



Neutral Citation: [2024] UKFTT 00177 (TC)

Case Number: TC09091

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Edinburgh Tribunal Centre

Appeal reference: TC/2022/13893

*PROCEDURE – application for strike out – no jurisdiction to consider complaints about HMCE’s actions in 1985 – allowed – application for late appeal – Martland and Katib considered – delay was a minimum of in excess of 27 years – no reasonable excuse – res judicata – application refused*

**Heard on:** 15 February 2024

**Judgment date:** 28 February 2024

**Before**

**TRIBUNAL JUDGE ANNE SCOTT**

**Between**

**MARY DAVIDSON**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Mrs Moira Davidson

For the Respondents: Mr Miles Matthews, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This is a sad and unfortunate case which has its origins in a dispute with the respondents (“HMRC”) a number of decades ago. At the heart of that dispute, and this hearing, is the fact that, as the appellant, who is known as Mrs Moira Davidson, confirmed to the Tribunal, she feels that she is a victim and that she has been treated very unfairly by HMRC and its predecessor. She believes that she has done everything in her power, and as promptly as possible, to seek appropriate redress.

2. On 5 December 2022, the appellant lodged with the Tribunal a Notice of Appeal and on 14 March 2023, HMRC lodged and served an application to strike out that appeal. That was on the assumption that the appellant was purporting to appeal a response from HMRC which was not an appealable decision. The alternative argument was that the appellant was seeking to appeal a decision made on 22 August 1985 and HMRC opposed any potential application for permission to bring an appeal outside the statutory time limits.

3. On 28 June 2023, HMRC filed amended pleadings separating the application for the strike out from the opposition to the appeal being brought late.

4. On 24 October 2023, the Tribunal issued Directions for this hearing.

5. HMRC had argued that this hearing is to decide:

(a) Whether the appellant’s appeal should be struck out on the basis that the Tribunal has no jurisdiction.

(b) Whether the bringing of that appeal amounts to an abuse of process and the proceedings should be struck out on the basis that it has no reasonable prospects of success.

(c) Whether the appellant seeks to appeal a decision taken on 22 August 1985 and permission should be given to her to bring that appeal notwithstanding that it is decades out of time.

6. The basis for the applications for strike out in respect of the first two issues are Rule 8(2)(a) and Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) (“the Rules”) respectively. In the course of the hearing, Mr Matthews withdrew the application in terms of Rule 8(3)(c) and the issue of the prospects of success was canvassed in the context of the application for a late appeal.

7. Apart from the applications, I had the appellant’s outline of argument in response to the Notice of Objection to the late appeal and also for the application for strike out. I also had a Skeleton Argument for HMRC and one email with enclosures from the appellant dated 30 January 2024 and another email which was a copy of an email to the appellant from Mr Matthews dated 29 January 2024. I had a hearing bundle extending to 1,098 pages and a supplementary bundle extending to 213 pages. There was also some email correspondence with the Tribunal to which I will refer. In the course of the hearing the appellant produced (a) a letter from the Tupperware Self Employed Distributors Association dated 26 September 1985 which reported on a meeting the previous day (“the 1985 letter”); and (b) a leaflet (from the DWP) which she said had acted as the catalyst for a further complaint to HMRC on 17 August 2022.

### Procedural background

8. As HMRC state in their Skeleton Argument, the background to these proceedings is very unusual. That is an understatement. Given the elapse of time, HMRC have no relevant papers from the earlier decades and the appellant had produced miscellaneous papers and on the face

of it the relevance of those was not always clear. An example is the document at page 91 of the bundle which it transpired was a production in another litigation and was part of an opinion, dated 31 October 1984, of an HMRC officer about the impact of a Court of Appeal decision a few days previously (the decision to which I refer in paragraph 26 below). As I pointed out to the appellant, it was incomplete and it was only that officer's opinion. Whether it was correct, or not, was not a matter to be tested in this hearing. As Mr Justice Roth and Judge Sinfield made clear at paragraph 44 in *HMRC v Sipprochoice* [2020] UKUT 149 (TCC) such evidence would carry very little weight even if it came from an HMRC manual, which it did not.

9. The appellant represents herself and lodged her Notice of Appeal with the Tribunal stating that she had a Review Conclusion Letter. She conceded during the hearing that that was an error and there was no such letter. There was not. That alone means that the Notice of Appeal did not comply with Rule 20 of the Rules and HMRC had considerable difficulty in working out exactly what the appellant was attempting to appeal.

10. I commend Mr Matthews, who has had conduct of this litigation since the appeal was lodged, as he has made every effort to assist the appellant and to try and work out what she was actually appealing and what grounds she might be able to advance.

11. In correspondence with Mr Matthews after she lodged the appeal it seemed that the appeal related to her complaints about HMRC.

12. On 1 December 2022, the Adjudicator's Office had written to the appellant rejecting her complaint about HM Customs & Excise ("HMCE") which had been received on 9 November 2022. On 18 April 2005, HMCE had merged with the Inland Revenue to form HMRC. That letter neatly summarises the essence of the voluminous correspondence over the previous decades and the appellant agreed with me that it was a fair summary. The relevant paragraphs read:-

"You have told us that between January 1990 and March 1994 HMCE made several mistakes which resulted in you paying more Value Added Tax (VAT) than he (sic) should have during the period. You believe that HMRC's failure to correct these mistakes are in breach of the Equality Act 2010.

You have been in dispute with both HMCE and HMRC over a number of years regarding the matter, but has (sic) been unable to resolve the matter. As a result, you have contacted this office to ask that we consider the matter, and requested that HMRC refund all the monies that you overpaid in VAT between 1990 and 1994."

13. The letter went on to point out that HMRC's calculation of VAT liability and the amount of any refunds both carry rights of appeal. As a result the Adjudicator's Office could not consider whether any of those decisions were correct or make any comment on that as that was "solely a matter for the tax tribunal to consider". As far as the Equality Act 2010 was concerned, the appellant was advised that a remedy, if any, might lie in the Civil Courts.

14. The letter concluded by stating that the next step for the appellant, should she wish to take the matter further, would be to ask an MP to refer her complaint to the Parliamentary Ombudsman.

15. The appellant lodged this appeal with the Tribunal. She agreed that she had done so because of the reference to the tax tribunal that I have quoted. She had previously complained to the Ombudsman and been rebuffed so she saw no point in another such appeal.

16. The Notice of Appeal sets out a lengthy argument about the history of this matter and concludes by stating "I would like justice and a refund". In the box headed "Desired outcome", she states:-

“I would like to be refunded what I was forced to pay re – The schedule 4 direction on the margin tax ... from after the tribunal decision in 1990 to 1994 ... There was never any mention at the tribunal about how much money was involved or how much stress it caused. I can send you all the proof I sent to HMRC to no Avail.”

17. On 8 March 2023, having ascertained that the appellant’s appeal related to her complaints, Mr Matthews wrote to her explaining that the Tribunal can only adjudicate on an appealable decision. He suggested that her challenge seemed to relate to a Schedule 4 Direction (the “Direction”) which the appellant argues should never have been imposed. Mr Matthews correctly pointed out that that was an appealable decision under the Value Added Tax Act 1983 (“VATA 1983”) but that it appeared that had never been appealed. He said that in the event that she sought to bring a late appeal, HMRC would oppose that given the elapse of time. He also pointed out that although the issue had not been appealed in 1985, it had apparently been raised in the course of a Tribunal hearing in 1989 and the Tribunal had rejected it. If it had been raised in 1989 then it would be an abuse of process to raise it again now. He explained that abuse of process was where there was an attempt to “have more than one bite at the litigation cherry” and that any attempt to do so would also be opposed.

18. Lastly, he pointed out that to attempt to appeal the Tribunal decision in 1989 was not achievable by appealing to the First-tier Tribunal.

19. On 9 March 2023 the appellant replied stating:

“The reason I did not appeal the sch 4 direction in 1985 was because our solicitor at that time had appealed on our behalf ... He also received permission from HMRC for our appeal to be on hold until the outcome of Direct Cosmetics to the European Court.

I would also appeal if necessary and allowed to The Upper Tribunal or Higher court against the further Maladministration of the said directions from 1990 to 1994 which I was not aware of until 1998 which cost us approx. £77K in loss profit.

I also have copies of our business accounts which show quite clearly that a reasonable profit was impossible with a schedule 4 direction there was no loss to the general taxpayer ... The loss was ours.

I am also aware of the laws of restitution ... I will now take further legal advice.”

20. On 13 April 2023, the appellant responded to the strike out application lodged on 14 March 2023 with a Statement of Case, referred to numerous cases and provided a number of documents, some of which were incomplete and some of which referred to previous appeals to the VAT and Duties Tribunal.

21. On 9 May 2023, HMRC made an application to the Tribunal for specific disclosure stating that it seemed that the appellant’s appeal was challenging the Direction ostensibly on the grounds that past Tribunals had not considered whether it should have been issued at all, because Tupperware dealers were retailers in their own right.

22. On 24 May 2023, Judge Poole granted limited disclosure on the basis that that “will enable a clearer picture to be built up as to what potential rights of appeal the Appellant may be seeking to exercise before the Tribunal”. He limited the disclosure because “The extracts already disclosed by the Appellant do not appear to me to provide any material support for her case...”. He issued Directions to that effect.

23. On 29 January 2024, Mr Matthews again wrote to the appellant referring to previous correspondence and explaining that compiling the bundle for the hearing was not straightforward because of the elapse of time. He pointed out that the hearing would not be a hearing of the appeal but would only relate to the applications for strike out and for a late

appeal. He explained that the Tribunal is a statutory body and can only consider appealable decisions and that did not include complaints about HMRC.

24. I do not propose to set out the lengthy history, insofar as it is available, in detail but it is sensible to identify certain key facts in order to give a context. Similarly, I do not propose to address in detail all of the diffuse, and sometimes contradictory, arguments deployed by the appellant over the years.

### **Brief overview of the facts**

25. In April 1978, the appellant and her late husband (he died in an accident in 2007) were distributors of Tupperware based in Ayrshire. The Tupperware was sold to dealers who in turn sold the goods on to members of the public, often at parties arranged by their friends. Dealers paid distributors 70% of the recommended retail price for the goods and retained the remaining 30% for themselves. HMCE required distributors to account for VAT on the sales of Tupperware at 100% of the recommended retail price.

26. In *Potter and Another (trading as P&R Potter Wholesale) v Customs & Excise Commissioners* 1984 2BVC 2000 49 (“Potter”) the Court of Appeal decided that dealers who sold Tupperware to the public were not acting as agents of Tupperware distributors. Instead the relationship was one of principal to principal. On the basis of that decision, distributors, such as the appellant and her husband, were only liable to pay VAT on 70% of the recommended retail price. The appellant has consistently argued that HMRC have misunderstood *Potter*.

27. Following that decision 85 Tupperware distributors, of whom the appellant was one, sought to litigate with HMCE in regard to overpaid tax. Following the release of the decision in *Potter*, HMCE issued to a number of distributors, but by no means all, a Notice of Direction under paragraph 3 Schedule 4 VATA 1983 which required distributors to account for the full amount of the recommended retail price of Tupperware, ie the open market value of their supplies.

28. On 24 July 1985, HMCE accepted that the original Schedule 4 Directions that they had issued were void *ab initio* and appeals in that regard, which had been lodged with the Tribunal, were withdrawn as a consequence of that concession. On the same date, HMCE wrote to David Rimmer & Co who were acting for the distributors. They referred to letters dated 10 and 16 July 1985 and agreed an extension of time for appealing the “fresh” Directions that had been issued until a definitive response was issued to the letter of 10 July 1985.

29. The Tribunal decision in *Moore*, to which I refer below, records that HMCE had commenced issuing Directions (which would have been those “fresh” Directions) in June 1985.

30. The Direction was issued to the appellant on 22 August 1985 with an effective date of 1 September 1985. HMRC have no record of any appeal against the Direction.

31. The 1985 letter reports on what was described as “The on-going situation with Schedule IV Directions” and identified the fact that not all distributors had been issued with such Directions but that those who had were advised to make payment “under protest”. Members of the Association had the right to appeal the Directions but any failure to do so would not prejudice claims for repayment of overpaid tax if litigation in the “European Courts of Justice” contesting the validity of the Directions was successful.

32. On 11 May 1989, Brown Cooper, Solicitors, wrote to the appellant in a letter headed “Schedule 4” where they referred to the fact that “your Tribunal case was due to be heard on Monday 22 May in Edinburgh”. The letter referenced a test case for appellants named Vi and Jim Moore (“Moore”) and it was agreed that the appellant’s case would be sisted and *Moore* would be the lead case.

33. It is not known what the basis of the appellant's case might have been, but it is possible that it was an appeal against the Direction. However, HMRC acknowledge that it is possible that there was no appeal given that on 14 July 1987, HMCE had conceded that appeals (albeit in relation to assessments) need not be lodged until the outcome of two cases before the European Court of Justice were released. Those decisions, which were in *Direct Cosmetics Limited and Laughtons Photographs Limited v C and E Commrs* Cases 138/86 and 139/86 ("Direct Cosmetics"), were dated 12 July 1988 and that was the litigation referred to in the 1985 letter.

34. In the interim, because the appellant and her husband had failed to comply with the Direction, they had been served with three appealable decisions under VATA 1983. Those were a Notice of Assessment for VAT periods between 1 August 1984 and 31 January 1987 in the sum of £16,688.62 which was later reduced to £13,676.59, a further Notice for VAT periods between 1 February 1987 and 31 July 1987 in the sum of £5,211.77 and a decision for the period 1 August 1987 to 31 October 1987 in the sum of £5,879.79. The total was £24,768.15. In the last decision HMCE refused to deduct alleged overpayments in the sum of £56,000. (In her Statement of Case for this hearing) the appellant alleges that that sum relates to overpayments between 1978 to 1984.

35. The appellant did lodge appeals against those decisions. The appeals had then been sisted pending the issue of the decision of the European Court in *Direct Cosmetics* and the Tribunal's decision, which was released on 8 February 1989, narrates the fact that that challenge to the validity of the Schedule 4 Directions in *Direct Cosmetics* had been unsuccessful. That followed on from a passage where the Tribunal said that:

"The Respondents issued a Direction to the Appellants under paragraph 3 on 22 August 1985, requiring the value of their supplies to be their open market value on a sale by retail. The appellants did not appeal against the validity of this Direction as they might have done under section 40(1)(j) of the said Act. Their representative (Mrs Moria Davidson) attempted for the first time in argument to challenge the validity of the Direction insofar (sic) it was unfair in its Application to the Appellants, but we are clearly of opinion (sic) that even if it were competent to consider the question of fairness it is much too late to seek to appeal against the Direction some three years after it was given."

36. The Tribunal having explained *Direct Cosmetics* stated that *Direct Cosmetics* applied to the appellant and her husband and "we are bound to uphold the validity" of the Direction. The Tribunal then confirmed that it had no jurisdiction to consider fairness. Lastly, the Tribunal rejected arguments based on *Potter, Woodcock v HMCE* and the Court of Appeal in *Fine Art Development PLC* pointing out in relation to the last of those that the House of Lords had reversed the decision of the Court of Appeal. (I mention the latter two cases since the appellant has referred to both in the papers for this hearing.) The appeals were dismissed. No appeal was lodged in relation to that Tribunal decision which has not been published but the appellant produced her copy.

37. In December 1989, the solicitors acting for the group of Tupperware distributors including the appellant, extra judicially settled all claims for overpaid tax between 1973 and 1984. The detail is narrated in another decision of the Tribunal issued on 16 December 1994 when the appellant's claim for interest on the monies repaid was rejected.

38. The *Moore* test case was unsuccessful. The decision was issued on 11 January 1990 and the Tribunal, having considered *Direct Cosmetics* and *Potter* amongst other cases rejected the various submissions challenging the validity of the Schedule 4 Directions.

39. On 23 January and 15 March 1990, Brown Cooper, Solicitors wrote to the appellant. The first letter intimated that Counsel had said that the prospects of a successful appeal "are very

remote indeed” and that the solicitors agreed with that assessment. It was pointed out that an appeal would involve “further expense to no good effect”. If there were to be no appeal then the only option was to take up the case with the Ombudsman. The second letter intimated that HMCE had applied to the Edinburgh Tribunal to dismiss the appellant’s sisted appeal. That was on the basis of *Moore* because it had been a lead case; accordingly, the appellant would have to consent to the application. HMRC concede that it may be that that appeal had included an appeal of the Direction. That seems likely since the first letter states that *Moore* was lost in regard to the validity of the Directions. I will revert to that.

40. On 8 August 1994, the appellant lodged a claim or claims with HMCE but the quantification of that or those was not included in the Bundle and nor was any subsequent correspondence. Part of that would seem to have been a claim covering the period from 1 September 1985 to 8 August 1994 and appears to have relied on what she described as the decision of the Court of Appeal in *Fine Arts Development Limited* (“Fine Arts”). That case has not been produced and nor has the decision in the appeal thereof. However, as I have indicated at paragraph 36 above, the Tribunal in 1989 had already referred to those decisions, which at that time had been relied upon by HMCE.

41. On 5 December 1996 the appellant made a claim to HMCE for £106,735.78 covering the period 1 September 1985 to 8 August 1994. The appellant had ceased trading on 12 June 1994.

42. On 20 January 1997, that was rejected. HMCE pointed out that the House of Lords had found in favour of HMCE in *Fine Arts* and went on to state unequivocally that the Direction applied and the output tax declared was correct. The 30 day time limit for an appeal was made explicit but no appeal was lodged. The appellant explained that she did not lodge an appeal since she knew that the House of Lords decision in *Fine Arts* was binding and she also thought that the Direction was valid and in force. She was advised by Brown Cooper who told her that there were no grounds for appeal.

43. In the course of the following years, the appellant continued to complain about what she perceived to be her unfair treatment at the hands of HMRC, not least on the basis that other taxpayers, including the purchaser of her business, had not been served with a Schedule 4 Direction.

44. Various MPs have been involved at different stages. On 4 May 2000 the Parliamentary Ombudsman rejected her complaints including her complaints that she had not received a refund for the period from 1985 to 1994 and that she had been treated unfairly. Her complaint was deemed to be many years out of time but in any event the Ombudsman could not “question the decisions of the independent courts and tribunals” and found there was no evidence of maladministration by HMCE.

45. On 25 May 2006, the Paymaster General at HM Treasury, Dawn Primarolo MP rejected the appellant’s complaint about “her long-standing claim for overpaid VAT amounting to £106,000” concluding that the Direction was “proper and she was obliged to comply with the terms. She has paid the correct amount of tax and therefore, a refund of VAT would not be appropriate.”.

46. In 2022, she received a leaflet from the DWP with her pension forecast. That had a Box which read:

“Treating people fairly

We are committed to the Equality Act 2010 and treating people fairly. To find out more about this law, search ‘Equality’ on [www.gov.uk](http://www.gov.uk)”.

Erroneously, she thought that the leaflet came from HMRC and she was very aggrieved because she has always believed that she has been treated unfairly. That caused her to complain, again, to HMRC on 1 August 2022. She again asked for the refund of VAT from 1985 to 1994, argued that the Direction had been wrongly issued and that the Equality Act had been breached because not all Tupperware distributors had been served with a Schedule 4 Direction.

47. She has exhausted the HMRC two tier complaint process. It was that that led to the complaint to the Adjudicator's Office since that is the only onward route for such complaints. Nothing has been successful to date.

48. Having lodged the appeal with the Tribunal, on 7 March 2023, the appellant wrote to the Tribunal on 7 March 2023 confirming that her claim was in the sum of £106,735.78, related to the Direction and covered the period from 1985 to 1994.

### **The legal framework**

49. In correspondence, Mr Matthews accurately pointed out to the appellant that the Tribunal is created by statute and has only the powers given to it by statute. He is also correct in stating that only an appealable decision falls within the jurisdiction of the Tribunal. In respect of VAT, the list of decisions that can be appealed is set out in section 83 Value Added Tax Act 1994 ("VATA") which is the successor to section 40 VATA 1983.

50. As I have indicated, in the Notice of Appeal, although the appellant said that she included the Review Conclusion Letter, it has transpired that the appeal is in effect about her complaint to HMRC and thereafter to the Adjudicator's Office. Complaints about HMRC's conduct do not fall within the jurisdiction of the Tribunal. I have referred at paragraph 6 above to Rule 8 of the Rules and insofar as relevant that reads:-

51. Rule 8

(1) ...

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—  
(a) does not have jurisdiction in relation to the proceedings or that part of them;...".

52. I explained, at some length, that although she wishes the "refund", this hearing was indeed limited to considering whether the Tribunal has jurisdiction and if so in regard to what. If there is a late appeal then the Tribunal has jurisdiction in that regard.

### **Decision on the Strike out application, as amended**

53. Maladministration by HMCE, if there was any and that is denied and that argument has been refuted on numerous occasions by others, simply is not a matter within the jurisdiction of the Tribunal. Accordingly, having had regard to Rule 8(2) of the Rules, I must, and do, strike out that element of the appeal.

### ***Is there an appealable decision?***

54. As I have indicated the appellant is very focussed on the issue of the "refund". The only decision on the claim for the refund was the letter of 20 January 1997. The only possible basis for appealing that decision would have been if she had sought to have made a late appeal of the Direction. Unless the Direction is, for lack of a better word "overturned", there is no possibility of making a claim for any refund.

55. Initially in the course of the hearing she said that she accepted that the Direction was "legal" and "valid". However, it transpired that, in reality, she is saying, as she did in correspondence with Mr Matthews that it should never have been issued and it is "wrong". She



argues that it is wrong on a number of diffuse bases referencing a miscellany of cases decided on very different issues in the decades since the Direction was issued.

56. Therefore, it seems that, at its most charitable, in essence, the appellant is still attempting to appeal the Direction. As she is a party litigant, and HMRC have very pragmatically accepted that that is what she is trying to appeal I am prepared to treat this appeal as an application for a late appeal of the decision to issue the Direction.

### *The late Appeal*

57. As has been made explicit both in the 1989 Tribunal decision and in the correspondence from HMRC, the time limit for appealing is, and was, 30 days. The case of *Martland v HMRC* 2018 UKUT 178 (TCC) (“Martland”) at paragraphs 43 to 47 sets out the approach that must be adopted by the Tribunal when considering a late appeal. Those paragraphs read:

“43. The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for “litigation to be conducted efficiently and at proportionate cost”, and “to enforce compliance with rules, practice directions and orders”. We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to “consider all the circumstances of the case”.

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.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

## **Discussion**

58. I have adopted, as I must, the three stage approach in *Martland*.

### *The length of the delay*

59. The appellant has repeatedly argued that David Rimmer & Co had agreed an extension of time for an appeal of the Direction and that it had been appealed. I explained to her that that was not the case. As can be seen, those solicitors had negotiated an extension of time for directions which were issued prior to 10 July 1985. The Direction was issued in August 1985 and therefore would not have been covered by that correspondence. In any event there is no indication that an appeal was lodged. On the contrary, the VAT Tribunal in February 1989 (see paragraph 35) above made it very clear that there had never been an appeal of the Direction. If there was no appeal and this appeal to the Tribunal is the first appeal of the Direction, then the delay is in excess of 39 years. By any standard that is a very serious and significant delay.

60. There is the possibility that the appeal which was sisted behind *Moore* did relate to the Direction but neither HMRC nor the Tribunal have any information in that regard.

61. The appellant certainly had an opportunity to appeal the decision dated 20 January 1997 if she had argued that the Direction was not valid. That decision was silent on the issue of the Direction beyond stating that it had been issued to Mr and Mrs Davidson and “On this basis, the Output tax declared by you is correct, and your claim for (sic) refund of £106,735.78 is refused”. There is no mention of any challenge to the Direction, whether or not in the appeal that had been sisted behind *Moore*. If the Direction had never been appealed then the delay from that decision in January 1997 to the Notice of Appeal is in excess of 27 years. Again that is a very serious and significant delay.

### *Reasons for the delay*

62. It was very difficult indeed to illicit from the appellant a coherent explanation as to whether there had been any appeal of the Direction and, if so, in what format and when. Accordingly it was extremely difficult to ascertain what the reason for any delay might be. Eventually I attempted to recap what I understood the reasons to be and the appellant agreed with me that:

- (a) She had assumed that the extension of time in 1985 to which I have already referred had operated but she knew no more than that.
- (b) There had been a further extension of time until the decision in *Direct Cosmetics* was issued but, again, she did not know what happened in that regard.
- (c) She had not understood that she could or should have appealed the decision of the Tribunal in February 1989. She had not been advised to do so.
- (d) She had not appealed the letter of 20 January 1997 because Brown Cooper had told her that there was no basis for an appeal. She had known, or believed, that the Direction was in force and was “legal” and, of course, the House of Lords decision in *Fine Arts* meant that there was no basis for her claim.
- (e) She had always acted in accordance with the advice given to her by the solicitors who were involved and it would have been far too expensive to have attempted to appeal *Moore*.
- (f) A local solicitor whom she respected had told her that if she won at a Tribunal then she would have had a *Fleming* (she called it a Conde Nast) claim. (However, she has not won at any Tribunal.)
- (g) It was only when she had received the DWP leaflet (albeit she thought that it was from HMRC) that she had thought about revisiting the whole sorry saga because she felt

so strongly that she had been unfairly treated by HMRC and she wanted to raise an argument under the Equality Act.

(h) She had understood from the letter from the Adjudicator's Office that the Tribunal could look again at her case and investigate her belief that the Direction should never have been issued because such Directions had not been issued to others in a similar position.

(i) She thought that HMRC misunderstood *Potter*. There were numerous later cases that she had found when she had googled "mistake of law" which supported her position such as *Test Claimants in the Franked Investment Income Group Litigation v R and C Commrs* [2021] BTC 22 and *Kleinwort Benson Ltd v Lincoln City Council and others* [1998] UKHL 38 ("Kleinwort").

#### *All the other circumstances*

63. This evaluation proceeds from the starting point that it is important that litigation be conducted efficiently and at proportionate cost, and that time limits be respected (see *Martland* at paragraph 45). I must undertake a balancing exercise, assessing the reasons for the delay and the prejudice which may be caused to both parties by granting or refusing permission.

64. By any standard, whether it is the original Direction or an appeal based on the letter of 20 January 1997, the appeal is exceedingly late and HMRC are entitled to expect finality. Mr Matthews argued that it is overwhelmingly late and I agree with him. If the appellant were to be permitted to bring the appeal at this very late stage HMRC would suffer considerable prejudice because of the elapse of time.

65. The cost to the public purse, even to get to this stage, has been considerable because of the time frame. HMRC argue that there would be prejudice to them if they now have to litigate a case that they had long believed to be closed. That is correct in that they would have to divert resource, at a cost to the public purse, in order to do so.

66. I do understand that the appellant feels extremely strongly that she has a grievance. Indeed, she went as far as to say that she feels that it "is like being put in jail for something that I didn't do...which is just not right because it is money that we worked hard for...". However, as I explained in the course of the hearing, the Tribunal was created by statute and has only the powers given to it by statute. The Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TC) made it very clear that the Tribunal has no jurisdiction to consider fairness. Indeed as the appellant knows, Mr Bennett made that point in the 1989 Tribunal decision.

67. I can only look at appealable decisions and, as Mr Matthews has repeatedly pointed out the only possible appealable decision is the Direction.

68. Paragraph 46 of *Martland* makes it clear that this Tribunal can only look at whether the appellant has a really strong or a very weak case. I cannot look at the detail of the appellant's case although she would have wished me to have done so. For example her Statement of Case attempts to distinguish *Direct Cosmetics* but to consider such an argument would be to embark upon an investigation of the merits.

69. She was also very anxious that I should consider the numerous cases such as *Kleinwort* that she had unearthed in her research. Mr Mathews rightly pointed out that they post-dated the Direction and sometimes by decades so they could not assist her. The case was not cited to me but I agree with Judge Cannan in *Moore v HMRC* [2022] UKFTT 411 (TC) where he said at paragraph 95 that:

"In my view, the publication of a new authority which prompts an appeal out of time might have some weight in the balancing exercise at stage three. However, it is not in

itself a good reason for not appealing in time. If it was, then it would nullify to a large extent the benefit of finality recognised in *Data Select* and *Aberdeen City*. It seems to me that the longer the delay, the less weight that should be attached to the fact that the law was in effect misunderstood or misconstrued.”

70. In a similar view the Equality Act 2010 can have no bearing in relation to a decision taken approximately a quarter of a century previously.

71. In summary, I find that the appellant has an extremely weak case. I say that because:

(1) As I have pointed out, I cannot accept that the appellant is correct in saying that David Rimmer & Co had appealed the Direction before it was even issued. However, even if they had then it seems likely that that would have been the subject matter of the appeal that was sisted behind *Moore*. If it was appealed it cannot be revisited now.

(2) Rather more pertinently, I take the view that the 1989 decision of the Tribunal explicitly considered the question of a potential late appeal and rejected it. The decision is very short, as was the custom at that time, but to my mind it is very clear. The appellant made an oral application and it was refused or rejected. (I observe that Dawn Primarolo MP said in the letter dated 25 May 2006 that the appellant had failed in an appeal of the Direction to the VAT Tribunal but she refers to 1994 and that is not correct; that appeal dealt only with interest). That 1989 Tribunal decision cannot now be revisited and any attempt to do so would be very unlikely to succeed.

(3) On the balance of probability, I find that the appeal that was sisted behind *Moore* was almost certainly a challenge to the validity of the Direction. The fact that the appellant could not afford to appeal that cannot assist her as can be seen from paragraph 46 of *Martland*.

(4) I do not like using Latin in decisions where it can be avoided but there is a well-known and very long established principle in Scots law known as *res judicata* which applies to the three previous sub-paragraphs. It is a doctrine which prevents a party from re-litigating any claim or issue that has already been litigated. It is meant to ensure the finality of judgments and prevent what Mr Matthews described as a second bite of the litigation cherry.

(5) I recognise that the appellant argues that that is not what she is doing because she wishes to raise issues that were not previously litigated such as the sums of money involved and whether the Direction should have been issued in the first place. However, I must disagree with her. She can only attempt to appeal the Direction if she has not already done so. I find that she has.

(6) Even if I am wrong in that, I do not find that she has a strong case. The 1989 Tribunal and *Moore* looked at the validity of Schedule 4 Directions and considered *Potter* and *Direct Cosmetics* and other cases. As I have indicated both Counsel and Brown Cooper took the view that the chances of a successful challenge were very remote. Indeed Brown Cooper correctly predicted that any approach to the Ombudsman was also unlikely to be successful.

72. The appellant has advanced no argument that any advice that she received was wrong but, as I explained to her she could not use any such argument as a reasonable excuse for the delay in lodging an appeal (see *HMRC v Katib* [2019] UKUT 189 (TCC) (“*Katib*”) at paragraph 58.

73. Incidentally, whilst referring to *Katib*, I observe that at paragraph 17, the Upper Tribunal said that:

“17. We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion.”

74. Obviously the appellant would be prejudiced if I do not grant her permission to notify a late appeal in that she will have no opportunity to advance her case. That, however, is a consequence of the failure to appeal in time or to appeal the earlier decisions. It cannot be right that a very significant delay, for which no good reason has been advanced, should be overlooked because she believes that a large sum of money depends on a successful appeal. If that were right there would be no point in having a time limit. As I have pointed out, I have to weigh the prejudice to the appellant in the balance against the prejudice to HMRC and the need for time limits to be respected.

#### **Decisions**

75. As indicated, insofar as the appeal relates to complaints about HMCE or HMRC it is struck out in terms of Rule 8(2)(a) of the Rules.

76. For the reasons given, the application for permission to notify the appeal late is refused and, accordingly the appeal is not admitted.

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

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

**ANNE SCOTT  
TRIBUNAL JUDGE**

**Release date: 28<sup>th</sup> FEBRUARY 2024**