[2018] UKFTT 0300 (TC)

TC06530

Appeal number: TC/2016/03833
TC/2016/03836

PROCEDURE – application to reinstate appeal – Rule 17 of the Tribunal Rules 2009 – application being out of time –* Pierhead Purchasing Limited *considered – relevant criteria for consideration – reasons for delay – the effect on legal certainty – prejudice to parties – merits of the appeal – applications refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

FOX McMASTER SURVEYORS LTD **Applicants**

CHRISTOPHER ENGLISH

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Tribunal Centre, Eagle Building, 215 Bothwell Street Glasgow, on 29 November 2017

On request for a Full Decision by the applicants after the issue of the Summary Decision dated 28 February 2018

Mr Ken Tait, for the Applicants, and Mr English in attendance

Mr Matthew Mason, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. On 15 July 2016, the Tribunals Service received Notices of Appeal from Fox Master Surveyors Limited and its director Mr Christopher English. The date on the Notices (month illegible) would appear to be 30 June 2016.

2. These Notices of Appeal are treated as applications (henceforth "the application") to reinstate the original appeal listed for hearing on 19 February 2009 before the General Commissioners. The appealable decisions stated on the Notices of Appeal are dated 4 September 2007 and 10 January 2008, and are the same decisions for the substantive appeal due to be heard by the General Commissioners. (It would seem that there was only one appeal before the Commissioners in relation to matters that concerned both appellants.)

3. By letter dated 28 January 2009, the appeal was withdrawn by Mr Ken Tait, chartered accountant to the appellants, and their representative in those proceedings. The hearing scheduled on 19 February 2009 never went ahead.

4. The timing of the Notices of Appeal being lodged would appear to coincide with the escalating enforcement proceedings by HMRC Debt Management to collect the sums of tax that were appealed to the Commissioners.

5. The interlocutory hearing on 29 November 2017 was for the sole purpose of considering whether the appeals being re-lodged now with the Tribunals Service by Notices received on 15 July 2016 can be reinstated.

The request for 'full written findings and reasons'

6. The decision to refuse reinstatement of the appeals was announced at the end of the interlocutory hearing. I explained to the parties that on the principle of legal certainty, and given that nearly nine years have elapsed since the withdrawal notice, there can be no conceivable basis that the matters can be re-litigated.

7. It was also stated my intention to issue only a summary decision to dispose of the proceedings. A four-page summary decision was issued on 28 February 2018, refusing the applications to reinstate the appeals.

8. By email dated 28 March 2018, Mr Tait applied for a decision with full written findings and reasons. This is the full decision. Although Fox McMaster Ltd and Mr English were applicants for present purposes, they were the appellants for the appeal listed for hearing in 2009. I refer to them as the "appellants" in this Decision.

Documents and representations

9. For the appellants, Mr Tait lodged documents in excess of 500 pages by several batches of electronic submissions to the Tribunals Service. Most of the documents

relating to the substantive matters are dated over 10 years ago in 2006 and 2007, followed by documents in relation to the appeal in 2009, and then the protracted correspondence between the appellants and HMRC under the complaints procedure since the withdrawal to the re-lodgement of the appeal with the Tribunal.

10. The printing of 500 plus documents and delivery by post to the hearing judge were effected at some considerable costs to the public purse.

11. For the respondents, Mr Mason informed the Tribunal that he could no longer locate the Inspector's case file, and believed that the papers would have been destroyed following the withdrawal of the appeal some nine years ago, and in accordance with HMRC's data retention policy. Mr Mason was able to locate the "Appeal File", which contained only those pieces of correspondence in relation to the appeal proceedings in front of the Commissioners, including the notice of withdrawal by Mr Tait dated 28 January 2009.

12. Mr Tait made representations on behalf of the appellants at the interlocutory hearing, which was attended by Mr English in person. Mr Mason represented HMRC. No evidence was led by either party.

Applicable law

13. The application for reinstatement is considered with reference to the law that is applicable at the time of the application, even though I am conscious that the original appeal was brought before the General Commissioners, whose functions have since been replaced by the First-tier Tribunal (Tax Chamber).

14. The procedural provisions for considering this application therefore come under the Tribunal Procedural (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the Tribunal Rules). Rule 17 provides specifically for withdrawal and reinstatement of an appeal as follows:

> "**Withdrawal**
>
> 17 (1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case –
>
> (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each other party in writing of a withdrawal under this rule.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after –.

(a) the date the Tribunal received the notice under paragraph (1)(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

15. As with any other tribunal rules, Rule 17 is to be considered in conjunction with the overriding objective under Rule 2, which is "to deal with cases fairly and justly", which includes –

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

16. On withdrawal of the appeal in 2009, the assessments to which the appeal related were treated as settled by agreement under section 54 (4) of the Taxes Management Act 1970 ('TMA'), which provides as follows:

> "(4) Where –
>
> (a) a person who has given a notice of appeal notifies the inspector or other proper officer of the Crown, whether orally or in writing, that he desirers not to proceed with the appeal; and
>
> (b) thirty days have elapsed since the giving of the notification without the inspector or other proper officer giving to the appellant notice in writing indicating that he is unwilling that the appeal should be treated as withdrawn,
>
> the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and the inspector or other proper officer had come to an agreement, orally or in writing, as the case may be, that the assessment or decision under appeal should be upheld without variation."

Factual background

The matters in dispute

17. The business of Fox McMaster is to provide services as a chartered surveyor and its sole director at the material times was Mr Christopher English.

18. The matters under appeal to be heard by the General Commissioners were:

(1) For Fox McMaster ('the company'), the matter was whether the Land Rover Defender owned by Fox McMaster should be classified as a commercial (trade) vehicle or a private vehicle. HMRC contended that the said vehicle was a private vehicle for income tax purposes, and as such, the provision of its use to its director gave rise to benefits in kind for car and fuel on which Class 1A NIC was payable by Fox McMaster as the employer.

(2) For Mr English as the recipient of these benefit provisions, HMRC's ruling on the vehicle classification gave rise to income tax liabilities for the assessable car and fuel benefits.

19. The appealable decisions from HMRC assessing Fox McMaster to a total of £5,615 for Employers' Class 1A NIC were in relation to a few company vehicles made available to employees, and included the Land Rover Defender used by Mr English. The decisions were dated:

(1) 4 September 2007, assessment to Class 1A NIC for £3,165 for the period from 1 June 2004 to 5 April 2006;

(2) 10 January 2008, assessment to Class 1 A NIC for £1,450 for the year to 5 April 2007.

20. For Mr English, assessments to income tax were raised in January 2009 under sections 28A and 29 of the Taxes Management Act 1970 in the region of £16,500 in relation to car and fuel benefits in the years from 2004-05 to 2007-08.

Mr Tait's representations

21. A proposal to amend Fox McMaster's annual accounts was made by Mr Tait after the raising of the assessments on the company and Mr English. Mr Tait referred to the amendments as 'restating' the accounts, so as to remove all accounting entries relating to the Land Rover Defender as owned by the company in Fox McMaster's accounts, and for a director's loan account to be set up to account for the indebtedness by Mr English to the company in relation to the costs of Land Rover Defender and fuel.

22. Mr Tait further explained that the proposal to restate the company accounts would give rise to an increase in profits, resulting in higher corporation tax, but the re-statement would remove the tax consequences under the benefits code for both the company and Mr English in relation to the provision of the Land Rover Defender.

Appeals and written withdrawal before hearing in front of the Commissioners

23. In parallel with the proposal to restate the company's accounts, in-time appeal was lodged for both Fox McMaster and Mr English at the time, and the appeal was listed to be heard by the then General Commissioners on 19 February 2009.

24. Mr Mason provided the Tribunal with two notes of telephone communications from HMRC's "Appeal File"; the file notes were made by Mr Daley, the Tax Inspector that was handling the appeal in front of the Commissioners.

25. The first note of call was on 4 December 2008, when Mr Daley telephoned Mr Tait to explain that if the appeal was not heard by 31 March 2009, it would be heard by the new tribunal system. Over the substantive issues of the appeal, Mr Daley advised that the Special Commissioners' Decision 495 in *County Pharmacy Ltd v HMRC* was similar to the appeal of Fox McMaster Surveyors Ltd:

> "... that the grounds for appeal for Fox McMaster Surveyors Ltd was similar to that of Country Pharmacy Ltd and this case had gone to the High Court and HMRC's arguments had prevailed and the appeal had been dismissed."

26. In relation to the decision of *County Pharmacy*, Mr Daley also mentioned HMRC manual EIM23049, "which specifically mentioned motor homes and the Land Rover Discovery Station Wagons".

27. Mr Daley continued by suggesting the following:

> "Given the time constraints and the fact that the case was now being put forward probably to the new tribunal system I suggested to Mr Tait that I sent him a copy of the Special Commissioners Decision and requested that he also look again at EIM23049. I felt that the arguments and the information contained within this information would be sufficient to persuade Mr England [sic] the director in this case, to reconsider his viewpoint."

28. Mr Daley's telephone note then related what Mr Tait said about the amendments to the company accounts:

> "Mr Tait stated that the accounts had been submitted in this case with provisional figures only and that he would now reconsider my suggestions today and would perhaps contact the local inspector with a view to amending the accounts to final figure to include a claim to capital allowances for the Land Rover Discovery Station Wagon. I advised Mr Tait that that was something for him to consider and that I could not possibly comment on these proposals and that I was merely interested in the open appeal in this case."

29. Mr Daley's note concluded by noting the formal procedure in the event of a withdrawal of appeal:

> I suggested to him that if on reflection his client no longer wished to pursue this matter then he should let me have a formal withdrawal of the appeal in writing."

30. On 10 December 2008, Mr Tait called Mr Daley and the note of call was made by Mr Daley to relate the following:

> "[Mr Tait] said he had now spoken to a Mr Foyer at Hamilton tax office and [Mr Foyer] had no problems with Mr Tait now supplying amended accounts in relation to the limited company.

> Furthermore he had now read the tax case ... and also referred to the specific instructions at EIM23049. As a consequence it was now his intention to contact the director in this case and recommend to him that he withdraw his appeal.
>
> Indeed as a result of the amendments to the limited company accounts the position would be that the company will not be supplying the vehicle and all expenses claimed in respect of journeys in this car can be excluded. Mr Tait appreciated that the company will now have additional tax to pay as a consequence of these adjustments.
>
> Mr Tait asked why this tax case had not been brought to his attention before now. I said it had been given to me by Mr Hone last week and this High Court decision had been reached sometime after the Employer Compliance review had commenced.
>
> The Accountant [ie Mr Tait] will try and make contact with Mr England [sic] this afternoon and he will also telephone Irene Ray [the Employer Compliance Officer opening the enquiry into the company] and advise her of the developments in this case."

31. By letter dated 28 January 2009, Mr Tait wrote to HMRC Local Compliance Appeals at 200 West Regent Street in Glasgow as follows:

> "On behalf of the above client [Fox McMaster], I would like to withdraw the appeal due to be heard on 19th February in front of the General Commissioners".

32. By letter dated 6 February 2009, Mr Daley replied to Mr Tait as follows:

> "Thank you for your letter of 28 January 2009.
>
> In accordance with Section 54 4(b) Taxes Management Act 1970 I formally acknowledge the withdrawal of your client's appeal. I have notified the Clerk to the Commissioners of your client's decision and asked that the meeting scheduled for the nineteenth of this month is now cancelled."

Correspondence with HMRC after withdrawal of the appeal

33. Numerous letters were written, and some as a formal complaint, to hold off the enforcement proceedings following the withdrawal of the appeal. This set of correspondence spanned the years from 2009 to recent time when the appeal was re-lodged with the Tribunal in July 2016.

34. Mr Tait's letter 1 October 2010 in response to Debt Management's actions on Mr English is representative of the essence of this set of correspondence:

> "My client bought a vehicle described by the manufacturer and accepted by Customs as a commercial vehicle. However, after a PAYE investigation, HMRC assessed it as a passenger car and as such raised an assessment as a benefit in kind. We were informed that if we took the case to the commissioners and the decision went against HMRC that they would go to, if need be, the Court of Session regarding an appeal. To contest this would not have been commercially viable for

> my client. It was then our intention for this vehicle to be removed completely from the company as an asset and for our client to reimburse the costs to the company in full. If this happens, then the amount on recovery action should nearly be removed completely. I have tried to get a revenue instruction regarding this course of action but to date do not have one."

The application to reinstate the appeal

35. The grounds for notifying the appeal late (in Mr Tait's handwriting) are stated as follows:

> "All documents sent to tribunal over last 10 years will show how progress was not made of Full review in letter from HMRC of 21/7/11 not answered till 18/8/14 [illegible] later dated. Meeting was requested but never agreed."

36. The grounds of appeal, in typed font, fill the A4 page on Notice of Appeal received in July 2016, and are summarized as follows:

> (1) The Land Rover Defender in question (110 County Station Wagon XS model) received required confirmation in a fax named: Bulletin C2179 from Land Rover and this model has a load capacity of 1045 kg and is able to reclaim 100% VAT in compliance with HMRC's agreement with the manufacturers.
>
> (2) The Compliance Officer Irene Ray did not know what a Defender was and wrongly assumed that it was a luxury vehicle like a Range Rover.
>
> (3) She and her colleague Alex Kenny made this admission during meeting on 15 May 2007 in which Mr Kenny confirmed verbally that our vehicle was a "commercial vehicle" after they viewed the vehicle in the car park and were shown the chassis plate confirming the weight limits and capacity under the bonnet.
>
> (4) "The notes submitted dated 25 May 2007, of minutes of this meeting Irene Ray and Alex Kenny do not accurately record what was said. This was pointed out to them in writing by us. HMRC completely and consistently decline to accept clear and irrefutable evidence as regards their advice and the factor fitted compliance this vehicle had."
>
> (5) "We offered to remove all trace of this vehicle from our accounts and I would simply claim mileage allowance based upon the business mileage, however HMRC has seen fit to avoid this question and has never replied to date. Last letter sent on this matter on 1st October 2010 which remains unanswered.
>
> (6) This matter has gone on now for ten years. It has caused untold stress and strain on many relationships with my family and also has hindered my business.

37. For "Result", Mr Tait stated in box 8 of the appeal form that:

> "The result should have been that either HMRC agreed with Customs and Excise treatment or clear instructions should have been given by HMRC to the request to restate the accounts."

Representations for the appellants at the hearing

38. From the representations at the hearing, it would appear that Mr Tait thought at the time of his discussion with Mr Foyer on 10 December 2008, he had obtained permission to amend the company accounts, which would have the effect of reversing the tax assessments under appeal.

39. It would seem that since the withdrawal of the appeal in January 2009, the parties had been at loggerheads over the tax liabilities for those years of assessment. HMRC have been enforcing payment for the same sums of tax that were under appeal before the Commissioners, while the appellants argued that the sums of tax payable should be reduced in accordance with the amendments to the accounts.

40. The ongoing disagreement that lasted for nearly nine years has been the subject matter of protracted internal complaints procedure under HMRC, and was part of the contents of the correspondence in the 500 plus documents submitted for this hearing.

HMRC's objection to the application

41. Mr Mason submitted that the appeal was formally withdrawn and HMRC have closed the file. Officers have moved on, and it is not clear what the grounds of reinstatement are. To reinstate the appeal after a gap of nearly a decade would pose severe prejudice to HMRC.

Discussion

Relevant criteria for consideration

42. The relevant criteria for considering a reinstatement application made out of time are summarised by Mrs Justice Proudman in the Upper Tribunal decision of *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321 (TCC) at [23]:

> "Although as I have said, there is no guidance in the rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9(1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56]-[57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were,
>
> - The reasons for the delay, that is to say, whether there is a good reason for it.
> - Whether HMRC would be prejudiced by reinstatement.
> - Loss to the appellant if reinstatement were refused.

- The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
- Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained."

43. Mrs Justice Proudman continued at [24] by qualifying the approach in the following terms:

> "I was asked ... to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to the Tribunals in any event) does not exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective."

Fundamental misunderstanding of the implications in restating the accounts

44. As I understand it, Mr Tait believes his proposal to "restate the accounts" for tax purposes would remove the Land Rover Defender from the asset register of the company and to create a director's loan balance for the cost of the vehicle. While removing the vehicle as a company asset would result in higher profits for corporation tax, as the company could no longer claim the capital allowances on the vehicle, the company would not be liable to the Class 1A NIC in relation to the Land Rover Defender. (The appellants do not seem to contend that Class 1A liabilities in connection with the provision of vehicles to other employees as due.)

45. More importantly, Mr Tait considered his proposal would consequently remove the tax liabilities under the discovery assessments for the years 2004-05 to 2007-08 for Mr English in the total sum of £16,500.

46. From Inspector Daley's notes of call of 4 and 10 December 2008, a fundamental misunderstanding on the part of Mr Tait would seem to have arisen as regards his proposal to restate the accounts, and of the consequential effects he believed the proposal would have on the tax assessments under appeal.

47. It was clear from Inspector Daley's statement that he could not possibly comment on Mr Tait's proposal, and that he was "merely interested in the open appeal in this case". Inspector Daley did not make any connection between the proposal to restate the accounts and the figures in the tax assessments under appeal.

48. I am equally clear that Inspector Foyer would not consider what was being discussed by way of restating the accounts was intended to remove the tax assessments that were under appeal. Inspector Foyer was giving clearance for a set of accounts still to be finalised and submitted to be restated in a certain way; he was not

involved in the appeal that had its origin in a PAYE investigation; he would say that he could not comment on how restating the accounts for the said year would affect the assessments under appeal.

49. The tax assessments on Mr English are in relation to the years 2004-05 to 2007-08, with one assessment being under s 28A TMA following a s 9A enquiry, and the other years being discovery assessments under s 29 TMA.

50. In terms of the timing of Mr Tait's proposal in December 2008, and inferring from his reference that the figures in the accounts were still provisional, Mr Tait was probably proposing to restate the year of Fox McMaster's accounts falling due for assessment in the tax year 2008-09, which would be outwith all those years of tax assessments under appeal for Mr English.

51. The discovery assessments on Mr English were raised in accordance with the arrangements between the employer and the director for those relevant years. The tax treatments follow from the contemporaneous arrangements and the parties' intentions at the time. The proposal to restate the accounts for a later year did not and could not *re-characterise* the arrangements that were in place for the earlier years for tax purposes. What happened historically was the basis for the tax assessments appealed. The tax assessments cannot be reversed by retrospectively by restating the accounts in a later year.

The assessments under appeal are "settled" by statute following withdrawal

52. The protracted course of correspondence between Mr Tait and HMRC since the withdrawal notice of the appeal before the Commissioners reveals another misunderstanding on the part of Mr Tait.

53. While Mr Tait had formally withdrawn the appeal for the appellants, he does not seem to accept that the tax assessments to which the appeal related have been deemed as agreed between the parties. The statutory consequences of a withdrawal before an appeal was heard are clearly set out under s 54(4) of TMA.

54. From HMRC's perspective, the appeal before the Commissioners was unequivocally withdrawn. The statute provides that s 54(4) agreement is now in place, which means those assessments that were the subject matter of the 2009 appeal were upheld. The enforcement proceedings follow therefrom to seek the respective sums of £5,615 and £16,500 from Fox McMaster Ltd and Mr English.

55. Mr Tait and the appellants do not seem to appreciate the inevitable legal consequences ensuing from the withdrawal of the appeal: the sums of tax charged by those assessments under the 2009 appeal were held good and became payable.

56. The complaints procedure was then used to deal with Mr Tait's misguided notion that the amounts of assessment can still be contested. Mr Tait's letter of 1 October 2010 (at §34) is indicative of the extent of the misconceived notion under which Mr Tait has been resisting the enforcement proceedings, and complaining about

HMRC not replying to his letters. This misconception would seem to stem from Mr Tait's misunderstanding that by restating the accounts, the tax assessments under appeal would have been reduced or nullified.

57. The tax assessments under appeal could only have been varied by the General Commissioners: no statutory provisions can reverse the assessments that are now held as "agreed" under s 54(4) TMA by dint of the withdrawal.

58. The withdrawal of the appeal by notice of 28 January 2009 has the legal effect of sealing the sums of the tax assessments for enforcement purposes; in other words, the tax assessments are "set in stone" as a s 54(4) agreement. Despite the internal complaints procedure, no statutory provisions can now be invoked to re-consider Mr Tait's arguments to vary those amounts. There is simply no statutory provision for HMRC to engage any more with the substantive issues of the dispute regarding the assessments that are procedurally "settled" by a s 54 agreement. It is for this reason why no officer within HMRC has properly engaged with the substance of Mr Tait's complaints, which amount to re-opening the matter of dispute.

The merits of the substantive appeal

59. In view of the fact that the appellants would probably feel aggrieved to have withdrawn the appeal based on the misunderstanding that restating the accounts could have reversed the tax assessments under appeal, I give my assessment of the prospect of the appeal succeeding, even if the appeal were to be reinstated.

60. The main ground of appeal from the appellants is that the vehicle was classified as a "commercial" vehicle by Customs and Excise, and consequently, 100% input VAT was recoverable. The vehicle was therefore not a "private" vehicle that could give rise to an income tax charge as a benefit in kind.

61. This was the ground in front of the Commissioners, and continued to be the ground in resisting Debt Management's enforcement actions, and remains the ground stated in the grounds of appeal lodged with the Tribunal.

62. The decision of *County Pharmacy* makes it clear that the definition of a vehicle for VAT purposes has no bearing on the definition of a vehicle for income tax purposes under the benefits code. The rationale of the benefits code is to treat the equivalent in cash value for the provision of benefits by an employer to an employee as part of his earnings. If a vehicle is provided, the classification of it being a "commercial" vehicle for VAT purposes does not detract from the fact that it can still be a vehicle provided for "private" use of the employee.

63. The determining factor is usage under the benefits code. Where usage is not wholly related to business, then there is private usage. Where there is private usage, then there is a benefit in kind arising for the provision of such a vehicle from the employer. The determining factor being on usage means it does not matter how the vehicle is being classified for VAT purposes: a commercial vehicle like a transit van

for VAT purposes can still be a vehicle with "private" usage for the benefits code for income tax purposes.

64. It was not disputed that the Land Rover Defender was used by Mr English for private purposes. Mr Tait's contention is that HMRC should be consistent in treating the vehicle as commercial for both income tax and VAT purposes. There is no statutory basis for this assertion of consistency. Since it would appear to be common ground that there was private usage of the vehicle, it follows that there was provision of a benefit by the company to Mr English and income tax charges under the benefits code ensued. In my judgment, therefore, there is no reasonable prospect of Mr English's appeal succeeding, even if it were reinstated.

65. As to Fox McMaster's appeal, to recover the input VAT must have been a key factor in placing the vehicle in the company's ownership, since Mr English would not have been able to recover the VAT as a private individual. That was a decision taken at the time with tax consequences. No amount of restating the accounts in a later year can rewrite the historical arrangements and intentions that were in place in construing the tax consequences applicable to those years for which assessments had been raised. In my judgment, there is no prospect of the appeal by the company succeeding either.

Legal certainty and prejudice to good administration of justice

66. For procedural reasons, and as explained to Mr Tait and Mr English at the hearing, the principle of legal certainty demands that parties to a potential litigation know their position at any one point in time. It is paramount for the court system, for justice, and for proper closure to a disputed matter, that time limits for bringing an appeal are strictly adhered to by a party wishing to seek justice at the court.

67. Rule 17 of the Tribunal Rules states the period of 28 days after a notice of withdrawal to be the window for an application for reinstatement of an appeal to be made. In the present case, the withdrawal notice was dated 28 January 2009, which means an in-time application for reinstatement had to be made by 25 February 2009.

68. The present application was received on 15 July 2016 by the Tribunal, over seven years after the expiry of the time limit to apply for reinstatement.

69. Procedurally, there can be no basis to entertain an application that is so significantly out of time.

70. If time limits were to be overridden lightly, there could be no proper closure to any disputed matter. The justice system would be brought under severe pressure if it had to deal with innumerable stale claims, along with the live claims proceeding within the normal time limits. It would also cause considerable prejudice to the other party, who has quite properly considered the matter as closed after the expiry of the relevant time limit to reinstate an appeal.

71. The relevant appeal could have been heard in front of the General Commissioners on 19 February 2009. That was the time for any evidence to be heard and substantive issues to be argued in relation to the disputed matters.

72. The letter of 28 January 2009 by Mr Tait to withdraw the appeals had proper legal consequences. Mr Tait was the authorised representative for those appeals, and his written withdrawal was accorded with the due legal effect.

73. Nine years on, when the application was heard by me in November 2017, there simply can be no basis for reinstating the appeals, especially when a proper opportunity had been given at the time.

74. Briefly I have heard the complaints against HMRC in relation to these matters that were under appeal, which as far as the appellants are concerned, remain unresolved. These causes of complaints would seem to be related to the erroneous belief held by Mr Tait of the "expected" effects the restating of the accounts for the said year could have on the tax assessments that were under appeal. These causes of complaints do not give rise to any grounds to reinstate the appeals, nor do they fall within the Tribunal's jurisdiction to adjudicate.

75. The written notice by Mr Tait's letter of 28 January 2009 has conferred certainty on the intention of the appellants to effect a withdrawal of the appeal. HMRC are entitled to consider the case as settled and closed when no application was made to reinstate the appeal in the 28-day period after the withdrawal.

76. While the delay of over seven years to reinstate the appeals was attributable to the erroneous beliefs held by the appellants that the tax assessments would be reversed following the restating of the accounts, I am aware that the appellants have had the service of Mr Tait, who is a chartered accountant with the commensurate qualification to advise on such matters.

77. I have regard to the severe prejudice to HMRC if the appeals were reinstated. The file papers for the substantive case destroyed, which means that HMRC cannot defend the case if the appeals were re-opened and would suffer prejudice. The Tribunal should give effect to the withdrawal notice as conferred by the statute, namely that the appeal has been settled by agreement under s 54 TMA.

78. The Tribunal's overriding objective is to deal with cases fairly and justly, not only the appellants', but also the respondents'. One aspect of fairness concerns the proportionate use of resources of the respondents as a party to litigation. HMRC that are already stretched should not be deployed to deal with cases that are quite properly considered as final and conclusive in law.

79. For similar reasons, the Tribunal's consideration of justice should also encompass a public interest dimension as respects the access to justice.

80. Master McCloud's dictum of what the overriding objective means after the *Jackson* reforms is at [59] in *Mitchell v News Group Newspapers Ltd* [2013] EWHC

2355 (QB) ('*Mitchell*'), and cited with approval by the Court of Appeal on appeal of the case in [2013] EWCA Civ 1537 at [17]:

> 'Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all. Per the Master of the Rolls in the 18th Lecture ...
>
> > "*The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgment that the achievement of justice means something different now*."'

81. With each day that passes after a stipulated time limit, the effect of legal certainty strengthens its hold. The principle of legal certainty is central to the administration of justice, without which there can be no finality in dispute resolution. Where there is no finality in litigation, there can be no ultimate enforcement of justice, and the legal system would cease to command the respect of all concerned.

82. On the principle of legal certainty alone, I refuse the application to reinstate the appeals. The party seeking to reinstate an appeal after the expiry of the time limit has a heavy onus, and the appellants have not met this onus. There are no compelling reasons to displace the principle of legal certainty to reinstate these appeals that were withdrawn over nine years ago. This is irrespective of the fact that in my judgment, the appeals have no reasonable prospect of success.

Decision

83. For the reasons stated, the appellants' application to reinstate the appeals is refused.

84. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 11 JUNE 2018