to his colleague Mrs Perrett described it thus (page 241)—

“• Sought UCO as we had no contact from company or any reduction to the debt. Strongly oppose any adjournment request. The witness statement and application to the tribunal that were filed in November 2018 were rejected by the tribunal in January 2019 as company failed to provide information requested by the tribunal service. Our demand letter for this petition was issued after the tribunal rejection.

• Company granted adjournment to file another appeal”.

(93) On 27 September 2019, Jessica Whyatt of ASW emailed the tribunal. She enclosed a Form 64-8 and told the tribunal that ASW intended to contact the tribunal that day to discuss the appeal (page 285).

(94) On 3 October 2019, the tribunal replied (page 285)—

“Thank you for your email.

The above mentioned Is closed on our system as returned as no response was received from the appellants agent

The Tribunal does not keep copies of returned appeals.

I have attached forms and guidance for you to complete and return with supporting documents”.

(95) On 21 October 2019, Matthew Whyatt of ASW made his third witness statement in the winding-up proceedings, in relation to an adjournment request. The witness statement mentioned Mr Boland’s health, recorded attempts to extract further information from Mr Chesney and recorded that ASW had discovered from the tribunal that the appeal lodged in November 2018 had been closed (page 281)—

“6. Since the previous hearing, we have had great difficulty in taking instructions from our Client. Patrick Boland ("Mr Boland"), the Director of the Company, has been suffering from ill health and, in light of this, has been unable to contact this firm in order to provide instructions, despite this firm contacting Mr Boland by way of email on a number of occasions seeking the same.

7. ASW was able to take instructions from Mr Boland on Friday 18 October 2019. Mr Boland explained that he has had technical difficulties with his phone which has prevented him from being able to contact this firm. He also explained that, also due to these technical difficulties, he has not received any of our emails since around 25 September 2019. We have now provided Mr Boland with copies of any and all emails that have been sent to him by ASW since the Previous Hearing and Mr Boland has provided full instructions on how ASW is to proceed.

8. Mr Boland suffers from ill health generally and has recently experienced difficult personal circumstances which have caused him to, in his words, put his head in the sand as he could not deal with the stress of everything happening at once. Mrs Whyatt has since spoken with Mr Boland, has explained the steps that will need to be taken in order to lodge the Appeal, and has advised of the importance of doing all that he can to progress this matter moving forward. Mr Boland accepts that his conduct has not been conducive to progressing the matter as quickly as maybe would have been possible and understands that he must now provide instructions expeditiously in order to progress the matter moving forward.

[...]

10. In order to determine what became of the previously lodged Appeal, Mrs Whyatt contacted the Tribunal, providing them with a form of authority to speak on behalf of the Company, and asked for the Tribunal to confirm the outcome of the previously lodged appeal. This email was sent on 27 September 2019, following the previous hearing [MW3/X2}.

11. A response was received from the Tribunal on 3 October 2019 explaining that the previously lodged appeal had been closed on the Tribunal's system as no response was received from the Company's agent, the Accountant [MW3/1]. The Debtor intends to raise a complaint with the Accountant's *firm* and, should it become necessary, will seek legal advice in respect of the apparent negligent actions of the Accountant in failing to respond to the queries of the Tribunal.”.

(96) On 23 October 2019, the sixth hearing was held in the winding-up proceedings. The note by Jack Quinlan of HMRC to his colleague Mrs Perrett described it thus (page 242)—

“• The company asked for address to serve another W/S. The tribunal service who confirmed there was an appeal in 2018 and they wrote to company in November 2018 asking for more information but had no response so they closed case in January 2019 and confirmed there had been no further appeals with them. A 64-8 was sent to the tribunal service authorising a Jessica Wyatt but this is not a form the tribunal use. The tribunal also confirmed that an appeal must be made in 30 days of a decision and that the company were outside of that time with the appeal in 2018.

- Sought UCO at hearing
- Company granted adjournment to see if they will file their appeal as the claim they would on 28/10/2019”.

(97) On 29 October 2019, the appellant’s new representative, ASW, filed with the tribunal a new notice of appeal and an application to appeal out of time (pages 10 to 33). In the box headed “*The amount HMRC claim I owe*”, the amount entered was £1,517,156.00 (page 15), which was the amount only of the first assessment. But it was not suggested for HMRC that the appellant’s intention was not to appeal against all of the input tax assessments.

(98) On 9 December 2019, the tribunal wrote to HMRC requesting a decision on hardship and enquiring as to HMRC’s position on the late appeal (page 310).

(99) On 9 December 2019, the tribunal wrote to Jessica Whyatt, Litigation Manager at ASW, acknowledging receipt of the Notice of Appeal “*dated 30 October 2019*” (nothing turns on this difference of one day). The letter also said that the tribunal had asked HMRC whether they object to the hardship application and that the tribunal would write to Ms Whyatt again when the tribunal had heard from HMRC (page 309).

(100) On 23 January 2020, ASW applied to the tribunal on the appellant’s behalf for an unless order. They said they had not heard from HMRC on the late appeal or hardship, noted Mr Boland’s worsening health condition and enclosed a GP letter dated 2 January 2020 (page 318) which confirmed that Mr Boland had recently had a heart attack, has coronary artery disease and is an insulin dependent diabetic. I am setting out the cover email in full because, although it post-dates the latest date on which I find an appeal was made (the penalty appeal made on 29 October 2019), it is relevant when it comes to considering all of the circumstances. The email said (page 316)—

“We refer to the above.

Please find attached Application for an Unless Order against the Respondent. As our Client is due to attend another adjourned Winding Up Petition Hearing (the Appeal disputes the full petition sum/ debt) on 29 January 2020, we would be grateful if this Application could be dealt with as a matter of urgency.

Further, the director of our Client, Mr Boland, is suffering from very serious health conditions and has been advised that he must undergo heart surgery as soon as possible. He has also been advised that his recovery from that operation will be long and difficult and that he should avoid any stressful situations during his recovery. He has delayed this operation in order to conclude this litigation; however, his health has deteriorated so much so that he now has no alternative than to undergo his treatment as soon as possible. We are awaiting a report from Mr Boland's doctor confirming the same in more detail; however, we attach a letter obtained from our Client's doctor in this regard for ease of reference.

There has been a significant delay caused by HMRC in that they have simply done nothing since the Tax Appeal was issued in October 2019. This delay has had a serious impact on our Client's health and may also now mean that the litigation process will take much longer as our Client will not be fit and/or well enough to provide instructions during his recovery period.

It is for the reasons stated above that the Unless Order Application is being made.

The solicitors for the Respondent have been copied into this email for completeness.

We look forward to hearing from the Tribunal as a matter of urgency.

Yours faithfully”.

(101) On 29 January 2020, the second winding-up petition was dismissed, without costs. The parties each give a different reason for this (pages 77 and 242)¹³.

(102) On 5 February 2020, the appellant's hardship application was accepted.

(103) On 13 March 2020, the respondents filed with the tribunal their Notice of Objection to the application to make a late appeal (page 36).

(104) On 31 March 2021, Mr Boland's GP Dr Arora wrote to whom it may concern (page 315)—

"Dear Sir/Madam,

Re: Mr Patrick Boland [...]

Mr Boland has been my patient since 29/11/2002. He has been under my constant care. This patient is suffering from several co-morbidities:-

1. Chronic Kidney failure stage 3
2. Hypertension
3. Acute coronary syndrome
4. Gout
5. Diabetes
6. Arthritis.

He has recently suffered from mental problems. He is on multiple therapy.

He has gone through a rough time lately and has been thoroughly investigated by the Cardiology Team and I understand the question of heart surgery is not being considered due to his co-morbidities.

Presently with his health problems, anxiety and depression he is not coping very well. I understand from the cardiologists he has been given a limited life span due to his cardiology problems.

I always ask him to avoid stressful situations and I understand that he has had an extremely difficult time with Inland Revenue investigations.

Presently, he won't be able to stand, health wise, any stressful situations, especially in closed area [sic].

This is my opinion as his General Practitioner.

Yours faithfully".

(105) On 21 June 2021, Matthew Whyatt of ASW made a witness statement in these tribunal proceedings (page 76). He explained some of the history and described Mr Boland's own ill health and the progression which had precluded a previously planned operation, Mr Boland's long-term partner's cancer diagnosis, the death of a close friend, the death of a close family member, and the attempted suicide of Mr Boland's son (pages 77 and 78)—

"7. I refer to my Third Witness Statement from the Winding Up Proceedings [MW1/39-42] and specifically to Paragraphs 6-8 [MW1/39-40] wherein I explained that the Director of the Appellant, Mr Patrick Boland (Mr Boland) had been suffering from the effects of ill health and that this had prevented him from providing instructions to this firm in a timely manner, at that time. My Third Witness Statement, and correspondence generally, was served by way of email on numerous people and /or teams within HMRC's

¹³ Page 77: paragraph 8 of Matthew Whyatt's witness statement dated 21 June 2021 in these tribunal proceedings. Page 242: Jack Quinlan's note to Mrs Perrett, 10 August 2021.

organisation, as can be seen from the correspondence exhibited to this Witness Statement at pages MW1/45-70.

8. The Appellant was successful in having the Winding Up Petition dismissed as a direct result of the inaction of HMRC.

9. An application to Appeal out of time was issued by the Appellant on 29 October 2019 by way of email. The Tribunal acknowledged receipt of the same on 9 December 2019 and the Respondent filed its Notice of Objection five months after the Application was made, on or around 13 March 2020, despite having been served with the Application by way of email on 29 October 2019.

[...]

12. We are instructed that over the last 12 months, Mr Boland's son has attempted suicide as a direct result of being informed that Mr Boland's life expectancy has decreased significantly as a direct result of his numerous illnesses. Mr Boland lost a very close friend as well as a close family member to Covid-19 during the pandemic which caused him and his family a great deal of upset at an already difficult time, which had a detrimental effect on Mr Boland's mental health and wellbeing generally. Mr Boland's treatments for his numerous health conditions were delayed due to the Covid-19 pandemic and he suffered a mild heart attack during this time. He had been awaiting a date for triple heart bypass surgery, which he was told would give him a much longer life expectancy; however, his conditions have worsened to the point whereby he is no longer being considered for surgery as it is not believed that he will survive the same. As a result of this, Mr Boland has been informed that his life expectancy has reduced significantly, with his doctor confirming to Mr Boland that if he managed to survive for five years, then that would be the best-case scenario for him.

13. During our most recent contact with Mr Boland, we were informed that his long-term partner has been diagnosed with cancer and that she is undergoing immediate and intensive treatment for the same which has added yet more pressure to Mr Boland and is therefore worsening his overall condition. Whenever we do manage to speak with Mr Boland, he is noticeably distressed and upset, and so taking instructions is extremely difficult.”.

I make no finding as to the reason the winding-up petition was dismissed.

(106) On 10 August 2021, Jack Quinlan, an internal HMRC colleague of Mrs Perrett (who represented HMRC at the hearing before me), emailed to Mrs Perrett a case history “*taken from our system*” (page 240). The history seemed a combination of events in and relating to the High Court proceedings and to the tribunal. The first entry said, of a High Court hearing (page 241)—

“Hearing in 2018

- We were instructed to dismiss the case on first hearing to allow the appeal submission to be reviewed by tribunal.”.

(107) On 15 February 2022, Mr Patrick Boland's GP Dr Arora wrote to ASW (page 319)—

“Thank you for your email. I have been the GP of this patient for some considerable time and know of his conditions very well.

He suffers from Coronary Artery disease (presently angina also) which has been thoroughly investigated and is finding difficulty in having surgery. I understand he has been seen by consultants several times and had discussed possibility [sic] of cardiac surgery but there are risks involved.

He also suffers from Insulin Dependent Diabetes Mellitus, Hypertension, Asthma, Chronic Kidney Disease, Memory Problem, Anxiety and musculoskeletal pain.

He has had several incidents of chest pain and attended A&E.

From his notes and memory I can say that this patient is at risk of having heart [sic] attack and should avoid any stressful situations all the time.

Regards”.

10. That was the factual and procedural background. I turn next to the relevant law.

C. LAW

11. The parties were agreed that the following legislative provisions apply in this case.

(1) Legislation: Input tax deduction

12. Domestic law relating to input tax deduction is contained in the Value Added Tax Act 1994 (“the VAT Act 1994”) and the Value Added Tax Regulations 1995. Section 4(1) of the VAT Act 1994 provides for VAT to be charged on any taxable supply of goods or services by a taxable person in the course or furtherance of any business carried on by him. Taxable person is defined in section 3. Section 24(1) defines input tax. Sections 25 and 26 provide for recovery of input tax. Section 26 and regulation 101 provide for input tax allowable and for attribution of it to taxable supplies. I need not set out those legislative provisions; no point turns on them.

(2) Legislation: Assessments and appeals

13. The input tax assessments were made under section 73 of the VAT Act 1994. I need not set that out; nothing turns on its terms.

14. On 2 and 6 November 2017, section 83A provided, as it does now—

“Section 83A Offer of review

(1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.

(2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P.

(3) This section does not apply to the notification of the conclusions of a review.”.

15. The appeals against the VAT assessments issued for periods 04/15 to 07/17 are made under section 83(1)(p) of the VAT Act 1994. The appeals against the decision to refuse the appellant’s input tax claims for periods 08/17 to 02/18 are made under section 83(1)(c) of the VAT Act 1994. Those provisions said, so far as relevant—

“**83.**—(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

[...]

(c) the amount of any input tax which may be credited to a person;

[...]

- (p) an assessment—
 - (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; ... or the amount of such an assessment”.

16. The time limit for making an appeal under section 83(1) of the VAT Act 1994 is given in section 83G of that act—

- “83G.—(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, or
 - (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or
 - (b) if later, the end of the relevant period (within the meaning of section 83D).
[...]
- (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.”.

17. The time for appealing starts with the date of the document notifying the decision. In other words, day one of the period is the date of the document, not the day after the date of the document. So the time limits would, if HMRC’s dates were accepted, be one day less than what HMRC say. That does not however change the arguments that were made.

18. The penalty assessment was made under Schedule 24 to the Finance Act 2007. Paragraphs 15 and 16(1) of Schedule 24 provide—

“15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

(4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.

16(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).”.

19. That brings us back to the time limit in section 83G of the VAT Act 1994, that is, 30 days beginning with the date of the document which notified the decision.

(3) Legislation: Starting an appeal

20. Rule 7 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273) provided at the time the appeal was submitted to the First-tier Tribunal on 14 November 2018, so far as relevant—

“Failure to comply with rules etc.

7.—(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

- (a) waiving the requirement;
- (b) requiring the failure to be remedied;
- (c) exercising its power under rule 8 (striking out a party’s case);
- (d) restricting a party’s participation in proceedings; or (e) exercising its power under paragraph (3).”.

21. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provided, so far as relevant—

“20.—(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

(2) The notice of appeal must include—

- (a) the name and address of the appellant;
- (b) the name and address of the appellant's representative (if any);
- (c) an address where documents for the appellant may be sent or delivered;
- (d) details of the decision appealed against;
- (e) the result the appellant is seeking; and
- (f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.”.

(4) Case law

List of authorities

22. The following authorities were cited in oral argument—

- (1) *Cerchez v HMRC* [2020] UKFTT 452 (TC);
- (2) *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014] 1 WLR 3926;
- (3) *Katib v HMRC* [2019] UKUT 189 (TCC) at paragraph 56;
- (4) *Martland v HMRC* [2018] UKUT 178 (TCC) at paragraphs 44 to 46;
- (5) *Websons (8) Limited* [2020] UKUT 0154 (TCC);
- (6) *Jeyanthan, R (on the application of) v Secretary of State for the Home Department* [1999] EWCA Civ 3010, [1999] 3 All ER 231;
- (7) *NA (Bangladesh) v Secretary of State for the Home Department* [2016] EWCA Civ 651;
- (8) *SA (Non-compliance with rule 21(4))Bangladesh* [2022] UKUT 132 (IAC).

Authorities for considering whether to admit a late appeal

23. The Upper Tribunal in *Martland* specified what should be the starting point for considering whether to admit a late appeal—

“29. ...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”

24. The Upper Tribunal went on in *Martland* to say that in considering whether to admit a late appeal, the tribunal can usefully follow the three-stage process set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014] 1 WLR 3926—

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

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

“If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy

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

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

25. In *Websons (8) Limited* [2020] UKUT 0154 (TCC), the Upper Tribunal confirmed that *Martland* still applies.

26. It may be relevant at the third stage to consider whether an appellant has been misled by his representative (*Katib v HMRC* [2019] UKUT 189 (TCC) at 56).

Authorities for considering whether the appeal submitted on 14 November 2018 was valid

27. Rule 7 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that a failure to comply with a requirement of the rules does not render void the proceedings or any step taken in them. It makes provision for what the tribunal can do faced with such a failure.

28. The Court of Appeal considered a similar provision in *Jeyanthan, R (on the application of) v Secretary of State for the Home Department* [1999] EWCA Civ 3010. In that case the Secretary of State had failed to use the prescribed form for applying for leave to appeal. Lord Woolf, MR said—

"11. Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect

is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances (see *Brayhead (Ascot) Ltd v Berkshire County Council* [1964] 2 QB 303, applied by the House of Lords in *London & Clydeside Estates Ltd. v Aberdeen District Council* [1980] 1 WLR 182).”

29. The provision in question in *Jeyanthan* was rule 38 of the Immigration Appeals (Procedure) Rules 1984, since revoked, but which Lord Woolf reproduced thus—

“Any irregularity resulting from failure to comply with these Rules before an appellate authority has reached its decision shall not by itself render the proceedings void, the appellate authority may, and shall if it considers that any person may have been prejudiced, take such steps as it thinks fit before reaching its decision to cure the irregularity, whether by amendment of any document, the giving of any notice or otherwise.”.

30. Lord Woolf, MR said of that provision—

“21. ... The purpose of this Rule is to prevent technical points interfering with the jurisdiction of the Tribunal. There is therefore ample reason for saying that unlike the provisions as to time the requirement to use form A2 is not to be regarded as a strict requirement.

[...]

29. ... It does not follow that the application, although it does not have the required declaration, is a nullity....

[...]

32. I turn to the power contained in Rule 38 of the 1984 Rules. The existence of this power to deal with irregularities confirms that the Tribunal is not intended to allow technicalities to interfere with its responsibility to determine the merits of appeals. Because of a lack of familiarity with English and the procedures of tribunals in this country asylum applicants are likely to make many procedural errors. If they are not to be caused injustice Rule 38 should be given a wide interpretation. I do not accept Mr Fleming's submission that a stricter approach should be adopted than was adopted to the wide power contained in Order 2 r.1 of the Rules of the Supreme Court (see "*The Goldean Mariner*" [1990] 2 L.I.R. 215). The procedures of tribunals should normally be less and not more strict than the procedures of the High Court. The absence of a declaration would be an irregularity which could if necessary be dealt with under Rule 38.”.

31. Lord Justice Judge, agreeing with Lord Woolf, MR said—

“44. ... Like Lloyd LJ, my immediate impression on reading rule 38 was that it would be surprising if an incomplete notice of an application for leave to appeal, or a notice which did not scrupulously comply with the prescribed form, was not an "irregularity" within rule 38. That, on the face of it, is what it is. Moreover in the context of applications in asylum cases it would be wholly unrealistic not to recognise that errors, omissions and simple oversight by individuals, many without any proper grasp of English, or any understanding of the legal processes, are inevitable. To exclude them irrevocably from the appeal process, notwithstanding an application for leave brought in time, on the basis of incurable non-compliance with the mechanics of the appeal procedure, would be entirely inconsistent with a fair and just system for dealing with their cases. If Mr Fleming's argument were correct, and the current application for leave to appeal by the Secretary of State were a nullity, precisely the same conclusion would follow in the case of any asylum seeker whose notice was similarly deficient.”.

32. A provision equivalent to rule 7 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – which we are considering in the present case – was also considered by the Court of Appeal on an application for permission to appeal in *NA (Bangladesh) v Secretary*

of State for the Home Department [2016] EWCA Civ 651. There the appellant argued that, since a late application for permission to appeal to the Upper Tribunal must include a request for an extension of time and the reason why the application was not provided in time, and given that the instant application did not contain such a request, it was invalid, and the Upper Tribunal was bound not to admit it. In refusing permission to appeal, Christopher Clarke, LJ, following *Jeyanthan*, said—

- (i) The Upper Tribunal rules did not say that that tribunal must not entertain the application if a request for an extension is not included in the application. If that was what was intended, the rules could easily have said so (paragraph 11);
- (ii) The result contended for would be manifestly unjust in many cases (paragraph 14);
- (iii) If the application is to be regarded as a complete nullity, no waiver of the defect would be possible (paragraph 15);
- (iv) That that was not a tenable view was confirmed by the provisions of rule 7 (paragraph 16); and
- (v) “Draco might have approved the position argued for, but it would, in my judgment, require a much clearer provision in order for it to be an acceptable interpretation of the rules. There are no doubt good policy reasons for providing that an application for permission should include within it an application for extension of time and reasons, but the legislator cannot, it seems to me, be taken to have intended by the words that he used that a failure to include a request for extension with reasons in the application was invariably fatal to its success.” (paragraph 19).

33. In *SA (Non-compliance with rule 21(4))* [2022] UKUT 132 (IAC) the Upper Tribunal (Immigration and Asylum Chamber) dealt with the consequences of an application for permission to appeal to the Upper Tribunal that did not comply with rule 21(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008, which provided—

- “(4) The application must state—
- (a) the name and address of the appellant;
 - (b) the name and address of the representative (if any) of the appellant;
 - (c) an address where documents for the appellant may be sent or delivered;
 - (d) details (including the full reference) of the decision challenged;
 - (e) the grounds on which the appellant relies; and
 - (f) whether the appellant wants the application to be dealt with at a hearing.”.

34. At paragraph 14 of *SA*, the Upper Tribunal said—

“The expectation of some consistency of approach, absent particular circumstances in individual cases, is plainly desirable in the interests of justice...”.

35. The Upper Tribunal considered the status of an application that did not comply with rule 21(4). The tribunal said, at paragraph 19—

“Rule 7 provides that any irregularity resulting from a failure to comply with any requirement of the UT Rules does not of itself render void the proceedings or any step taken in the proceedings. This indicates that an application which does not comply with rule 21(4) is nevertheless an application.”.

36. Having considered *NA Bangladesh* and *Jeyanthan*, the Upper Tribunal in *SA* went on to say—

“22. Although *NA (Bangladesh)* concerned a failure to comply with rule 21(6), much of the reasoning of the Court in that case applies by analogy to applications which do not comply with rule 21(4). Thus we note that, whilst rule 21(4) requires an application to the Upper Tribunal to state the various matters specified in (a)-(f) of rule 21(4), there is nothing in rule 21(4) or the UT Rules which states that the Upper Tribunal must not entertain the application or that it must treat the application as invalid or that denies the Upper Tribunal jurisdiction if the provisions of rule 21(4)(a)-(e) are not complied with.

23. In addition, in our view, such a construction could lead to injustice. For example, if the only aspect of rule 21(4) that an application does not comply with is rule 21(4)(f) (which requires the application to state whether the appellant wants the application to be dealt with at a hearing), the Upper Tribunal would have all the material that it requires in order to make a decision on the application without a hearing. In such a case, it would be unfair to deprive an applicant of a decision on the application simply because rule 21(4)(f) had not been complied with. This could not have been the intention of the legislator.

24. We therefore agree with Mr Spurling that an in-time application which does not comply with rule 21(4) in one or more ways is nevertheless a valid application which must be decided by the Upper Tribunal. If it had been intended otherwise, the UT Rules could easily have said so.”.

37. The Upper Tribunal in *SA* then set out, from paragraph 46, guidance on what it would do in the various instances of non-compliance with aspects of rule 21(4)—

“46. Henceforth, therefore, parties should assume that the Upper Tribunal’s approach to applications that do not comply with rule 21(4)(e) is likely to be as follows: Where the Upper Tribunal receives an application which is not accompanied with [sic] the grounds (whether or not the covering letter accompanying the application or the completed IAUT-1 form states that the grounds are attached or enclosed), an Upper Tribunal Lawyer (or a judge) will write to the applicant (if his address has been supplied pursuant to rule 21(4)(a)) and (if represented) to his or her legal representative: (i) stating that the grounds were not received with the application; (ii) requiring (pursuant to rule 7(2)(b)) that the failure be remedied, in that the appellant must now submit the grounds within a specified number of working days beginning with the date of the letter; and (ii) explaining that upon expiry of the deadline, the application will be placed before an Upper Tribunal Judge for a decision on the application on the material before the Upper Tribunal.”.

D. ISSUES AND SUBMISSIONS

Issues

38. The parties advanced the following as the issues—

- (1) Was the first assessment made on 2 November 2017 as HMRC argued, or on 6 November 2017 as the appellant argued?
- (2) Were the appeals against all the input tax assessments made on 14 November 2018 as the appellant argued, or on 29 October 2019 as HMRC argued?
- (3) In light of the tribunal’s findings on issues (1) and (2) above, how late was each appeal?
- (4) For those appeals which were late, was the delay serious and significant?
- (5) For those appeals which were late, was there good reason for the delay?
- (6) For those appeals which were late, does an evaluation of all the circumstances result in permitting any of the appeals to be made late?

39. It was common ground that the appeal against the penalty assessment was made on 29 October 2019.

40. It was also common ground that a reference to the appeal and review rights is required to be included in or with a notification of assessment or sent at the same time as the notification of assessment. Section 83A(1) and (2) provide that HMRC must offer a person a review of a decision that has been notified to the person if an appeal lies under section 83 in respect of the decision (which it is common ground is so in the present case), and that the offer of the review must be made by notice given to the person at the same time as the decision is notified to the person. That section refers only to a requirement to offer a review and not to a requirement to mention appeal rights as the parties had said. I asked for the parties to be asked whether they had had another provision in mind that specifically required reference to the appeal rights. I have not yet had a response but have concluded that the lack of reference to appeal rights in section 83A makes no difference to the thrust of the submissions made, since the 2 November 2017 letter (and the 10 August 2018 letter) did not offer a review either.

41. Whether section 83A was satisfied was, in the event, relevant only to the question of whether the assessment of November 2017 was notified on 2 or 6 November 2017. HMRC had accepted that the notices of assessment for the periods covered by HMRC's six letters of 13 August 2018 and that of 14 August 2018 were those letters and not the 10 August 2018 letter that had preceded them (which had not contained an offer of review).

42. It was common ground that the 2 November 2017 letter did not contain text offering a review (nor a reference to appeal rights, although that transpires not strictly relevant for section 83A) and that no other notice given at the same time as the 2 November 2017 letter was issued offered a review.

Submissions

43. Mrs Perrett argued for HMRC that the 6 November 2017 notice of assessment which was headed "Notice of Assessment" referred back to the 2 November 2017 letter, and so the 2 November 2017 letter was the notice of assessment that started time running for appealing. She submitted that Mr Chesney did not chase the tribunal after he had submitted the Notice of Appeal on 14 November 2018. Mrs Perrett argued that the appellant said its director Mr Boland had left the matter entirely with his agent, but correspondence showed that Mr Boland had been able to engage with his MP and so he could at the same time have made an appeal. She submitted that, despite Mr Boland being under his GP's constant care since 2002 (GP letter 31 March 2021, page 315), the application for VAT registration on page 320 was dated 1 October 2014. That meant, she argued, that being under his doctor's constant care since 2002 had not stopped Mr Boland applying for VAT registration. She submitted that the appellant has not provided a valid reason or evidence for why the appeal was not submitted within the statutory time limit, and that the evidence provided is for a much later period. Generally, Mrs Perrett argued that HMRC should not have unexpectedly to divert resources to reopening matters which HMRC had thought were closed. Mrs Perrett said HMRC do acknowledge that, if the application is denied, then there will be a liability of over £1million, but she argued, that situation alone does not justify permitting a late appeal to be made.

44. Mrs Perrett argued that all the delays were serious and significant, that there was no good reason for the delays, and that an evaluation of all the circumstances should not result in the appeals being permitted to be made late.

45. Mr Watkinson argued that it was not open to HMRC to make submissions on finality when, months after the expiry of the initial time limit, their Chief Executive Officer was writing to an MP saying the matter was under review. A matter still under review still has resources being used on it and so there is no question of HMRC having to divert resources, whether

unexpectedly or at all, said Mr Watkinson. The attachment to an email from Jack Quinlan of HMRC to Mrs Perrett on 10 August 2021 (page 240) had as its first entry “*Hearing in 2018 • We were instructed to dismiss the case on first hearing to allow the appeal submission to be reviewed by tribunal.*” (page 241). Mr Watkinson argued that this appeared to reflect an internal HMRC resolution at some time after the 14 November 2018 appeal had been submitted that HMRC would not do the very thing they are now doing, that is, stand in the way of this appeal. He submitted that the timing of that entry showed that HMRC were aware that there was an appeal to the tribunal in 2018. That, taken with their resolution not to stand in the way of it, makes it difficult he submitted to claim that finality is in HMRC’s favour. He submitted that it was not, in view of that entry, open to HMRC now to say “we never knew about this appeal and have allocated resources elsewhere, so you should be for us”. As to an internal printout on page 332 from HMRC’s computer system, Mr Watkinson pointed out that it was for a different company of which Mr Boland was a director. Mr Watkinson argued that – if this had been included by HMRC to say “*if you could submit the corporation tax return, why did you not attend to this appeal?*” – that is misconceived because the next page shows that that return was submitted by the agent, Mr Chesney (as was the VAT registration application). Mr Watkinson submitted, citing *Cerchez v HMRC* [2020] UKFTT 452 (TC), that terminal financial prejudice remains highly relevant to applications such as this and that the prejudice was all one way, against the appellant. He also submitted, citing the Upper Tribunal decision in *Katib v HMRC* [2019] UKUT 189 (TCC) at paragraph 56, that it may be relevant at the third stage to consider whether an appellant has been misled by his representative.

46. Mr Watkinson accepted that there had been a serious and significant delay. But he argued that there was good reason for it and that an evaluation of all the circumstances should result in the appeals being permitted to be made late.

E. ANALYSIS

(1) Analysis: Question 1: Was the first assessment made on 2 or 6 November 2017?

47. Although the issue identified by the parties was whether the first assessment was made on 2 November 2017 or on 6 November 2017, the legislation provides that time starts running from “*the date of the document notifying the decision*”. I find that – for the purposes of starting time running – the date of the document notifying the decision was 6 November 2017, for the following reasons.

48. The 2 November 2017 letter said “*Please find enclosed all of the appropriate paperwork to withdraw my previous assessment and raise the assessment for the input tax. As you will see this reduces the amount due back to HMRC from £1618212¹⁴.00 to £1517156.00*”. Unlike the assessment notification dated 6 November 2017, and the other assessment notifications in this case, the 2 November 2017 letter was not headed “*Notice of VAT assessments*” and did not offer a review as required by section 83A. To the extent that it is relevant, it is also clear from the other assessments in this case that HMRC consider that the document notifying the appellant of the assessment decision is the one headed “*Notice of VAT assessments*”, which actually included the word “*Notice*”. Moreover, the 6 November 2017 letter actually said “*I have made assessments of VAT due under section 73 of the VAT Act 1994. This letter and enclosed schedule is our notice of those assessments*” (my underlining).

49. Mrs Perrett seemed to suggest for HMRC that – because the 6 November 2017 letter, which did contain an offer of review (and a reference to appeal rights), referred back to the 2

¹⁴ The assessments notified by the letter dated 24 October 2017 had actually said £1,618,282, but no issue appears to have been taken with this error in narrating the prior assessment.

November 2017 letter – then the 2 November 2017 letter could be deemed to have contained those matters, and so time started running from 2 November 2017. I reject that submission. A future letter cannot retroactively change what was done in or with a previous letter.

50. It may be that the 2 November 2017 letter was not sent until the 6 November 2017 “Notice of VAT assessments” was ready to send, and that the letter dated 2 November was sent with the 6 November assessments, in which case the 2 November 2017 letter cannot have been sent before 6 November. I do not accept that HMRC can start time running from a date earlier than the date on which they actually make and notify an assessment, by simply putting an earlier date at the top of a letter enclosed with the actual assessment notices. So I would – even if the 2 November letter was sent with the 6 November letter – still not accept that 2 November 2017 was the date on which time started running. The 2 November 2017 letter did not have in it or with it the offer of review required by section 83A, and no such offer was sent at the same time as that letter either.

(2) Analysis: Question 2: Were the appeals against all the assessments, except the penalty, made on 14 November 2018 or on 29 October 2019?

51. I find that the input tax appeals were made on 14 November 2018, despite the HMRC decisions not being supplied to the tribunal with the Notice of Appeal, contrary to rule 20(3). As set out in the case law upon which Mr Watkinson relied, at paragraphs 28 to 37 above, rule 7 is there for a reason. If an appeal is automatically null because it fails to attach something required by the rules, there is no place for rule 7. When it became apparent that the decision notices had not been supplied to the tribunal despite its request of 28 November 2018, the appeal should have been referred to a judge for consideration of what to do in light of that. That the tribunal did not consider whether to waive the irregularity and simply rejected the appeal as invalid was unlawful; both the 28 November 2018 letter and the 25 January 2019 letter came from tribunal staff and did not purport to be sent on the direction of a judge¹⁵. There was no unless order warning of a potential striking out (although I do not suggest that one would necessarily have been justified merely for the lack of the decision notices). And there was no striking out order.

52. I am now treating the appeal as having been referred to me for consideration of whether to waive the irregularity, and I do waive it. This is not one of the more extreme cases where, for example, an appellant has simply emailed the tribunal saying the appellant wants to appeal, without saying against what and without supplying a Notice of Appeal. Nor is it a case where, although a Notice of Appeal has been supplied, it includes no indication of what is being appealed. Although, even in those cases, there can be room for rule 7 to operate.

53. Like the Notice of Appeal filed on 29 October 2019, the one filed on 14 November 2018 specified in the box headed “*What is the amount of tax?*” an amount lower than the total of all the input tax assessments. The notice also seemed confused about the periods covered by the assessments (there was no assessment covering August 2018 or dated 21 August 2018, although there was one dated 14 August 2018). But Mrs Perrett did not suggest for HMRC that the appeal filed on 14 November 2018 – if accepted as valid – should be taken not to appeal against all of the assessments made prior to that date, and I heard no argument on that point. It is the kind of point that one sees clarified later on in an appeal, without objection necessarily being made as to the amounts not matching.

¹⁵ Tribunal staff have confirmed to me that the January letter does not show on the tribunal system as having been directed by a judge to be sent.

54. Whether or not Mr Chesney or Mr Boland saw the tribunal's 28 November 2018 letter asking for more information would not alter my judgment that the tribunal should not have rejected the appeal without referring it for consideration under rule 7.

55. It is for the above reasons that I find that the appeals against all of the assessments except the penalty assessment were made on 14 November 2018.

56. The next question is, how late does that make each appeal?

(3) Analysis: Question 3: In light of the tribunal's findings on issues (1) and (2) above, how late was each appeal?

57. I found above that, as to the first assessment, the letter dated 6 November 2017 was the one which started time running for appealing, and that the date on which the appeal was made for all of the assessments except the penalty was 14 November 2018. In view of those findings, the below table sets out the tribunal's findings as to how late each appeal was. The appeal in respect of the assessment notified on 12 November 2018 was not late at all.

Tribunal's findings as to lateness					
Date of Assessments	Period assessed	End of Appeal Period (day one being date of notification of assessment, not day after) Section 83G(1)(a) VATA	Amount	Date of Appeal	Days Late (as found by tribunal)
Section 73 VAT Act 1994 assessments:					
06/11/2017	04/15 - 07/17	05/12/2017	£1,517,156.00	14/11/2018	344 days late
13/08/2018	08/17 - 11/17	11/09/2018 ¹⁶	£288,266.49	14/11/2018	64 days late
13/08/2018	01/18	11/09/2018 ¹⁷	£72,661.33	14/11/2018	64 days late
14/08/2018	12/17	12/09/2018 ¹⁸	£39,172.00	14/11/2018	63 days late
12/11/2018	02/18	11/12/2018	£70,596.80	14/11/2018	Not late
Schedule 24 Finance Act 2007 penalty:					
26/11/2018	01/02/2015 to 31/01/2018	25/12/2018 ¹⁹ (but 25 and 26 were bank holidays so would have been in time if received by 5pm on Thursday 27/12/18: rule 12)	£1,629,658.09	29/10/2019	306 days late

¹⁶ Mrs Perrett's table said 2017 but she confirmed this was a typo for 2018.

¹⁷ Mrs Perrett's table said 2017 but she confirmed this was a typo for 2018.

¹⁸ Mrs Perrett's table said 2017 but she confirmed this was a typo for 2018.

¹⁹ Section 83G VAT Act 1994, by virtue of paragraph 16(1) of Schedule 24 to the Finance Act 2007.

(4) Analysis: Question 4: For those appeals which were late, was the delay serious and significant?

58. I found above that the appeal against the assessments notified by the notice dated 6 November 2017 was 344 days late, the appeals against the assessments notified by the notices dated 13 and 14 August 2018 were 64 and 63 days late, and the appeal against the penalty assessment notified by the notice dated 26 November 2018 was 306 days late.

Serious

59. I find that the delays were serious. Even the appeals against the assessments notified by notices dated 13 and 14 August were some two months late, which is twice the 30-day time period.

Significant

60. The delays were not however significant, so far at least as relating to prejudice to HMRC.

61. Mr Watkinson argued that the prejudice here is all one way because, if the appellant were not permitted to make a late appeal, HMRC would (i) wind up the company without trial of HMRC's very serious allegations of fraud; and (ii) publicise the appellant's details as a tax fraudster, without any judicial scrutiny whatsoever of its allegations. The financial prejudice to the appellant could not be greater; it is, and is quite obviously, terminal by reference to the sums involved. He pointed out that HMRC themselves accept that, since they have granted the appellant's hardship application. By contrast, he submitted, any prejudice to HMRC is purely procedural; HMRC must already have the evidence in their possession to have made such serious allegations since HMRC bear the burden of proof of making good those allegations, and they have been aware for some time of the attempts to regularise the appeal position. Mrs Perrett argued that HMRC should not have to divert resources to a matter which they thought was closed and that they did not know that the appeal was coming.

62. I accept Mr Watkinson's submission that the prejudice is one way, against the appellant. The delay was not significant so far as relating to prejudice to HMRC: (i) because HMRC were still for much of the delay considering whether the assessments were correct, that is to say, putting their resources into the case by considering the evidence, inviting further evidence and suggesting that the appellant appeal; and (ii) because HMRC were being told, right up until just six days prior to the 29 October 2019 appeal being filed, that the appellant intended to pursue an appeal. I take each in turn.

(i) HMRC continuing to consider and invite evidence and suggesting an appeal

63. On 14 August 2018, HMR were still considering whether the assessments were correct, according to Officer Glen's letter of that date (page 172): "*I write with reference to my ongoing VAT enquiry*", then he referred to further reconsideration "*If there is any further evidence that you wish to provide for me to reconsider my decision, I will need to receive it by 13 September 2018.*". The following year, on 5 July 2019, Officer Glen was still asking for further evidence to suggest that his conclusion was incorrect.

64. I reject Mrs Perrett's submission for HMRC that "should the application be allowed, the Respondents would be prejudiced in that they will have to divert resources to defend an appeal which they were entitled to consider closed, especially given the significant length of the delay". Not only were HMRC still considering materials from the appellant, HMRC were also advising the appellant to appeal, as Mrs Perrett pointed out. Mrs Perrett submitted that HMRC

had advised the appellant to appeal on at least four occasions prior to 14 November 2018: (i) 28 September 2018 in the respondents' letter to Mr Sajid Javid, (ii) 19 October 2018 in the respondents' letter refusing ADR, (iii) 24 October 2018 in a telephone conversation with Debt Management, and (iv) 13 November 2018 in a telephone conversation with Debt Management. The 28 September 2018 letter did not quite advise an appeal but did say "*Mr Boland can find more information about the appeals process at www.gov.uk/tax-appeals*" (page 184). The 19 October 2018 letter did not quite advise an appeal either, but did say "*The reason I've taken this decision [refusing ADR] is because you do not currently have an open appeal. You have not appealed the assessments received to HMRC*". In addition to the four occasions that Mrs Perrett mentioned, there was also a telephone call of 23 October 2018 in which HMRC Debt Management advised him to appeal, as I accepted in the factual and procedural background above. So that makes at least five occasions on which HMRC either mentioned appealing or advised appealing.

65. Moreover, in an internal HMRC email of 10 August 2021 (page 240), from Jack Quinlan to Mrs Perrett, Mr Quinlan attached what he described as a "*document with a case history of each hearing that took place taken from our system. If you have any queries about conversations that were had with the company, tribunal or VAT departments you'll need to go back to Chris' team for further information. I hope this helps!*". The first entry in the attachment said—

“Hearing in 2018

- We were instructed to dismiss the case on first hearing to allow the appeal submission to be reviewed by tribunal.”.

66. It was common ground that this referred to a hearing in 2018 in the winding-up proceedings. I accept Mr Watkinson's submission that this entry shows that HMRC (whether or not Officer Glen personally) were in fact aware of an appeal having been made in 2018. Indeed, HMRC's chronology makes that even clearer; it specifically records that, on 28 November 2018, the petition was heard in the High Court and was dismissed at HMRC's request pending the outcome of the appeal to the tribunal (page 67).

67. Moreover, in its entry about the third hearing in the winding-up proceedings, Mr Quinlan's note also shows that, on 31 July 2019, HMRC were aware that an appeal had been made or was said to have been made (page 241, emphasis in original)—

“Third Hearing 31/07/2019

- Sought UCO as we had no contact or payment from company.
- Company granted an adjournment for claims of a FTT appeal and for HMRC to consider the appeal”.

68. On 11 September 2019, Officer Glen wrote to the appellant's new representative, ASW, enclosing all correspondence relating to the enquiry into the appellant. He reiterated in the bottom paragraph the potential for a late appeal—

“Should your client wish to make a late appeal then your client must explain why the appeal is being made outside of the 30 day appeal window from the date of the assessment. Alternatively, he can appeal to the tribunal directly”.

69. What I have described at paragraphs 63 to 68 above are not in my judgment the actions of a department that considered “closed” the appeal, the prospect of an appeal or the issues in the appeal.

(ii) HMRC were being told that the appellant intended to pursue an appeal

70. Moreover, it was apparent from what HMRC were being told that the appellant still intended to appeal—

(1) On 28 August 2019, Matthew Whyatt of ASW said in his first witness statement in the winding-up proceedings (page 250)—

“14: ... What this does show is that Mr Glen appears to accept that the enquiry stage is not only still open but progressing towards a conclusion which might itself be the subject of (a) an independent review and/ or (b) a formal appeal to the First Tier Tax [sic] Tribunal”.

(2) On 24 September 2019, Matthew Whyatt of ASW made his second witness statement in the winding-up proceedings, saying, among other things that (page 267)—

“8. ... Regrettably, the Company and/ or ASW are still not in a position whereby it can explain to the Court what became of the Appeal that was lodged by the Accountant on or around 14 November 2018 as the Accountant has still not provided the information and/ or documentation requested by the Company and, more recently, by ASW”.

(3) On 25 September 2019, HMRC on their own account (Jack Quinlan’s 10 August 2021 note to Mrs Perrett) knew that the company intended “*to file another appeal*”. This entry related to the fifth hearing in the winding-up proceedings (page 241, emphasis in original)—

“Fifth Hearing 25/09/2019

- Sought UCO as we had no contact from company or any reduction to the debt. Strongly oppose any adjournment request. The witness statement and application to the tribunal that were filed in November 2018 were rejected by the tribunal in January 2019 as company failed to provide information requested by the tribunal service. Our demand letter for this petition was issued after the tribunal rejection.
- Company granted adjournment to file another appeal”.

(4) On 21 October 2019, solicitor Matthew Whyatt of ASW made his third witness statement in the winding-up proceedings. He mentioned Mr Boland’s health, recorded ASW attempts to extract further information from Mr Chesney and recorded that ASW had discovered from the tribunal that the appeal lodged in November 2018 had been rejected. This third witness statement was made just eight days before the appeal of 29 October 2019 was filed with the tribunal.

(5) On 23 October 2019, again HMRC on their own account (Jack Quinlan’s 10 August 2021 note to Mrs Perrett), knew that the company were “*to see if they will file their appeal as the [sic] claim they would on 28/10/2019*”. This entry related to the sixth hearing in the winding-up proceedings (page 242, emphasis in original)—

“Sixth Hearing 23/10/2019

- The company asked for address to serve another W/S. The tribunal service who confirmed there was an appeal in 2018 and they wrote to company in November 2018 asking for more information but had no response so they closed case in January 2019 and confirmed there had been no further appeals with them. A 64-8 was sent to the tribunal service authorising a Jessica Wyatt but this is not a form the tribunal use. The tribunal also confirmed that an appeal must be made in 30 days of a decision and that the company were outside of that time with the appeal in 2018.
- Sought UCO at hearing

- Company granted adjournment to see if they will file their appeal as the claim they would on 28/10/2019”.

71. So, until just six days prior to the 29 October 2019 appeal being put in, HMRC had reason to believe that the appellant did still wish to appeal. This is relevant to the penalty appeal made on that date.

72. For the reasons at paragraphs 62 to 71 above, I consider that permitting the appeals to be made late will not prejudice HMRC, or not significantly. While that is a consideration when evaluating all the circumstances, it is also relevant in the present case to whether the delays were significant.

(5) Analysis: Question 5: For those appeals which were late, was there good reason for the delay?

73. I deal with the delay in two categories. There was the failure to put in a timeous appeal. Then there was the failure to put in a late appeal sooner after time had expired than was in fact done.

Failure to put in a timeous appeal

74. I accept Mrs Perrett’s submission that there was not good reason for Mr Chesney’s initial failure to put in a timeous appeal against each assessment (except that of 12 November 2018, for which the appeal was in time). I say so for the following reasons.

75. The 2 November 2017 letter, the one which HMRC had argued was the first notification of assessment, said (page 135)—

“As previously discussed, should you provide me with any further evidence, then I will happily consider all paperwork you are able to provide. As discussed with your accountant, I still wish to visit the business at its actual trading address and discuss with you some of the details about the working of the business that your accountant was unable to answer in our meeting. Please contact me to arrange this meeting”.

76. The 6 November 2017 letter headed “Notice of VAT assessments”, the one I have found started time running for appealing, said towards the end (page 137)—

“What to do if you disagree

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

77. The statement in the 2 November 2017 letter that “*should you provide me with any further evidence, then I will happily consider all paperwork you are able to provide*” was not inconsistent with the statement in the review and appeal part of the 6 November 2017 notice which said “*If you disagree with our decision, you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an HMRC officer not previously involved in the matter*”. However, the 2 November 2017 letter went on to say “*I still wish to visit the business at its actual trading address and discuss with you some of the details about the working of the business that your accountant was unable to answer in our meeting. Please contact me to*

arrange this meeting". That reference to still wanting to make a visit suggested that the November 2017 assessments were still being considered. I accept that, read together, the letters dated 2 November and 6 November 2017 gave the impression that that was so.

78. I also accept that the time it took Mr Chesney from receiving the 6 November 2017 assessment to 24 January 2018 (when his undated letter was sent) for him to collate and supply documents to HMRC was just about reasonable. In that letter, Mr Chesney said "*All of this has been very difficult as you hold all of the documentation on behalf of all the transactions that we have completed over the last 3 years, so we have had to try and sort through this with the hope that customers would work with us on this issue*" (page 143). I consider it was just about reasonable for it to take until 24 January 2018 to supply the documents to HMRC, for two reasons—

(1) First, Mr Chesney was having to recreate the history without much of the appellant's records, since they were with HMRC: see telephone call of 15/3/18 in which Officer Glen "*Agreed that agent would need the records to answer some of the queries - agreed a meeting at 13.00 on Tuesday (20/03/18) - where I would return records and the agent would provide records for pre-cred periods.*" (page 145).

(2) Second, Christmas and New Year intervened.

79. I accept too that Mr Chesney's first chaser after 24 January 2018 was reasonably prompt, the telephone call just six days later on 30 January 2018. And I accept that it appears from the note of that telephone call that Officer Glen was considering the documentation, and that it was Mr Chesney who then had to chase Officer Glen in March, starting with the telephone call of 6 March 2018. I accept too that the impression received from HMRC, for much of the period ending with 13 November 2018 (the day before the appeals against the assessments were made), was that HMRC were considering the documents and whether to change the assessments.

80. I do not, however, accept that receiving the (apparently correct) impression that HMRC were still checking whether they had got it right was good reason for failing to put in an appeal within the deadline for each assessment. As Mrs Perrett pointed out, HMRC had no power to extend the time limit for appealing. HMRC did have power to say they would not object to an appeal being made late. But an agent properly acting should have advised his client that a protective appeal should be put in, and the client should if such advice were given have accepted it and ensured that a protective appeal was put in, whether or not by the agent. There is no evidence as to whether the appellant was so advised by Mr Chesney in the present case. But in any event, I find that it was unreasonable of the appellant not to put in a protective appeal within the time limit. I so find for all of the assessments excluding that of 12 November 2018 which was in time, and including the penalty assessment. The penalty assessment was notified on 26 November 2018, just 12 days after Mr Chesney had finally put in the appeal against the input tax assessments, and it appears from the internal HMRC email of 25 June 2019 (page 220) to Officer Glen that Mr Chesney was still acting for the appellant in the appellant's dealings with HMRC well beyond the date of notification of the penalty assessment. So, my point that an agent properly acting should have advised that a protective appeal be put in applies also to the appellant's failure to put in a protective appeal against the penalty assessment. It was unreasonable for the appellant not to put in a protective appeal against that assessment too.

Failure to put in a late appeal sooner after time had expired than was in fact done

81. I do however accept that, once time had expired for appealing, HMRC continued to act and use language in a way that (i) suggested that HMRC were willing to reconsider the assessments once the further information they had requested had been supplied to them, which

would if a favourable reconsideration took place render unnecessary an appeal, and (ii) implied that HMRC would not necessarily object to a late appeal being made. Even by 14 June 2018, Officer Glen was still saying that HMRC were still looking into the details of the repayment claims (page 160).

82. On 10 August 2018 however, Officer Glen wrote to Mr Chesney informing him that the appellant was not undertaking any taxable activity. On Mr Chesney's receipt of that letter, it should reasonably have suggested to him that HMRC were no longer considering matters and had reached a conclusion. That was perhaps contradicted by the reference just four days later in a letter dated 14 August 2018 from Officer Glen to his "*ongoing VAT enquiry*" (page 172). But I consider that too late in relation to the assessments notified on 6 November 2017; the point had already been reached, on Mr Chesney's receipt of the 10 August 2018 letter, at which HMRC were no longer suggesting that they were still considering the assessments notified by the notice dated 6 November 2017. So I find that, from the date of Mr Chesney's receipt of the 10 August 2018 letter in which he saw that that was so, the appellant had no reason to believe that HMRC were open to reconsidering the assessments notified by the notice dated 6 November 2017 and no reason to delay any further the making of an appeal in relation to those assessments, even if Mr Chesney still believed that HMRC might not object to a late appeal being made.

83. The deadlines for appealing against the assessments notified on 13 and 14 August 2018 were 11 September and 12 September 2018. In relation to the delay in appealing against those assessments, Officer Glen's 14 August 2018 letter saying that he was writing further to his ongoing VAT enquiry did give the impression that he had not finished that enquiry. But by the time HMRC had on 30 October 2018 began High Court proceedings to recover the debt, there can have been no reasonable belief that HMRC were still open to reconsidering the assessments of 13 and 14 August 2018.

84. So, there was no good reason for Mr Chesney's delay from 10 August 2018 to 14 November 2018 in making the appeal against the assessments notified on 6 November 2017. If the appellant is fixed with Mr Chesney's failures, then the appellant had no good reason for that delay. And there was no good reason for Mr Chesney's delay from 31 October 2018 to 14 November 2018 in making the appeal against the assessments notified on 13 and 14 August 2018. If the appellant is fixed with Mr Chesney's failures, then the appellant had no good reason for that delay.

85. There was no good reason for Mr Chesney's failure to make an in-time appeal against the penalty assessment notified on 26 November 2018. The deadline was 25 December which was a bank holiday, as was 26 December. So the appeal would have been in time by virtue of rule 12(2) had the appeal been received by the tribunal by 5pm on Thursday 27 December 2018. There was no good reason for Mr Chesney not to put in an appeal in the period after expiry of the time limit until 30 July 2019 when ASW took over from Mr Chesney. If the appellant is fixed with Mr Chesney's failures, then the appellant had no good reason for that delay.

86. The reason that Mr Chesney's failures went unnoticed or unmanaged by Mr Boland was that, as I accept, Mr Boland was in poor health as well as dealing with the fall-out of a failed property purchase. If, because Mr Chesney failed the appellant, the appellant is not fixed with Mr Chesney's failures, then the appellant did have good reason for the delays I mention at paragraphs 84 and 85 above. But if not, then in any event my below evaluation of all of the circumstances rescues the appellant from those delays.

87. As to the penalty appeal, I have dealt with the delay from the expiry of the time limit until the point when ASW took over on 30 July 2019. From that point, there was a period of time when they were trying to obtain information from Mr Chesney. On 9 September 2019,

Mr Chesney said in a telephone call to ASW that he would send an email to ASW “tomorrow” (10 September 2019) with copies of any and all documentation requested (Mr Whyatt’s second witness statement in the winding-up proceedings, paragraph 10). ASW heard nothing further from Mr Chesney after that telephone call and by the time of filing with the tribunal a Notice of Appeal on 29 October 2019. ASW also had the obstacle that Mr Boland was (in my judgment, understandably and reasonably) unavailable for a significant period of time to give instructions. The time the solicitors took to piece together what was happening and to take instructions before putting in the appeal of 29 October 2019 was not in my judgment unreasonable. There was therefore good reason for the delay from when ASW took over until 29 October 2019, in relation to the penalty appeal.

The completed T239 form

88. Before moving on to the final part of the three-strand test, I will deal with Mrs Perrett’s submissions about the completed T239 agent authorisation form. It seems those submissions were made on the premise that the appeals were all made on 29 October 2019 and that her T239 submissions were relevant to the delay until then. Although I have found that the input tax assessment appeals were made on 14 November 2018, I deal for completeness with Mrs Perrett’s submissions about the completed T239 form.

89. The tribunal office’s 28 November 2018 letter asking for further information was addressed not to Mr Chesney whose name was given in the Notice of Appeal as agent, but to Mr Boland at the company’s registered address. I accept that Mr Boland did not see it because he was away from the office for the reasons at paragraph 8(68) above. It was addressed to Mr Boland, so there was no reason for Mr Chesney to open it even if he had attended at the appellant’s premises, which Mrs Perrett did not suggest he had done. Moreover, I do not accept Mrs Perrett’s submission, based on the date on the completed T239 form, that Mr Chesney must have seen the tribunal’s 28 November 2018 letter which had said it enclosed a T239 authority form. The signed T239 authority form on page 259 bore the date “29/09/07”, 11 years earlier, squarely within the date box. That date had been crossed out and replaced with “29/11/2018”. That replacement date was above the 2007 date and appeared squeezed in above it. Next to the replacement date were the initials “P.B”. Mrs Perrett made much of the later of those two dates – 29 November 2018. That was one day after the tribunal had sent its 28 November 2018 letter. Mrs Perrett submitted that Mr Chesney must therefore have seen the tribunal’s 28 November 2018 letter because otherwise he would not have had the T239 form that came with that letter to be able to complete and return the form to the tribunal.

90. Mr Watkinson suggested that it appeared that Mr Chesney had backdated the completed T239 form, (i) because the completed T239 form bears a much earlier date, the 2007 date that had been crossed out, than the 29/11/2018 date which appeared above it, suggesting that a document completed years before had been amended to apply again from 29 November 2018, and (ii) because it pushed at the boundary of the possible to receive the form (with the letter) and on the same day complete the form and send it off.

91. I accept Mr Watkinson’s submission. I do not infer from the completed T239 form on page 259 that Mr Chesney or Mr Boland must have seen on or shortly after 28 November 2018 the tribunal’s letter of that date.

92. I turn next to the final strand of the three-strand test.

(6) Analysis: Question 6: For those appeals which were late, does an evaluation of all the circumstances result in permitting any of the appeals to be made late?

93. An evaluation of all of the circumstances leads me to permit the appeals to be made late.

94. First, the merits are not without investigation so obviously weak as to render it unreasonable to permit the appeals to be made. Among other things, as Mr Watkinson pointed out, HMRC have failed to particularise the alleged fraud.

95. Second, as I have found above, there will be no significant prejudice to HMRC.

96. Third, there would however be very significant financial prejudice to the company: the total of the assessments appealed late comes to £1,917,255.82, plus there is the £1,629,658.09 penalty, totalling £3,546,913.91 at stake. The Upper Tribunal in *Katib* commented at paragraph 60 that it is a “*common feature*” of tax appeals that an appellant will suffer more hardship than HMRC if his case cannot be heard. In the same case, the Upper Tribunal criticised the First-tier Tribunal for putting too much weight on the adverse financial consequences for Mr Katib, namely that if he was not able to appeal he would lose his home, and this was “too unjust to be allowed to stand”. So the mere fact that the appellant will suffer more hardship than HMRC is not, alone, sufficient to allow the application. However, in *Katib* the Upper Tribunal did not say that no weight should be given to the balance of financial prejudice. It is clearly a factor to be weighed. In the present case, added to the other factors, it helps to tip the balance in favour of allowing the application.

97. Fourth, there would also be significant prejudice to the appellant in rendering it unable to defend itself against the serious allegations of dishonesty that are part of HMRC’s case. The allegations of dishonesty are in practice allegations against the single director, Mr Boland. There is no other director on which any dishonesty could potentially be pinned.

98. Fifth, Mr Boland’s health and circumstances carry great weight in this application. While we all have hardships at one time or another, it is rare to see such a concatenation of troubles as that described to the tribunal, and which I accept. Mr Boland’s circumstances include the following, according to Matthew Whyatt’s witness statement dated 21 June 2021 made in these tribunal proceedings (page 76) and according to Mr Boland’s GP’s letters—

- (1) Mr Boland’s son has attempted suicide because of Mr Boland’s reduced life expectancy (a cause which has not gone away);
- (2) Mr Boland has lost a very close friend to Covid;
- (3) Mr Boland has lost a close family member to Covid;
- (4) Mr Boland’s long-term partner has been diagnosed with cancer and she is undergoing immediate and intensive treatment for it, the pressure of which is worsening Mr Boland’s own overall condition (it is unclear whether this is the family member referred to in paragraph 13 of Mr Whyatt’s statement whose terminal diagnosis caused Mr Boland to miss a meeting with Mr Chesney, or whether that was a separate family member);
- (5) Mr Boland’s treatments for his numerous health conditions were delayed due to the Covid 19 pandemic;
- (6) Mr Boland suffered a heart attack during the pandemic;
- (7) His condition has so worsened that he is no longer being considered for the triple heart bypass surgery because it is not believed that he would survive that surgery;
- (8) Mr Boland has been informed that his life expectancy has reduced significantly and his doctor has said that if Mr Boland managed to survive for five years that would be the best-case scenario;
- (9) Mr Boland’s GP letters describe his health up to 15 February 2022—
 - (a) his GP said in a letter dated 2 January 2020 (page 318) that Mr Boland had recently had a heart attack, suffers with coronary artery disease, is an

insulin dependent diabetic and “*should avoid any type of stress at the moment*”;

(b) in a letter dated 31 March 21 (page 315), his GP said Mr Boland has chronic kidney failure stage 3, hypertension, acute coronary syndrome, gout, diabetes, arthritis, mental problems, anxiety and depression and is on multiple therapy and that “*I always advise him to avoid stressful situations and I understand that he has had an extremely difficult time with Inland Revenue investigations. Presently, he won’t be able to stand health wise any stressful situations, especially in closed area [sic]. This is my opinion as his General Practitioner*”; and

(c) in a letter dated 15 February 2022 (page 319), his GP says that, in addition to the coronary artery disease and the diabetes, Mr Boland also suffers from angina, hypertension, asthma, chronic kidney disease, anxiety and muscular pain (and “*Memory Problem*”), and that “*From his notes and memory, I can say that this patient is at risk of having a heart attack and should avoid any stressful situations all the time*”.

99. Given the lack of significant prejudice to HMRC, the significant financial prejudice to the appellant, Mr Boland having to defend himself against dishonesty allegations, and all of his personal health and circumstances, I am not willing to add to all of that by not permitting these appeals to be made late. I say that especially given that HMRC must already have all the evidence they consider they need to allege fraud, since it would be improper of them to have alleged it otherwise. It is important to bear in mind that I am not suggesting that the appellant’s input tax claims should succeed because of all of the circumstances, nor that the penalty should not be payable because of all of the circumstances. It is simply that the tribunal is giving the appellant the chance to argue its case on those matters.

100. To be clear, these considerations were not relevant to – and have not contributed to – my findings as to the date of notification of the November 2017 assessment or as to the dates on which the appeals were made.

F. CONCLUSION

101. It is for all of the above reasons that the tribunal finds that the appeal against the 12 November 2018 assessment was in time and that the appeals against the other input tax assessments were less late than HMRC said, and permits to be made late those appeals and the appeal against the penalty.

G. APPEALING AGAINST THIS DECISION

102. 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 the First-tier Tribunal not later than 56 days after this decision is sent to the party making the application. 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.

RACHEL PEREZ
TRIBUNAL JUDGE
Release date: 15th MAY 2023