



Neutral Citation: [2024] UKFTT 00496 (TC)

Case Number: TC09194

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

In public by remote video hearing

Appeal references: TC/2023/10916  
TC/2023/10917

*CORPORATION TAX AND INCOME TAX – assessments and penalties – application to  
make late appeals – application allowed*

**Heard on:** 9 May 2024  
**Judgment date:** 31 May 2024

**Before**

**TRIBUNAL JUDGE NIGEL POPPLEWELL**

**Between**

**YT MEDICAL LIMITED  
ELIZABETH ODUWAIYE**

**Appellants**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Mr Rhys Thomas of TM Sterling Ltd

For the Respondents: Mrs Fiona Man litigator of HM Revenue and Customs’ Solicitor’s  
Office

## DECISION

### INTRODUCTION

1. This decision deals with the appellants' application that they be permitted to make appeals out of time against assessments to corporation tax (as regards the first appellant), and assessments to penalties (as regards both appellants) (together "**the application**"). The assessments and penalties visited on the first appellant are in the amount of £206,057.67. The penalties visited on the second appellant are in the amount of £29,120.08.

2. It is HMRC's position that no appeal against these assessments was made by either appellant before 8 September 2023. Given that the penalty assessments were issued on 25 and 26 November 2022, and the corporation tax assessments were issued in November 2021 and April 2022, that appeal is out of time.

3. As regards the penalty assessments, the appellants' position is that appeals were made in time on 6 December 2022. As regards the corporation tax assessments, the first appellant's position is that they were never properly served on the first appellant and furthermore, it had thought that the assessments were under appeal and the appeals were made as soon as that appellant became aware that they had not been.

4. For the reasons given below I have decided to allow the application.

### THE LAW

5. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which should be followed when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), ("*Martland*") in which the Upper Tribunal considered an appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

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

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that 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”.

## **THE EVIDENCE AND FINDINGS OF FACT**

6. I was provided with a bundle of documents. In addition, I received, during the course of the hearing, some “COTAX” printouts to which Mr Thomas did not object and which Mrs Man asserted were “service” screens for the corporation tax assessments issued to the first appellant. I deal with these later.

7. I had also received an application by the appellants, prior to the hearing, that they be allowed to amend their grounds of appeal to include the ground that neither appellant had received the assessments. This application was opposed by HMRC. I deal with this later.

8. Given that service and receipt of these assessments was an important element of the application, I was somewhat surprised that although the second appellant, and the assessing officer, Officer Metcalfe, were both present at the hearing, neither was called to give oral testimony. Whilst I might have a shrewd idea as to what they might have said, I can clearly not take that into account when determining the facts of this case. I must decide the case on the facts which were adduced to me, which are restricted to those in the documents.

9. From these documents, I find as follows:

(1) In September 2020, Officer Metcalfe opened an investigation into the tax affairs of the second appellant under Code of Practice 9. That investigation revealed that the second appellant had been the sole director of the first appellant since November 2013.

(2) On 29 March 2021 Officer Metcalfe issue the second appellant with an income tax assessment for the year ended 5 April 2015 which the second appellant appealed against, and which Officer Metcalfe cancelled on 24 September 2021.

(3) HMRC set out their view of the matter regarding the corporation tax assessments which they claimed were issued to the first appellant on 29 November 2021, in a letter dated 21 March 2022 (“**the view of the matter letter**”). That letter set out HMRC’s view of the matter regarding the first appellant’s tax position for the accounting periods 30/11/2014 to 30/11/2017. That letter set out that it was the officer’s intention to arrange for the issue of PAYE tax assessments to the first appellant. It went on to tell the first appellant that it could send further information to the officer in an attempt to reach an agreement, in the absence of which the first appellant could ask for an independent review or appeal to an independent tribunal.

(4) In a letter dated 28 March 2022 written by the first appellant’s then agent to HMRC, that agent requested the assessment for the year 30 November 2014 to be withdrawn.

(5) In a letter dated 25 March 2022 from the second appellant to Officer Metcalfe (“**the 25 March letter**”) the second appellant stated that she was writing in response to letters dated 21 March 2022 about “your view of the matter of YT medicals Ltd company’s returns for accounting period ending 30/11/2014, 13/11/2015, 30/11/2016 and 30/11/2017”.

(6) She went on to say that she wished to “state my disagreement with your conclusions and amendments to the company returns and consequently wish to appeal the decision based on the following reasons....”. These reasons were essentially that expenses disallowed by HMRC were genuinely incurred to carry out the company’s activities.

- (7) She also asked for an independent review as well as postponement of payment of tax penalties and interest.
- (8) In an email dated 4 April 2022 timed at 13:34, from the appellants agent to Officer Metcalfe, the “Subject” is identified as “RE: 20220404 Letter to accompany Assessments, Dr Oduwaiye/YT Medicals Ltd”. The “Attachments” are identified as “Appeal.pdf”.
- (9) The text of that email thanks the officer and indicates that “I will forward all these assessments to my client. Please find attached the signed appeal letter as requested.....”
- (10) The appeal letter referred to is a letter dated 23 March 2022 from the second appellant to the officer in which he writes in response to letters dated 18 March 2022 and 21 March 2022 regarding checks into her self-assessment tax returns and closure notices, and in particular those for the years ended 5 April 2019, 2020, and 2021. In that letter she said that she wished to appeal against the decision in those letters and any amendments to those tax returns.
- (11) In a letter dated 7 April 2022 from the second appellant to Officer Metcalfe the second appellant, writing “in response to your letters dated 4 April 2022 about notice of Self-Assessment tax returns for [years ended 5 April 2016-5 April 2018]” indicated her disagreement with HMRC’s assessments and said that she wished to appeal against the officer’s decision.
- (12) A letter to the second appellant dated 17 June 2022 from HMRC is a review conclusion letter. It deals with an assessment under section 29 TMA and closure notices under the same Act. In other words, it deals exclusively with the second appellant’s personal tax position and does not deal with the first appellant’s corporation tax assessments. At paragraph 33 of that letter, the reviewing officer states: “As the company decisions have not been appealed, these are final, and the tax is due and payable....”.
- (13) The second appellant lodged an appeal with the tribunal against these conclusions sometime between 25 August 2022 and 31 August 2022. The FTT’s record was that this notice of appeal had been lodged under the second appellant’s individual name against income tax assessments.
- (14) On 18 November 2022, Officer Metcalfe issued a penalty explanation letter to the first appellant. On 25 November 2022, Officer Metcalfe issued income tax penalty assessments to the second appellant for the tax years ending 5 April 2016 to 5 April 2021. On 26 November 2022, Officer Metcalfe issued the first appellant with the penalty assessments for corporation tax inaccuracies in respect of the periods ending 30 November 2015 to November 2017.
- (15) In an email dated 3 December 2022, from the second appellant to Officer Metcalfe the second appellant thanked the latter for the penalty letters and requested that “you kindly suspend all penalty notices and letters sent to myself and YT medicals pending the outcome of my appeal?”
- (16) In an email dated 5 December 2022 from Officer Metcalfe to the second appellant, the officer responded to that 3 December 2022 email. He referred to an attached appeal document which the second appellant had referred to as being her appeal against the corporation tax assessments for the first appellant and indicated that “as can be seen from the attachments, the company has **NOT** made any appeal against the Corporation Tax assessments...” (emphasis in the original).
- (17) He then helpfully set out the timeline for all the assessments which he asserted had been issued in order to assist the second appellant.
- (18) In that letter he asserts that a corporation tax assessment for the accounting period ending 30 November 2015 had been raised on 29 November 2021. And on 4 April 2022, corporation tax discovery assessments had been raised on the first appellant for the accounting periods ending 30 November 2016 and 30 November 2017.
- (19) Later on in that email, he goes on to state that “HMRC has not been notified of any appeal against the Corporation Tax assessments and considers them final and due”.

(20) In a letter dated 6 December 2022, from the second appellant to HMRC, (“**the 6 December letter**”) headed “Request to cancel all tax penalties against [the second appellant] and [the first appellant]”, the second appellant indicated her wish “to request the cancellation of all tax penalties against myself and my limited Liability personal services company (YT medicals Ltd) with immediate effect”.

(21) In that letter she went on to say that she continued to rely on her accountants to help with her yearly self-assessment tax returns and that she had decided to appeal against the outcome of the review and she did not agree with it. Her “understanding of the appeal is that I am appealing against the Tax penalties issued against me and against YT medicals through which I carry out my numerous medical assignments”.

(22) She went on to say that “I will therefore be very grateful if you will kindly consider the explanations I provided in this letter, and kindly cancel all Tax penalties issued to me and to YT medicals (my personal service company) as they are unwarranted, unfair and impossible for me to pay”.

(23) Finally, having explained how hard she had worked and that she would not be able to pay the penalties, she went on to ask HMRC to “kindly consider my letter as an appeal to relieve me of this dark cloud of unwarranted and un-incurred debts...”.

(24) In an email dated 8 December 2022 from Officer Metcalfe to the appellants’ then agent, the officer reasserted, as in his email of 5 December 2022, that none of the corporation tax assessments had been formally appealed to HMRC. He referred to the 6 December letter and stated that “your client’s email suggested it was believed that the CT Assessments WERE under appeal, but I can confirm the appeal held is for your client’s Income Tax assessments. If the Company now wishes to appeal the above CT assessments, then this will need to be made in the first instance, to HMRC.....” (emphasis in the original). He went on to state that he would not be able to accept a late appeal and an application would have to be made to the FTT to consider a late appeal which HMRC would likely contest. Finally, he observed that with regard to the penalties, those were just within the appeal period.

(25) At some point between December 2022 and July 2023, the appellants instructed TM Sterling Ltd who, in a letter dated 8 September 2023 sent to Officer Metcalfe, made a formal appeal against the corporation tax assessments visited on the first appellant, and the penalty assessments visited on both the first and the second appellant.

(26) Those appeals were notified to the tribunal on 9 October 2023.

### **The assessments - findings of fact**

#### *The penalty assessments*

10. As regards the penalty assessments, the evidence that they were issued and served on both appellants on 25 November 2022 and 26 November 2022 comprises copies of the penalty explanation letters dated 24 November 2022 sent by HMRC to the second appellant, a copy of a penalty notice in relation to the second appellant sent to her then agents dated 24 November 2022, and a letter dated 18 November 2022 from HMRC to the first appellant indicating that they were intending to charge penalties.

11. This is evidence which allows me to find as a fact that the penalty assessments which HMRC assert were issued on 25 and 26 November 2022 were so issued by HMRC on those dates and were sent to the correct address.

12. As evidence that the appellant received them, there is the email dated 3 December 2022 sent by the second appellant to Officer Metcalfe, and the 6 December 2022 letter.

13. From this evidence I find as a fact that the appellants received the penalty assessments on or around the end of November 2022.

#### *The 4 April 2022 corporation tax assessments*

14. As regards the corporation tax assessments that HMRC allege were issued to the first appellant on 4 April 2022 the evidence on which HMRC relies that they were so issued and served on that appellant comprises;

(1) Two computer printouts headed “OPERATOR ID DISPLAY ASSESSMENT”, with the letters COT 206C in the left-hand corner. The first appellant was named. There is a start date. Each document states “Discovery Assessment made 04/04/2022 issued 05/04/2022”. One printout relates to the assessment to £73,481.10 and the second to the assessment for £32,715.80.

(2) Two screenshots from COTAX relating to the assessments each of which states that the “Assessment Made” was 04/04/2022, and that “Date of Issue” was on 05/04/2022.

(3) A pro forma, uncompleted generic template of a corporation tax assessment.

15. Officer Metcalfe, who I think was the discovering officer, and who was present throughout the hearing, was not called to give evidence about either making the discovery or issuing the assessments. However, the emails of 5 December 2022 and 8 December 2022 to which I have referred above clearly show that as far as that officer was concerned, tax assessments were issued to the first appellant on 4 April 2022 for the amounts set out above.

16. There is the email of 4 April 2022 to the appellant’s agent from Officer Metcalfe, the subject matter of which is consistent with a letter accompanying assessments dated 4 April 2022 for both appellants. However, the date of 4 April 2022 whilst it might be the date that the COTAX information states was the date of assessment, is different from the date of issue on the COTAX printouts which is recorded as being the following day, 5 April 2022. It would seem odd that the assessments issued according to HMRC’s records on 5 April 2022 were sent to the appellants agent the day before.

17. Finally, in her letter of 7 April 2022 to Officer Metcalfe, the second appellant appealed against amendments made to her self-assessment tax return for three tax years.

18. From this evidence HMRC ask me to infer that the discovery assessments made on 4 April 2022 were properly served on the first appellant in accordance with the provisions of sections 115 Taxes Management Act 1970 and section 7 of the Interpretation Act 1978.

19. In essence they ask me to find that paper versions of assessments in the amounts set out above were put into prepaid envelopes with the appellant’s correct address thereon and then sent in the post to the appellant, and copies of those assessments were sent, electronically, to the appellant’s agent on 4 April 2022.

20. An inference of this kind must be drawn on the balance of probabilities. I need to be satisfied that the assessments were more likely than not issued and sent to the second appellant or its agent on the basis of all relevant and proven facts.

21. This is the case whether or not I consider the appellant’s assertion, on which they based their application to amend their grounds of appeal, which was only made through their agent, that the appellant did not receive the notices of assessment.

22. I do not believe that the evidence that HMRC have suggested, namely the emails from Officer Metcalfe of December 2022, the computer printouts, the COTAX screenshots, and that pro forma, generic, notice of appeal, is sufficient primary evidence on which I can infer that the assessments which they claim were sent to the appellant on 4 April 2022, were so sent. Whilst they may be evidence of the making of the assessments, they are not evidence that those assessments were then actually sent to the appellants. HMRC have adduced no evidence of system. And submissions that they would have been sent, made by Mrs Man cannot, carry no evidential weight.

23. However, it is clear that some documents were sent to the appellants’ agent on 4 April 2022, and whether they were transmitted to the second appellant by the agent or sent directly, the second appellant was able, in her letter of 7 April 2022, to appeal against self-assessment

tax return assessments. Given the heading to 4 April 2022 email, that it related to the first appellant and not just the second appellant, I am prepared to infer that the corporation tax assessments were sent to the first appellant's agent on 4 April 2022. And this is notwithstanding this ostensible discrepancy in dates mentioned at [17] above.

24. I find, therefore, as a matter of fact that the corporation tax assessments of 4 April 2022 were sent to and received by the first appellant's agent on that date.

25. As to when they came to the attention of the first appellant, that is something I deal with later in this decision.

*The 29 November 2021 corporation tax assessment*

26. HMRC have submitted that on 29 November 2021 Officer Metcalfe issued the first appellant with a corporation tax assessment for the period ending 30 November 2015 in an amount of £55,100.70.

27. As evidence of this they have provided:

(1) A computer printout headed "OPERATOR ID DISPLAY ASSESSMENT", with the letters COT 206C in the left-hand corner. The first appellant was named. There is a start date. The document states "Discovery Assessment made 30/11/2021 Issued 01/12/2021". It records the Net tax payable as being £55,100.70.

(2) A screenshot from COTAX relating to the assessment which states that the "Assessment Made" was 30/11/2021, and that "Date of Issue" was on 01/11/202.

(3) A pro forma, uncompleted generic template of a corporation tax assessment.

28. Additionally, and as mentioned above, there are the December 2022 emails from Officer Metcalfe from which it is clear that he thought the corporation tax assessment was issued to the first appellant on 29 November 2021.

29. As I have said in relation to the 4 April 2022 assessments, in the absence of any oral evidence, or witness statement, from Officer Metcalfe, this is insufficient to persuade me that I should infer that the corporation tax assessment was indeed properly sent to the first appellant. Whilst they may be evidence that an assessment was made on 30 November 2021, there is a similar discrepancy between the date of issue (1 December 2021) as there was in respect of the 4 April 2022 assessments. I find it surprising, therefore, given this evidence that Officer Metcalfe asserts that the assessment was sent on 29 November 2021 in his emails.

30. In the case of *Barry Edwards* [2019] UKUT 131 ("**Edwards**"), it is recorded (at paragraph [52]) that the FTT had declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with a date appearing on it alongside, was adequate to allow them to find that a notice to file had been properly put in the post by HMRC.

31. I am of the same mind in this case. It seems to me that the evidence provided by HMRC to us support their assertion that the tax assessment was sent to the first appellant on 29 November 2021 does not discharge their evidential burden to allow me to infer that it was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the first appellant.

32. And unlike the position regarding the 4 April 2022 assessments, there is no evidence of any response by either appellant or their agent, to this alleged assessment. This is to be contrasted with the appellants' behaviour when they received other documents from HMRC, when, generally speaking, the second appellant responded with alacrity.

33. Interestingly, in response to HMRC's view of the matter letter dated 21 March 2022, the appellant's then agent, in a letter dated 28 March 2022, refers to an assessment for the year to 30 November 2014. This cannot be a reference to the assessment which HMRC say was raised on 30 November 2021, since that is for the year ended 30 November 2015. It

seems to me likely that had either the first appellant or its agent received that assessment, reference would have been made to it in response to the view of the matter letter.

34. In HMRC's favour, there is no oral evidence that the appellants did not receive this assessment. There is simply their agent's assertion to this effect which, as I have said, is evidentially worthless.

35. But it is up to HMRC to demonstrate that a discovery assessment dated 29 November 2021 was properly issued and served on the first appellant, and they have not done that. HMRC, in response to my ruling that the appellants could challenge effective receipt, submitted the COTAX screenshots. But, as mentioned above this does not, to my mind, satisfactorily establish that any discovery assessments which were properly made by Officer Metcalfe had been actually sent to the first appellant.

36. I find as a fact, therefore, that no corporation tax assessment dated 29 November 2021 was served on, or received by, either appellant.

#### **THE APPLICATION TO AMEND**

37. Shortly before the hearing, the appellants made an application to amend their grounds for the application to include the ground that they had not received the notices.

38. It is clear, as I have previously mentioned, that they had received some of the notices. But it seems to me that the notices that they submit were not received are the corporation tax assessments.

39. In support of the application, the appellant's representative submitted that they had had no chance to include this ground in the original application as they had not received copies of the assessments themselves from HMRC and thus were unable to take instructions and include this ground at the time that the notices of appeal were submitted.

40. He further submitted that it was in the interests of justice for their application to be allowed.

41. The application was opposed by HMRC on the grounds, broadly speaking, that the appellants had had ample opportunity to submit that they had not received the notices yet had never done so. No such submissions had been made in any of the correspondence, or in the appeals to HMRC, or in the notices of appeal to the tribunal.

42. Furthermore, on the facts, it is clear that the appellants had received notices as they were able to respond to them.

43. Neither party addressed me on the approach I should take towards such an application. However, I have considered the principles which are set out in *Quah v Goldman Sachs International* [2015] EWHC 759.

44. I took the view that this is a very late application, but it is not one which will have an impact on the timetable. I considered the overriding objective. It is my view that to deal with a case fairly and justly, the appellant should be entitled to amend their pleadings as it would be unjust if they were not able to make what I consider to be an important and relevant submission. This outweighed the prejudice to HMRC.

45. I also took the view that HMRC had not been ambushed by this application. It had originally been made in an email to the tribunal and to HMRC on 11 April 2024. In response to that, HMRC not only indicated that they would oppose it, but also sent the computer printouts of the corporation tax assessments set out at [15(1) and 28(1)] above. So they had ample time to provide rebuttal evidence, both written and oral, in the event that the appellants' application was successful.

46. I was anticipating both parties adducing oral evidence. The appellants from the second appellant, and HMRC from Officer Metcalfe. The second appellant would then be cross-examined on her evidence. So HMRC would have ample opportunity to challenge the appellants' assertion of non-receipt. And I would then be in a position to consider her evidence.



47. Furthermore, it is up to HMRC to establish that the assessments were properly made and issued, and in doing this they need to show that they were served on the appellants. It would then be up to the appellants to deny receipt.

48. And so, at the hearing I ruled in favour of the application, indicating when I did so that I would been a better position to consider the value to be placed on the evidence, once I had heard it.

49. So, as mentioned above, I was somewhat surprised that neither party adduced oral evidence in support, or in opposition to, the assertion of nonreceipt.

50. However, HMRC did respond by producing the COTAX screenshots.

## **DISCUSSION**

51. The onus is on the appellants to persuade me that I should exercise my discretion to permit them to bring late appeals, in their favour.

### *The penalty assessments*

52. I have found as a fact that the penalty assessments were served on, and received by, the appellants on or around 25 and 26 November 2022. However, I also find as a fact that the 6 December 2022 letter comprises a valid, in time, appeal, against those assessments.

53. It is true that that letter does not state, in terms, that the appellants are appealing against the penalties.

54. So what principles should I adopt when deciding whether that letter comprises a valid notice of appeal?

55. In *Bristol & West v HMRC* [2016] STC 1491 at [26], the Court of Appeal, when considering whether a closure notice was valid stated that “in our view the answer to the question identified in para [25] above depends upon the correct interpretation of the October Notice, as it would be understood by a reasonable person in the position of its intended recipient, namely B&W, having B&W’s knowledge of any relevant context....” (I describe this as the “**objective reader**” test).

56. Although this objective reader test is couched against the background of a closure notice, I see no reason why I should not adopt it when considering whether the 6 December 2022 letter comprises a valid notice of appeal, given that there is no statutory definition of an appeal, nor any statutory criteria that must be included therein.

57. There is no need, for example, for the word “appeal” to be used. What is important is that it must be understood by the objective reader that the appellant is requesting HMRC to change its decision, and either discharge or to modify it.

58. The 6 December 2022 letter is headed “Request to Cancel All Penalties against [the appellant’s] ...”.

59. The text of the letter indicates that the second appellant wishes to request a cancellation of all tax penalties against herself and her personal service company (namely the first appellant). It goes on to request HMRC to consider the explanations provided in the letter and to kindly cancel tax penalties issued to her and to her personal service company, identified as the first appellant.

60. Finally, it goes on to ask HMRC to “kindly consider my letter as an appeal.....”.

61. It is my view that the objective reader would have construed the 6 December 2022 letter as an appeal against the penalty assessments which were issued to the appellants on 25 and 26 November 2021. It is clear that the letter challenges HMRC’s decision to issue the penalty assessments (and those assessments themselves) and is asking HMRC to change that decision. Indeed, it asks HMRC to discharge the penalties and to reverse their decision. To my mind this is an appeal.

62. Given that this is an in time appeal, there is no need for the appellants to make an application to bring a late appeal.

63. However, given that they have done so, I formally decide that their application to bring a late appeal against the penalty assessments is allowed.

64. And indeed, Mrs Man, having taken instructions, indicated to me at the hearing that if I was minded to find that the 6 December 2022 letter was a valid notice of appeal, HMRC would agree that it was an in time appeal.

*The 29 November 2021 corporation tax assessment*

*The parties' respective positions*

65. The first appellant's position is that the second appellant's letter of 25 March 2022 was an appeal against this assessment. Admittedly it was a late one. However, the lateness is only some four months which is considerably less than it would be if the appeal was deemed only to have been made on 8 September 2023.

66. They also assert that the 6 December 2022 letter comprises appeal not just against the penalties but also against the assessments. And so, contrary to HMRC's position, the appellant did respond to Officer Metcalfe's email of 5 December 2022, and, to the extent that she needed to, refreshed her appeal against the corporation tax assessment.

67. They also say that the assessment has never been received by the appellant.

68. HMRC's position is that the assessment was properly issued and served on the appellants. No appeal against it was made until 8 September 2023. Even if the appellants thought that they had made an appeal earlier than that, for example in March 2022, they were disabused of that by Officer Metcalfe's emails of 5 December 2022 and 8 December 2022 which make it very clear that HMRC did not consider that any appeal had been made against the corporation tax assessments. And if there was a reasonable excuse, or good reason, for the appellants' position that they thought they had made a valid appeal before then, that good reason or reasonable excuse could not extend beyond December 2022. An appeal made on 8 September 2023 is still a very late one for which no good reason has been given.

69. Furthermore, the letter of 25 March 2022 from the second appellant to HMRC, and the letter from the appellants' representative of 28 March 2022 to HMRC, both in response to the view of the matter letter, could not be treated as appeals against the assessment. They were appeals against the provisions of the view of the matter letter.

*My view*

*Length of the delay*

70. I turn to the *Martland* criteria. The first of these is to establish the length of the delay.

71. I need to decide when an appeal was actually made. Was it, as HMRC assert, only made on 8 September 2023, or was it made on 25 March 2022 in the second appellant's letter to HMRC in response to the view of the matter letter.

72. It is true that an appeal right under section 31 TMA only arises in respect of an assessment. And it is fair to say that the view of the matter letter was not an assessment.

73. But by then HMRC had actually made a discovery assessment. I am prepared to accept the evidence of the making of the assessment. What I am not prepared to accept is that there is evidence of satisfactory service of that assessment on either appellant.

74. So by the time that the second appellant sent a letter to HMRC on 25 March 2022, in which she refers to the first appellant's accounting period ending 30 November 2015, and in which she states that "I wish to state my disagreement with your conclusions and the amendment to the company returns and consequently wish to appeal the decision....." HMRC have made a discovery assessment against which an appeal can validly be made.

75. Adopting the objective reader test, and given the low technical threshold for an appeal (it simply requires something which demonstrates that the appellant does not agree with HMRC's position and requires HMRC to change it) I can see no principled reason why the form of words set out in the second appellant's letter of 25 March 2022 is not an appeal against the discovery assessment for the period ending 30 November 2015.

76. I have found that HMRC had not sent a copy of the discovery assessment to the appellants, and the view of the matter letter was the first indication that the appellants

received that HMRC considered that the first appellant had deliberately under assessed its corporation tax liabilities for the accounting period ending 30 November 2015. HMRC also indicated that they intended to issue the company with “PAYE tax assessments”. I am not sure, incidentally, whether HMRC ever went on to do this.

77. So returning to the first *Martland* criterion, namely the length of the delay, I think that delay is some 3 ½ months. This is taken from the end of the 30 day period following the assessment of 29 November 2021 until 25 March 2022. This is sufficiently serious and significant to warrant an investigation into the reasons and proceed to the final evaluation stage.

*Reasons for the delay*

78. I have dealt with the reason above. I have found as a fact that HMRC have not established satisfactory service of the assessment.

79. And the reason therefore that the appellants did not appeal until 25 March 2022 was because they did not know of that assessment.

80. It seems to me, as a general observation, that the second appellant has been extremely diligent in corresponding with HMRC when she had received correspondence. She has not kept her head down and hoped that things would go away. She has engaged with HMRC. In reasonable excuse terms, it seems to me that she is a “responsible trader conscious of and intending to comply with [her] obligations regarding tax”.

81. This can be readily seen from the chronology set out above, and in particular her response to Officer Metcalfe’s email of 5 December to which she responded by the 6 December 2022 letter.

82. I have no doubt, therefore, that had she received the 29 November 2021 assessment, she would have responded to it.

83. HMRC assert that even if the appellant did have a reasonable belief that she had made an appeal against the corporation tax assessment, that was an unsustainable position following, at the latest, Officer Metcalfe’s emails to the representative, on 8 December 2022, and to the second appellant, on 5 December 2022, in which he said that HMRC had not been notified of any appeal against the corporation tax assessments.

84. To my mind that is incorrect. My view is that HMRC had been notified, by then, of an appeal against the corporation tax assessment of 29 November 2021, for the reasons given above. It was suggested by Mrs Man that this was not an in time assessment, but that point is not made by Officer Metcalfe, in his emails.

85. Furthermore, I read the 6 December 2022 letter more broadly than does HMRC. Whilst it clearly relates to penalties, there is text which suggests that the appellant is disagreeing with the assessments themselves. I consider this in more detail in respect of the 4 April 2022 assessments below.

86. So, leaving aside the nonservice issue, I accept the appellants’ submission that they thought that a valid appeal had been made against the 29 November 2021 corporation tax assessment. And I have found that such a valid appeal was indeed made in March 2022.

87. As things turned out, it seems that the appellants then approached their current advisers who sought to obtain copies of the assessments which could not be produced by HMRC for the reasons given by Mrs Man. And so, a more formal appeal was made by those advisers on 8 September 2023.

88. And interestingly, given HMRC’s approach towards the appellant’s letter of 25 March 2022 being an appeal against the view of the matter letter, they appear to be prepared to accept the letter of 8 September 2023 as being an appeal against the 29 November 2021 assessment even though, as I understand it, those appeals were made on the basis of the information provided by Officer Metcalfe in his emails of 5 December 2022 and 8 December 2022. In other words, they are appeals based on secondary information about the primary documents. And this, it seems to me, is precisely what the second appellant has done by dint

of her letter of 25 March 2022. She is appealing against the primary, or underlying, document (the corporation tax assessment of 29 November 2021) evidenced by the secondary document (namely the view of the matter letter).

*Final evaluation*

89. Turning to the final evaluation stage, I am conscious that I must conduct a balancing exercise, essentially weighing up the prejudice caused to either party by accepting or rejecting the application. And 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.

90. I have found that there is insufficient evidence for me to infer that the corporation tax assessment of 29 November 2021 was served on either appellant. However, both parties have accepted that on 8 September 2023 an appeal was made against that assessment. This, even if it was the first appeal, would be seriously and significantly late.

91. But I have found that the appellant's letter of 25 March 2022 comprises a valid appeal against the tax assessment. And that she had a good reason for the delay in appealing some 3 ½ months late, namely that it was only when she received the view of the matter letter that she realised that HMRC were contesting the first appellants corporation tax assessment for the year ending 30 November 2015.

92. There was no need, therefore, for her to make another appeal, notwithstanding HMRC's view, expressed in the emails of December 2022, that no valid appeal had been made against that corporation tax assessment. And in any event, her swift response, comprising the 6 December 2022 letter, and its contents, could be seen as a further appeal against that assessment.

93. The first appellant would clearly be prejudiced if I dismiss the application. I do not believe that HMRC will be prejudiced if I allow it. I am aware that there is ongoing litigation between the parties, and indeed an appeal has been scheduled to be heard in June 2024 concerning the second appellant's income tax position. It is not as though, therefore, HMRC have put their papers away in relation to these appellants and will be prejudiced in time and financial terms in retrieving them.

94. Time limits need to be respected and litigation conducted efficiently. As I have said in respect of the second appellant, she strikes me as someone who is conscious of her responsibility towards the tax system, and that responsibility is reflected in her actions, and her engagement with HMRC. I accept her position, as set out in the correspondence, that she understood that her agents had appealed against all matters.

95. On balance, therefore, I allow the first appellant's application to bring her appeal against the 29 November 2021 corporation tax assessment out of time.

*The 4 April 2022 corporation tax assessments*

*The parties' respective positions*

96. The appellants' position in relation to these assessments is identical to their position as regards the 29 November 2021 assessment. In their view the appellant had no knowledge of the assessments until the view of the matter letter and the response to that on 25 March 2022 comprised a valid appeal. If that was not the case, then the 6 December 2022 letter was a valid appeal. The reason that no earlier appeal was made was because the appellants thought that their agent had appealed against all assessments.

97. Likewise, HMRC's position is largely the same. In their view these corporation tax assessments were properly served; the 25 March 2022 could not have been an appeal against those assessments since they had not been issued by that date; and in any event, the appellants' assertion that they thought that appeals had been made by their agent had clearly been negated by December 2022, and no valid appeal was then made until September 2023.

*Length of the delay*

98. I am not prepared to accept that the second appellant's letter of 25 March 2022 comprised a valid appeal against the 4 April 2022 corporation tax assessments. It was capable of being a valid appeal against the 29 November 2021 assessment as that assessment had been made prior to the date of that letter. However, it is not capable of being a valid appeal against the April assessments since they had not been made at that stage. No discovery had been made by Officer Metcalfe. I appreciate that the view of the matter letter evidences an intention to make assessments (albeit PAYE assessments) but I do not think that that comprises sufficient evidence of an underlying assessment. Indeed, to the contrary, it is prospective. There was no prior assessment which there was in the case of the 29 November 2021 assessment.

99. So when was the appeal against the 4 April 2022 corporation tax assessments actually made? I need to decide this in order to ascertain the length of delay. There are two possibilities. Firstly, the appeal was made by dint of the 6 December 2022 letter. Alternatively, it was only made on 8 September 2023.

100. The 6 December 2022 letter is headed "Request to Cancel all Tax Penalties.... [against the appellants]" and this is repeated in the letter itself. At face value, it seems to deal with the penalties and not with the assessments. But it seems to me that the second appellant is talking about penalties, here, in the broad rather than technical sense. It seems to me that she is using it to describe tax liabilities which are being visited on the appellants rather than restricting it to the penalties themselves.

101. In that letter she says that:

"My understanding of the appeal is that I am appealing against the Tax penalties issued against me and against YT medical through which I carried out my numerous medical assignments.

I was, however, surprised to see more tax penalty letters come through my door over the weekend after an exhausting week at my workplace in the NHS...."

102. I take from this that the penalty assessments issued on 25 and 26 November 2022 had arrived at the appellant's premises over the weekend and it was this, as well as HMRC's email of 5 December 2022 that caused the second appellant to submit the 6 December 2022 letter. Yet in that letter, as the extract above shows, it was her understanding that by that stage she had already appealed against "the Tax penalties issued against me and YT medicals...."

103. This could not mean the tax penalties which were received over the weekend. It must refer to other tax penalties. And since none had been issued to the company by then, I construe this is being a slightly sloppily worded indication that her appeals had been made against any liabilities imposed on the appellants and was not restricted to the penalties as technically construed.

104. Furthermore, in that letter she goes on to say "Secondly, I do not agree with the Tax decisions and penalties as I have paid all my taxes (both income and corporation taxes) and therefore do not have any overdue taxes".

105. Adopting the objective reader test, it seems clear to me that the second appellant is here challenging not just the penalty assessments but also the corporation tax assessments. In her view there is no overdue corporation tax which has all been paid.

106. That is a clear disagreement with HMRC's position on the corporation tax assessed. When this is read with the text at the end of the letter that HMRC should "kindly consider my letter as an appeal to relieve me of this dark cloud of unwarranted and un-incurred debts...". It is my view that this comprises an appeal against not just the penalties but also the corporation tax assessments of 29 November 2021 and 4 April 2022.

107. This means that the delay in bringing the appeal is approximately seven months. That is serious and significant and warrants an investigation of the reasons and the subsequent evaluation.

*Reasons*

108. Turning now to the reasons given by the appellants for this delay. I have found as a fact that the appellants' then agent received the 4 April 2022 corporation tax assessments.

109. It is the second appellant's position that she relied on that agent to submit appeals and believed that it had done so. If they did, then no evidence of that was presented to me, and HMRC have, as clearly indicated, no record of any such appeal. I find as a fact therefore that the appellants' agent did not submit an appeal against the 4 April 2022 corporation tax assessments.

110. As a general principle (see [54] of *Katib* [2019] UKUT 0189) "failures by a litigant's adviser should generally be treated as failures by the litigant".

111. So failure to make a timely appeal by the appellants' agent is a failure by the appellants. And thus, cannot be seen as a "good" reason why the first appellant failed to make a timely appeal. However, that failure is something which can be considered at the final evaluation stage.

112. The failure, however, is more acute if the appellants themselves were aware of the assessments, by virtue of the fact that the agent had sent them to the appellants.

113. The appellants' late submission to amend their pleadings to include one that the appellants did not receive those assessments has not been supported by any oral testimony by the second appellant.

114. And so, if I am to accept any submission, there must be evidence on which I can base that acceptance.

115. I have already made clear that I believe that the second appellant has acted conscientiously towards HMRC and towards the tax system. And furthermore, there is evidence that she has responded to HMRC's correspondence as and when it is clear that she received it and engaged fully with HMRC.

116. Furthermore, it is clear from the 4 April 2022 email that both personal and corporate tax assessments were sent to the appellant's agent. And that subsequently the second appellant in her letter of 7 April 2022, to HMRC, submitted an appeal against amendments to her personal self-assessment tax return for three tax years.

117. It is my view that had she received, from the agent, the corporation tax assessments, she would have, similarly, appealed against them to HMRC. That would be consistent with her aforesaid attitude and behaviour. The fact that she did not permits me to infer that her agent did not send to her the letters relating to the corporation tax assessments. The agent only sent to her the letters relating to her personal tax position.

118. It was reasonable, therefore, for her to believe that the agent had appealed against the corporation tax assessments, and that reasonable belief continued until she received the email of 5 December 2022 from Officer Metcalfe which made it clear that as far as HMRC were concerned, no valid appeals had been made against any corporation tax assessments.

119. However, on the following day, 6 December 2022, she sent, to HMRC, the 6 December 2022 letter.

120. So the first time that she personally became aware that there had been no appeals against the corporation tax assessments was 5 December 2022, and she appealed against them the following day. Once again this demonstrates a commendably conscientious attitude towards her tax obligations.

#### *Final evaluation*

121. So I now come to the final evaluation stage, weighing up the balance of prejudice, taking into account the matters such as the need for finality in litigation and that time limits should be respected.

122. And this comprises an evaluation of all the competing issues. I have found that an appeal was made on 6 December 2022 against the 4 April 2022 corporation tax assessments. This is seriously and significantly late. And I have also found that the agent had been properly served with those tax assessments on or around 4 April 2022.

123. But equally, I have found that the agent did not transmit either the relevant letters or the tax assessments to the appellants, and that the first time that the appellants discovered that the agent had failed to make timely appeals against the assessments was on 5 December 2022. And the appeal was made the following day.

124. I do not consider that any injustice or prejudice will be suffered by HMRC if I were to allow the application. Clearly there will be prejudice to the appellants if I do not. But that is simply one of the consequences of failing to make a timely appeal.

125. This is very finely balanced. However, given the second appellant's conscientious attitude and exemplary engagement with HMRC, where it is clear that she has received communications, at this final evaluation stage I think the balance of prejudice favours the first appellant.

126. Accordingly, I allow the application to bring an appeal against the 4 April 2022 assessments out of time.

#### **DECISION**

127. For the foregoing reasons, I allow the application.

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

128. 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.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**Release date: 31<sup>st</sup> MAY 2024**