TC07686

VALUE ADDED TAX – appeals against compulsory registration and "failure to notify" penalties – were appeals notified to Tribunal after time specified in s83G VATA 1994? – yes – Tribunal's permission needed to make appeals – Martland *applied – eight-month delay due to misunderstanding of VAT appeal procedure by taxpayer's accountants – serious delay - not a good reason – failure by HMRC to offer review at same time as notifying decision on penalties - permission granted in respect of penalty appeal but denied in respect of registration appeal*

FIRST-TIER TRIBUNAL
TAX CHAMBER

APPEAL NUMBER : TC/2019/02478

BETWEEN

ABDUL VAHAB KHARADI **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON
MR JOHN ROBINSON

Sitting in public at Taylor House London EC1 on 3 February 2020

Mr R Dar of Trojan Solicitors for the Appellant

Ms N Davis, Litigator of HMRC's Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. This decision concerns whether appeals against VAT compulsory registration and "failure to notify" penalties were made out of time and, if so, whether the Tribunal should give permission for late appeals.

2. References to sections in what follows are to sections of the Value Added Tax Act 1994.

BACKGROUND TO THE APPLICATION

3. Mr Kharadi notified the Tribunal on 9 April 2019 of his appeal against a VAT assessment under s73 of £10,458.20 and a penalty assessment (for failure to notify liability to VAT) of £5,490.55, both in relation to a period of VAT registration 25 October 2014 to 15 May 2015 (the "Period"). In the notice of appeal, Mr Kharadi ticked the box saying, "I am not sure" in relation to whether he was in time to appeal to the Tribunal.

4. In a letter to Mr Kharadi dated 24 July 2019 the Tribunal stated that the appealable decision is not against the s73 VAT assessments but against the requirement to be compulsorily registered for VAT for the Period (no appeal to the Tribunal lies against the s73 assessment as it is not in respect of a period for which Mr Kharadi had made a VAT return.)

5. By notice to the Tribunal dated 6 October 2019 HMRC opposed the "application for an extension of time in which to lodge [the appellant's] appeal" and applied to have the appeal struck out. We note that HMRC appear to have made a typographical error in the email address when attempting to send a copy of this to the appellant's representatives.

6. By letter to the parties dated 5 November 2019 the Tribunal listed the application for permission to appeal out of time for hearing; stated that HMRC was not required to serve a statement of case unless the application was successful; and said that if a party intended to rely at the hearing on any documents not previously sent to the other party, copies should be sent to the Tribunal and the other party to be received at least 14 days before the hearing.

7. We note that HMRC did not abide by the original deadline for producing a statement of case (24 September 2019); and, when they did send a statement of case to the Tribunal on 21 October 2019, they did not send a copy to the appellant. However, as the Tribunal determined in its 5 November 2019 letter, HMRC's statement of case was not, in the event, required to be filed by the original deadline, given that HMRC notified their objection to the Tribunal permitting a late appeal.

EVIDENCE

8. The appellant submitted electronically a document entitled "Statement of case and documents to be relied by on the appellant" a few days before the hearing. To the extent this contained documents on which Mr Kharadi was relying and which had not previously been sent to HMRC (and so was in breach of the Tribunal's direction of 5 November 2019), we give such documents little weight if and to the extent we considered that their late-submission caused prejudice to HMRC.

9. Mr Kharadi also gave oral evidence at the hearing.

FINDINGS OF FACT

10. HMRC wrote to Mr Kharadi at 67 Howard Street, Oxford, on 10 June 2016, stating that he needed to be registered for VAT for the Period and assessing him to VAT under s73 in the amount of £10,458.20. The letter said that if he did not agree with the decision, Mr Kharadi could ask for an HMRC officer not previously involved in the matter to review the decision, or appeal to an independent tribunal to decide the matter.

11. HMRC again wrote to Mr Kharadi, this time at 56 Asquith Road, Oxford, on 5 September 2016, with a notice of penalty assessment under Schedule 41 Finance Act 2008 (failure to notify) in the amount of £5,490.55. This letter also said that if Mr Kharadi did not agree with the decision, he could ask for an HMRC officer not previously involved in the matter to review the decision, or appeal to an independent tribunal to decide the matter.

12. Mr Kharadi received neither of the above two letters. This was because he stopped living at the Howard Street, Oxford address at the end of April 2016 and had no arrangements for post to be forwarded, as he left on bad terms with the landlord; he was also experiencing family and financial problems at the time; and from 1 May 2016 to the end of 2016 he lived at an address in Cowley Road, Oxford. He moved to 56 Asquith Road, Oxford at the beginning of 2017.

13. In July 2018 Mr Kharadi received a "statutory demand" (under the Insolvency Act 1986) from HMRC dated 5 July 2018 and addressed to him at 56 Asquith Road, Oxford, in respect of tax due from him including the VAT assessed under s73 (£10.458.20) and VAT penalties (£5,490.55).

14. Shortly after receiving this Mr Kharadi instructed accountants, Fradalit Associates, to deal with HMRC on his behalf in relation to these matters. Fradalit wrote to HMRC on 1 August 2018 under the heading "Appeal against VAT debt" stating that they were "lodging an appeal" on the grounds set out in the letter. At the end of the letter it said:

> "Furthermore, under TMA 1970 s55 (3), we are requesting HMRC to formally stand over and postpone, both outstanding liabilities and penalties of £15,948.75 until the appeal has been settled. Our client requires the payment to be suspended, pending the appeal. Therefore HMRC can informally stand over the amount and suspend the collection of the amount that the customer believes to have been over charged as a result of the disputed tax liabilities."

15. Miss Price of HMRC emailed Fradalit on 9 August 2018 stating: "I confirm that action will be delayed until the appeal has been settled".

16. Fradalit wrote to Ms Wing of HMRC on 1 October 2018, again under the heading "Appeal against VAT debt". They enclosed certain documents to support the appellant's case that the business in question was being run by a limited company, Shams-5 UK Ltd, rather than by Mr Kharadi.

17. Fradalit wrote to Ms Wing of HMRC on 7 November 2018 enclosing further documents and making further arguments on Mr Kharadi's behalf.

18. Fradalit wrote to Ms Wing of HMRC on 2 January 2019. The letter included the following:

> "Thank you for your email dated 19 December 2018 with regards to the ongoing VAT matter.
>
> In your email, you have stated that you have investigated this matter further. We would like to request your findings in this respect.
>
> Secondly, we are quite puzzled with the rest of the contents of your email. We initially made an appeal against the outstanding debt on 01.08.2018 which is just over 5 months ago. Since then we have exchanged numerous correspondence back and forth and detailed exchange of documents surrounding the circumstances of appeal has also taken place. In fact you promised in your previous email to issue a decision/determination on the appeal lodged. It now transpires that you wish to engage in technicalities which are reserved at the inception of any appeal. This is an unconscionable conduct that you engaged in evaluating the details merits of the appeal and just as it is expected to conclude you want to re-invent the wheel once again.
>
> Please note that with your frequent emails and requests of the paperwork, you clearly conveyed an impression that a valid appeal has been lodged and determination of the appeal is outstanding

based on the evidence. HMRC always has the authority to accept late appeals without reference to the tribunal and your conduct showed that validity of the appeal was not in question. Therefore, as a public body you have given unmistakeable impression of certain understandings and benefits accruing to our client from which you cannot retract. In legal terms, this concept is called substantive legitimate expectation arisen from a clear representation from a public body. It would now be unconscionable for the public body to revoke and frustrate these expectations. Therefore, you are duty bound to now follow through the course already pursued and understood by both parties involved ….

Therefore, it is now expected that a public body would take these into consideration and desist from hassling him further by requiring detailed tribunal appeals. What is even more shocking is that an appeal is not required because of the merits of the case but on a technicality of time Limits. It is clear that having had no substantive reply to the submissions made by our client, HMRC is now hoping that his appeal will be dismissed and he would be liable for the debt regardless. This is a predatory behaviour where a Her Majesty's government department is looking to charge sums knowing fully well that these are not due. This shows a desperation on part of the HMRC to increase its tax take irrespective of the Legitimacy of the claim.

We do not have any issue lodging an appeal if you were to issue an adverse decision in the outcome of the appeal. In fact our client wishes to engage services of a solicitor to apply to set aside the statutory demand served on him. In such a situation, HMRC will be liable for the cost of pursuing this line of action especially where grounds of debt are so spurious and baseless. You must not force this matter unnecessarily to the legal realm which has huge cost implications regardless of the outcome of the matter. This would be considered an abuse of power and authority against which law provides harsh remedies to the affected party.

We hope and appeal that you would review your conduct in the matter and avoid prolonging this matter further. You now have ample evidence to decide this matter one way or other and should not seek to hide behind technicalities. If you doubts above (sic) the validity of the appeal, you should have advised from the very beginning so our client can provides for the possibility of pursuing matters in the tribunal and budget his costs accordingly. You cannot exchange correspondence for months on end, provide clear indication of impending decision and then suddenly come back with a question reserved for the very beginning. If our client's appeal was not valid then on what grounds did you request documents from him and provided your version of the events and correspondence in your possession. It may have been the case that you have just been advised by your seniors to adopt this strategy but with all due respect it is too late in the proceedings.

We plead with you that you issue the determination of the appeal following which our client can either avail the required relief or revert to legal action to enforce his rights against HMRC's conduct."

19. On 29 January 2019 Ms Wing of HMRC sent an email to Fradalit with the following text:

"To date, you have not provided me with any paperwork evidencing that Sham -5 Ltd traded between 25 October 2014 to 15 May 2015.

If you do not provide me with any evidence by 5 February 2019, this enquiry will be closed and I will authorise collection of the debt from Mr A V Kharadi as a sole trader."

20. On 11 February 2019 Ms Wing of HMRC sent an email to Fradalit with the following text:

"Thank you for your email dated 6 February 2019.

Given the circumstances, I am willing to set a new deadline of 28 February 2019 for Mr Kharadi to produce the required documents.

If the documents are not produced by 28 February 2019, the enquiry will be closed and I will authorise collection of the debt from Mr A V Kharadi as a sole trader."

21. On 21 February 2019 Fradalit wrote to Ms Wing of HMRC regarding her request for certain documentation.

22. On 9 April 2019 Ms Wing of HMRC wrote to Fradalit with the following text:

> "Period of VAT registration 25 October 2014 to 15 May 2015
>
> Amount of VAT Assessment £10,458.20
>
> …
>
> Amount of Penalty £5,490.55
>
> I refer to your letter dated 21 February 2019.1 apologise for the slight delay in replying.
>
> I have sought advice from a Higher Officer regarding this matter. Further consideration has been given to your representations however, we are of the opinion that we have not been provided with a reasonable excuse or supplied with enough new information for the above decision to be overturned.
>
> I will not be accepting any further correspondence regarding this matter.
>
> If your client wishes to appeal to the tribunal outside the 30 day time limit, as advised in my email dated 19 December 2018, an application needs to be made H M Courts and Tribunals Service.
>
> https://intranet.prod.dop.corp.hmrc.gov.uk/manual/appeals-reviews-and-tribunals-guidance/artg3110
>
> https://intranet.prod.dop.corp.hmrc.gov.uk/manual/appeals-reviews-and-tribunals-guidance/artg3160
>
> https://intranet.prod.dop.corp.hmrc.gov.uk/manual/appeals-reviews-and-tribunals-guidance/artg4300
>
> Please send me a copy of the form T240 when you send it to H M Courts and Tribunals Service. If I have not heard from you by 9 May 2019, I will close this enquiry and request that Debt Management continue to pursue this debt from Mr Kharadi as a sole proprietor"

LAW

23. Sub-section 83(1) sets out the matters with respect to which an appeal lies to the Tribunal. These include VAT registration (s83(1)(a)) and an assessment under s73 and other sections (s83(1)(p)). Sub-section 83(2) provides that a reference in Part V of the Act (sections 82-87 inclusive) to a decision with respect to which an appeal under s83 lies includes any matter listed in sub-section 83(1) whether or not described there as a decision.

24. Under paragraph 17 Schedule 41 Finance Act 2008, a person may appeal against a decision of HMRC that a penalty is payable by that person, or against the amount of the penalty payable. Under paragraph 18 of that schedule, an appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the Tribunal or the Upper Tribunal).

25. Section 83G (Bringing of appeals) reads as follows:

> (1) An appeal under section 83 is to be made to the tribunal before—
>
> (a) the end of the period of 30 days beginning with—
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or
>
> (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or
>
> (b) if later, the end of the relevant period (within the meaning of section 83D).

(2) But that is subject to subsections (3) to (5).

(3) In a case where HMRC are required to undertake a review under section 83C—
(a) an appeal may not be made until the conclusion date, and
(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(4) In a case where HMRC are requested to undertake a review in accordance with section 83E—
(a) an appeal may not be made—
(i) unless HMRC have notified P, or the other person, as to whether or not a review will be undertaken, and
(ii) if HMRC have notified P, or the other person, that a review will be undertaken, until the conclusion date;
(b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;
(c) if HMRC have notified P, or the other person, that a review will not be undertaken, an appeal may be made only if the tribunal gives permission to do so.

(5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.

(6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.

(7) In this section *"*conclusion date*"* means the date of the document notifying the conclusions of the review.

26. Sub-section 83A(1) defines "P" as follows: "HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision". Sub-section 83A(2) provides that "the offer of the review must be made by notice given to P at the same time as the decision is notified to P".

27. Section 83E (Review out of time) reads as follows:

(1) This section applies if—
(a) HMRC have offered a review of a decision under section 83A and P does not accept the offer within the time allowed under section 83C(1)(b) or 83D(3); or
(b) a person who requires a review under section 83B does not notify HMRC within the time allowed under that section or section 83D(3).

(2) HMRC must review the decision under section 83C if—
(a) after the time allowed, P, or the other person, notifies HMRC in writing requesting a review out of time,
(b) HMRC are satisfied that P, or the other person, had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and
(c) HMRC are satisfied that P, or the other person, made the request without unreasonable delay after the excuse had ceased to apply.

(3) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision.

28. Section 83C (Review by HMRC) reads as follows:

(1) HMRC must review a decision if—

(a) they have offered a review of the decision under section 83A, and

(b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer.

(2) But P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G.

(3) HMRC must review a decision if a person other than P notifies them under section 83B.

(4) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision.

29. Section 98 (Service of notices) reads as follows:

Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative

30. In *Martland v HMRC* [2018] UKUT 178 (TCC) at [26] the Upper Tribunal endorsed the words of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [22]:

"The central feature of [provisions which allow a person to make a late appeal] is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament."

13. The Upper Tribunal went on (at [44-45]) to give this guidance to this Tribunal (the FTT):

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

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be

> respected…The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

PARTIES' ARGUMENTS

31. Mr Dar's primary argument at the hearing was that Mr Kharadi was only notified of the VAT registration and penalties by the "statutory demand" received in July 2018; and that HMRC's email to Fradalit of 9 August 2018 showed that HMRC had accepted that Mr Kharadi was making an appeal. In Mr Dar's submission, HMRC opened an enquiry into these matters in August 2018 and this caused the time limits for notification of the Tribunal to be suspended. He submitted that HMRC did not raise the issue of time limits for appealing, throughout the period of this enquiry. He argued that the trigger point for Mr Kharadi appealing to the Tribunal was the closing of this "enquiry" by HMRC's email of 9 April 2019 – and that Mr Kharadi had notified his appeal to the Tribunal promptly after that. Hence, his appeal was not out of time. Mr Dar also argued, in the alternative, that HMRC had in August 2019 commenced a review of the matters under appeal, which was concluded with their letter of 9 April 2019 – which, again, triggered the 30 day deadline for the appeal to be notified to the Tribunal.

32. Ms Davis submitted that the appeal was out of time, because the documents notifying Mr Kharadi of the matters under appeal were dated in June and September 2016. She urged the Tribunal to refuse permission to appeal out of time, applying the principles in *Martland*, as no reasonable excuse for the long delay had been demonstrated.

DISCUSSION

33. We first consider whether Mr Kharadi's appeal required the Tribunal's permission to be made out of time.

34. Section 83G sets out deadlines for making appeals under s83. Both matters being appealed by Mr Kharadi are therefore governed by s83G: the VAT registration matter is governed by it because it is an appeal made under s83; and the penalty matter is also governed by it, because such appeals are to be treated in the same way as an appeal against an assessment to VAT (the relevant tax here) (see paragraph 18 Schedule 41 Finance Act 2008).

35. Under sub-section 83G(1), Mr Kharadi's appeal should have been made before the period of 30 days ending with the date of the document notifying the decision to which the appeal relates. We consider that the decisions in respect of both matters being appealled were those taken by HMRC in 2016 and evidenced by their letters to Mr Kharadi of 10 June and 5 September of that year. In contrast, the decision made by HMRC in their email of 9 April 2019 was not in respect of the matters being appealed to the Tribunal by Mr Kharadi; rather, that decision was in respect of a request by Mr Kharadi's accountants to reconsider the decisions made by HMRC in 2016. The accountants referred to that request in their 2018 letters as an "appeal" to HMRC – this was an incorrect use of that term, as VAT appeals lie to the Tribunal, not to HMRC.

36. We have considered whether HMRC's letters to Mr Kharadi of 10 June and 5 September 2016 were documents "notifying" HMRC's 2016 decisions (being the decisions to which Mr Kharadi's appeal relates), given that they were sent to addresses where Mr Kharadi did not live. We considered section 98, and whether the letters had been sent to Mr Kharadi at his last or usual residence or place of business. In our view the 10 June 2016 was sent to Mr Kharadi's last address – we have found that he was living at an address in Cowley Rd, Oxford, at the date of the letter, but his immediate previous address was 67 Howard St, Oxford, the address to which the 10 June letter was sent.

37. In contrast, the Asquith Rd address to which the letter of 5 September 2016 was addressed, was neither where Mr Kharadi was living at the time, nor his immediately previous address. We find therefore that the 5 September 2016 letter was not the document notifying HMRC's 2016 penalty decision to Mr Kharadi. Rather, it was the was the "statutory demand" dated 5 July 2018 which was the document notifying Mr Kharadi of HMRC's 2016 decision on penalties. We note that this document did not offer a review of that decision – and so HMRC did not satisfy the requirement of sub-section 83A(2) (to offer a review at the same time as the decision is notified) in respect of the penalty decision.

38. It follows, under sub-section 83G(1), that Mr Kharadi's appeal to the Tribunal in respect of his registration to VAT should have been made by 10 July 2016; whereas his appeal to the Tribunal against the penalties should have been made by 5 August 2018. As neither appeal was made by the date in question, both appeals may only be made if the Tribunal gives permission to do so (see sub-section 83G(6)).

39. We note that sub-section 83G(1) is subject to, inter alia, sub-section 83G(4), which can have the effect of extending the deadline for making an appeal where (i) a request for a review out of time under s83E has been made by the appellant and (ii) HMRC have notified the appellant that a review will be undertaken (see sub-section 83G(4)(b)). We find neither of those things happened here:

> (1) Neither Mr Kharadi nor his accountants notified HMRC in writing requesting a review out of time, as required by s83E(2)(a). (The fact that HMRC's email of 9 April 2019 suggests that HMRC may have regarded such a request as having been made – it referred to Mr Kharadi failing to show that he had a "reasonable excuse" (which is the criterion for HMRC accepting such a request, if it has been requested in writing– see sub-section 83E(2)(b)), and contained a link to the HMRC manual on late acceptance of a review offer) - does not alter our finding on this point of fact).
>
> (2) Nor did HMRC notify Mr Kharadi that a review would be undertaken, as required by sub-section 83G(4)(a)(ii).

40. Accordingly Mr Kharadi's appeals in respect of the two matters may only be made if the Tribunal gives permission to do so under sub-section 83G(6).

41. It will be apparent from the foregoing that we see no basis in law for Mr Dar's argument that the opening of an "enquiry" by HMRC suspends the operation of the statutory deadlines for notifying the Tribunal of s83 VAT appeals.

42. In deciding whether to give permission, we apply the guidance in *Martland*, as follows.

Length of the delay

43. The delay in this case was 2¾ years in respect of the appeal against VAT registration and just over 8 months in respect of the penalty appeal. Both are serious and significant delays.

Reasons why the default occurred

44. The initial reason for Mr Kharadi not notifying an appeal against compulsory VAT registration within 30 days of the letter dated 10 June 2016 was that he did not receive the letter and was unaware of its contents.

45. This reason for delay ceased once Mr Kharadi received the "statutory demand" in July 2018: from this point he was aware of the VAT assessment, as well as the penalties. At that point he appointed Fradalit to deal with both these matters on his behalf. It appears from the correspondence that the reason Fradalit did not notify an appeal to the Tribunal – or request an out of time review by HMRC – on both matters straight away, was that they were under the

impression that they could pursue what their letters called an "appeal" to HMRC. As we have already noted at [35] above, this was not actually an "appeal," as VAT appeals lie to the Tribunal, not to HMRC. Rather, Fradalit's actions were an attempt, via evidence and argument, to persuade HMRC to reverse the compulsory VAT registration and penalties for the Period. Fradalit appeared to believe that, if HMRC refused to change their mind at the end of this "appeal" process, Mr Kharadi would then be able to appeal to the Tribunal against that decision within statutory time limits. This, for the avoidance of doubt, was an incorrect belief.

Evaluation of all the circumstances of the case

46. We now proceed to a balancing exercise, weighing up the merits of the reasons for delay outlined immediately above against the respective prejudice to the parties of our granting or refusing permission; and recalling

> (1) the starting point that permission should not be granted unless the Tribunal is satisfied on balance that it should be; and
>
> (2) the particular importance of statutory time limits being respected.

47. The prejudice to Mr Kharadi of our refusing permission for a late appeal would be the financial loss of his losing any right of appeal. The prejudice to HMRC of our giving permission would be the same financial considerations (although obviously of far less relative financial significance to HMRC than to Mr Kharadi) as well as the need to devote resources to preparing the case.

48. The underlying cases of the parties revolve around the factual point of whether it was Mr Kharadi, or a limited company, that was carrying on the business in question: neither side's case is obviously very strong or very weak; and so this is a neutral factor in the overall assessment of whether to give permission for a late appeal.

49. As regards the initial two-year delay, up to the point of receiving the "statutory demand", in the making of Mr Kharadi's VAT registration appeal, we see considerable merit in the reason given – that Mr Kharadi was unaware of the matter in respect of which he might have made an appeal.

50. As regards the eight month delay from August 2018 to April 2019 in respect of both the VAT registration and penalty appeals, we have set out above the reasons for Fradalit's failure to notify the Tribunal of the appeal immediately upon receiving the "statutory demand". In our view, Fradalit misapprehended the workings of s83 and s83G, under which appeals lie to the Tribunal. (It appears from the correspondence that Fradalit may have been thinking of the procedures on income tax appeals – for example, they cited s55 Taxes Management Act 1970 in their letter of 1 August 2018 – this is an income tax provision). What Fradalit's letters called an "appeal" to HMRC, was no such thing – it was simply an attempt to persuade HMRC to change their mind – such that, when they confirmed their refusal to do so in April 2019, prompting Mr Kharadi to notify his appeal to the Tribunal, it was eight months after (i) the expiry of his earlier meritorious reason for not notifying the VAT registration appeal; and (ii) the deadline under sub-section 83G(1) for the penalty appeal.

51. We would not ordinarily regard a misapprehension of the VAT appeal process on the part of one's accountants as a good reason for eight months' delay in making an appeal. There were numerous ways Mr Kharadi and/or his accountants could have discovered the statutory deadlines for VAT appeals – the position was succinctly summarised in the HMRC letters of June and September 2016 (which, whilst not received by Mr Kharadi originally, could have been requested from HMRC in copy), not to mention HMRC's website or consulting an adviser with experience of VAT appeals.

52. We acknowledge that Fradalit pursued the argument with HMRC over the eight month period reasonably conscientiously; and that they notified the appeal to the Tribunal promptly upon being told that HMRC would not overturn the decisions made in 2016. This does not, however, improve what we regard as a weak reason for the eight-month delay.

53. We note HMRC's email to Fradalit of 9 August 2018 stating that action would be delayed until the "appeal" was settled. This was inaccurately expressed; in our view, HMRC should have realised the erroneous use of the term "appeal" in Fradalit's 1 August 2018 letter and used correct terminology in response – indeed, it appears that a later letter from HMRC, in December 2018, did explain that VAT appeals need to be made to the Tribunal under statutory deadlines. HMRC's 9 August 2018 email was thus arguably an indirect reason for the delay continuing: if HMRC had clarified VAT appeal procedure to Fradalit at this stage, Fradalit might have notified the appeal to the Tribunal earlier. But the fundamental point remains that it is for taxpayers in disputes with HMRC to inform themselves on a basic point of law such as the procedure for making a VAT appeal. The reason for Mr Kharadi's eight-month delay is not, in our view, strengthened by the fact that a more accurate response from HMRC on 9 August 2018 might have prompted an earlier appeal to the Tribunal.

54. The fact that HMRC subsequently engaged in correspondence with Fradalit about the underlying VAT issues and referred to their interaction as an "enquiry" does not, for similar reasons, strengthen the reasons for the eight-month delay in our view: the fact that HMRC appeared to be open to negotiation has no bearing on the VAT appeal procedure. Indeed, HMRC's December 2018 letter, which apparently informed Fradalit of the requirement to notify the Tribunal of any appeal (and that permission would be required), triggered a fighting response in Fradalit's 2 January 2019 letter – but did not cause them to change their course of waiting until the end of their negotiations with HMRC before notifying the Tribunal (a further three month delay).

55. We further note that

(1) As noted at [37] above, HMRC failed in their statutory duty to offer Mr Kharadi a review at the same time as notifying him of the penalties; and

(2) the position would have been quite different if Fradalit had made a written request for a review out of time (in respect of both matters under appeal) under sub-section 83E(2)(a). Had they done so (contrary to our findings at [39] above), no appeal could have been made until HMRC notified whether or not a review would be undertaken (sub-section 83G(4)(a)(i)).

56. Although argument was not advanced by Mr Dar that responsibility for the eight-month delay should not lie with Mr Kharadi, as it was a failure of his advisers, we have considered this as a possible argument in his favour. We note, however, the Upper Tribunal's observation in *HMRC v Katib* [2019] STC 2106 at [54], that failures by a litigant's adviser should generally be treated as failures by the litigant. Particular circumstances can displace this general rule: in this case, however, we have no evidence of the interaction between Mr Kharadi and Fradalit, and so little on which to base a departure from this general principle.

57. In summary, the particular factors we weigh in the balance here are:

(1) A strong reason for the initial two-year delay in appealing the VAT registration matter to the Tribunal;

(2) A weak reason for the subsequent eight-month delay in appealing both the VAT registration matter and the penalty matter to the Tribunal;

(3) Eight months is a significant and serious delay;

(4) HMRC's failure in its statutory duty to offer a review at the same time as notifying Mr Kharadi of the penalties – and the fact that that a request for a review out of time would have "stopped the clock" on the appeal process;

(5) The serious financial consequences to Mr Kharadi of losing the appeal; and

(6) The particular importance of respecting statutory time limits.

58. Our decision is to refuse permission under sub-section 83G(6) for the out of time appeal in respect of the VAT registration matter – on the basis that the reason for the delay has little merit – but to give permission under sub-section 83G(6) for the out of time appeal in respect of the penalties, as the failure by HMRC to offer a review in the manner required by statute is a serious matter and tips the balance in favour of making an exception to the time limit set down in sub-section 83G(1).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. 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.

ZACHARY CITRON

TRIBUNAL JUDGE

RELEASE DATE: 23 APRIL 2020