TC03552

Appeal number: TC/2012/07057

INCOME TAX – application for permission to make late appeals – principles to be applied by the Tribunal – new CPR 3.9 – whether efficiency, proportionate cost and compliance with rules outweighs other circumstances* – Mitchell, McCarthy & Stone *and* Chartwell Estate Agents *considered – held, Tribunal to balance the factors giving extra weight to compliance etc – delay of over a year in this case – no reasonable excuse – taxpayer and adviser both responsible for delay – disability of taxpayer – merits of little weight – consequences for HMRC – balancing exercise – application dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORMAN ARCHER **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR DUNCAN MCBRIDE

Sitting in public at 45 Bedford Square, London WC1B 3DN on 10 April 2014

Mr Solad S Mohammed of Abu Umar & Co for the Appellant

Mr Paul O'Reilly, of HM Revenue and Customs Appeals and Reviews Unit, for the Respondents

DECISION

1. This was Mr Archer's application for permission to make late appeals against closure notices amending his self-assessment tax returns for 2005-06 and 2006-07, and discovery assessments for the three years 2007-08 to 2009-10. The total extra tax was £28,708.96. Having considered the evidence and the relevant case law, the Tribunal refused Mr Archer's application.

The evidence

2. HMRC supplied a bundle of correspondence between the parties. Mr O'Reilly also provided a chronology of the HMRC enquiry into Mr Archer's SA tax returns for 2005-06 and 2006-07. Mr Archer gave oral evidence on oath and was cross-examined by Mr O'Reilly. We found him to be a credible witness, other than in respect of his evidence about communications between him and Mr Mohammed, which was inconsistent. We return to this further below.

3. On the basis of this evidence, the Tribunal makes the following findings of fact.

The facts

4. Mr Archer is self-employed businessman who suffers from diabetes. This caused him to lose his vision in one eye over ten years ago; the other eye is severely myopic. He can read large print with some difficulty. He has two hospital check-ups a year for his eye problems, but remains able to drive and run his business.

5. On 3 November 2007 HMRC opened enquiries into Mr Archer's 2005-06 tax return. They asked for certain business records, which were not provided. On 9 April 2008, HMRC imposed a penalty.

6. On 15 April 2008, Mr Archer made contact with HMRC by telephone and advised that he had difficulties with his sight. From then onwards HMRC issued all letters in large print. Mr Archer told us, and we accept, that he can always identify a letter from HMRC by the heading, and he invariably sends these letters to his accountant, Mr Mohammed.

7. Between April and December 2008, HMRC tried several times to arrange a meeting with Mr Archer but he was never available to meet with them at the times proposed.

8. On 19 December 2008, HMRC opened an enquiry into Mr Archer's 2006-07 SA return. Several further attempts were made to contact Mr Archer in the period from January to March 2009 with a view to arranging a meeting, but no response was received.

9. On 14 April 2009 Mr Mohammed replied. This was the first written communication sent to HMRC by or on behalf of Mr Archer in relation to either of the years under enquiry.

10. On 27 July 2009 HMRC requested copies of Mr Archer's personal bank statements, because the lodgements in his business bank accounts were in excess of the amounts declared as turnover in his SA returns.

11. On 17 August 2009 Mr Archer told the HMRC case worker that he had another property, which was rented out. On 23 September 2009 HMRC wrote asking for further details about the rented property and made a further request for a meeting.

12. On 29 September 2009 Mr Archer provided HMRC with a signed bank mandate allowing them to obtain copies of his personal bank statements.

13. On 17 June 2010, HMRC issued a Notice under Finance Act 2008, Schedule 36 ("the Schedule 36 Notice") to obtain details of Mr Archer's let property. On 16 August 2010, Mr Mohammed told HMRC that his let property had been purchased on 28 June 2006 and therefore was irrelevant to the enquiry into Mr Archer's 2005-06 return. On 25 August 2010, HMRC informed Mr Mohammed that the Land Registry records showed that the property had been purchased by Mr Archer in 2003 and remortaged in 2006.

14. At some point between August and October 2010, HMRC issued a £300 penalty for Mr Archer's failure to produce the records relating to his let property which were the subject of the Schedule 36 Notice.

15. In October 2010 Mr Archer advised HMRC that he was letting the rooms above his business premises.

16. On 12 January 2011, HMRC issued a penalty of £1,230 for failure to respond to the Schedule 36 Notice.

17. In February 2011, Mr Mohammed submitted a number of outstanding SA returns on behalf of Mr Archer.

18. On 26 May 2011, HMRC wrote to Mr Archer suggesting a basis on which the enquiries could be settled. On 15 September 2011, Mr Mohammed replied. He did not accept HMRC's suggested settlement offer.

19. On 20 October 2011, HMRC held their first meeting with Mr Archer. This led to revised settlement terms which were included in a letter from HMRC dated 31 October 2011 and repeated in a further letter from Mr Perry of HMRC dated 6 December 2011.

20. On 2 July 2012 Mr Mohammed replied to these letters, saying that the revised proposals were not accepted.

21. On 24 July 2012 Mr Perry set out the basis for amending the profits for the two years under enquiry. The main reason for the amendments was that the deposits in Mr Archer's bank accounts were more than £20,000 greater than his declared business turnover for each of the two years under enquiry. In addition, Mr Perry advised he

would be making discovery assessments for the tax years 2007-08, 2008-09 and 2009-10. Mr Perry did not receive a reply to this letter.

22. On 6 August 2012 Mr Perry issued closure notices amending the years under enquiry. He also made discovery assessments in reliance on the principle of continuity for the other three years.

23. In a covering letter which ran to over five pages, Mr Perry explained the basis for the closure notices and discovery assessments. He attached penalty notices for 2008-09 and 2009-10, as the earlier years were not within the penalty regime in Finance Act 2007, Schedule 24. Penalties were charged at a rate of 24.75% on the basis that Mr Archer had been "careless." However, Mr Perry suspended these penalties for a four month period, on conditions set out in the letter.

24. Under the heading "Appeal Process" he said:

> "If do not agree with my decision you can appeal against the decision. If you want to appeal you should write to me at [address] within 30 days of the date of this letter giving your reasons why you do not agree with my decision…if you appeal I will consider any further information you send me and try to reach agreement with you. If we cannot agree you can:
>
> - ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or
> - notify your appeal to an independent tribunal."

25. The final paragraph of his letter said:

> "if I do not hear from you within 30 days of the date of this letter, I will assume that you agree with my decision and your appeal will be treated as settled under Section 54(1) of the Taxes Management Act 1970 on the basis of my views of the matter as set out above. The tax chargeable based on my view will then be due and payable."

26. Attached to Mr Perry's letter were copies of guidance from HMRC's Enquiry Manual. The letter, together with the closure notices, discovery assessments and the attachments, were all copied to Mr Mohammed on the same day with a separate covering letter.

27. On 6 November 2012 an SA statement of account was sent to Mr Archer setting out his liabilities. On 21 November 2012, Mr Mohammed wrote to "HM Inspector of Taxes, Self-assessment…Newcastle". His letter read:[1]

> "With reference to your letter dated 6th November 2012, please note that all tax due is based on estimate, therefore can we suggest to make it nil and provide us full break downs."

[1] All extracts from correspondence between the parties is cited verbatim.

28. On 6 December 2012 Mr Powner of HMRC's SA Office in Newcastle replied. He provided Mr Perry's address and told Mr Mohammed that if he wished to make a late appeal he should write to that address, together with an explanation of why the appeal was late.

29. At some point in April Mr Archer received a further SA Statement of Account. On 27 April 2013 Mr Mohammed wrote again to Newcastle and a Mr O'Loughlin replied. His letter is substantially the same as that from Mr Powner.

30. On 17 June 2013 Mr Mohammed wrote to Mr Perry. His letter refers to Mr O'Louglin's letter, before saying:

> "in accordance with our information that from the year ended 6th April 2005 to 2011 were based on estimates, therefore we request you to make it nil and put the original figures as submitted. If you need any more information please do not hesitate to contact us."

31. Mr Perry treated this letter as a late appeal against the amendments and assessments issued on 6 August 2012. By letter to Mr Archer dated 24 July 2013 (copied to Mr Mohammed), he refused to allow a late appeal on the grounds that no information had been provided as to why Mr Archer's appeal was late and therefore no reasonable excuse had been put forward. He advised Mr Archer that he had the right to apply to the Tribunal and that this application should be made within 30 days of the date of issue of his letter. He provided detailed information to Mr Archer about how to contact the Tribunal.

32. In an undated letter, received by HMRC on 30 July 2013, Mr Archer said:

> "As my rep is Muslim and this is the month of Ramadan I beg your forbearance for this period after which I will consult with him for the best way forward."

33. Mr Perry replied on 31 July 2013 saying:

> "I appreciate that your advisor is a Muslim and my letter has been issued during the month of Ramadan. However, I have rejected your advisor's late appeal to me dated 17 June 2013 and the instructions and deadlines I have set out in my previous letter to you are the law, and you must follow these, in order to take your late appeal further."

34. He suggested that Mr Archer request that Mr Mohammed "review this matter with some urgency. Even though your accountant is a Muslim and it is Ramadan, he should still be contactable regarding these matters." He said that alternatively Mr Archer could contact the Tribunal himself. Mr Perry again provided the telephone number and website address, along with detailed advice including where to locate the appeal form. A copy of his letter was sent to Mr Mohammed.

35. On 12 August 2013 Mr Mohammed replied to Mr Perry saying:

> "please find the enclosed copy of our letter dated 17 June 2013 which left no answers? We shall be grateful if please note that inquiry of the

> tax return for 2005/06 was not finalised and never agreed by out client and years afterwards were all estimated?"

36. On 28 August 2013 Mr Perry wrote a long, detailed reply to Mr Perry, setting out the history of recent correspondence and attaching copies of his last eight letters. Again he gave precise information about how to appeal to the Tribunal. A copy of that letter was sent to Mr Archer.

37. On 25 September 2013 Mr Mohammed wrote to Mr Perry saying: "we discussed with our client and now reached to decision that please treat this as appeal to Tribunal…"

38. On 1 October 2013 Mr Mohammed called Mr Perry. Following that call he completed a Notice of Appeal form on behalf of Mr Archer. This was dated 5 October 2013 and was received by the Tribunals Service on 14 October 2013.

39. The Notice of Appeal said that the grounds of appeal were that:

> "Our client has requested to investigate all documents of 2006-07…but no response except reminder of estimated tax demands."

40. In the box headed "Result" it stated that:

> "Inspector should go through all of the years of claims and then finalise tax due rather estimates and start sending demands which confuse or made fear to our client who is already one eye blind and sick."

Inconsistent evidence and further findings of fact

41. As noted earlier in this decision, Mr Archer gave inconsistent evidence about the extent to which he discussed the HMRC enquiries and the appeal process with Mr Mohammed. Under cross-examination from Mr O'Reilly, he said:

(1) When HMRC wrote to me, I gave it to my accountant. I didn't do anything to follow up.

(2) Sometimes I ask someone to read [the HMRC letter] to me before I sent it to Mr Mohammed.

(3) Sometimes Mr Mohammed sends me a letter saying "this is my response to HMRC."

(4) Generally I don't ask Mr Mohammed to read [his letters] to me. When I read them I just get scared.

(5) Sometimes I go to his house and he would explain it to me and then deal with it. If he said it was urgent I would deal with it. He hasn't said anything is urgent. He has just said these are based on estimates.

42. On the basis of this evidence, we find as a fact that Mr Archer was able to follow the progress of the enquiry. He could ask someone to read HMRC's letters to him and sometimes did so; he could ask Mr Mohammed to read out his replies to HMRC, and sometimes did so. He communicated regularly with Mr Mohammed

about the enquiry, including visiting him at his home. Although some letters were not read to him, we find that this was his choice.

Submissions by or on behalf of the parties

Submissions by Mr Mohammed on behalf of Mr Archer

43. Mr Mohammed made brief submissions to the Tribunal saying that:

(1) HMRC's assessments had never been agreed by him or his client, and were based on estimates. Mr Archer should be allowed to appeal the assessments so that the true figures could be used instead; these would be lower.

(2) The delays were in part due to the fact that Mr Archer was disabled and had sometimes been hospitalised as a result of his eye problems. Mr Mohammed himself had been "busy", as had Mr Archer, and this too had caused delays.

Submissions by Mr O'Reilly on behalf of HMRC

44. Mr O'Reilly said that Mr Archer had had 30 days from 6 August 2012 to appeal the amendments and assessments. HMRC had treated Mr Mohammed's letter of 17 June 2012 as a late appeal. That letter was over 9 months after the deadline for an appeal. Taxes Management Act 1979 ("TMA") s 49(5) states that HMRC can only accept a late appeal if there is a reasonable excuse for not appealing within the required time limit. Mr Mohammed had given no explanation for the lateness.

45. HMRC's SA office in Newcastle had twice told Mr Mohammed that, if he wanted to appeal the decision, he should write to the case officer, and given him the information needed to do this.

46. Mr O'Reilly also said that the entire enquiry had been marked by a lack of co-operation and this should be taken into account by the Tribunal in deciding whether to allow the application. It was 17 months before any reply was received to HMRC's opening letter. It was four years before Mr Archer met with HMRC to discuss their concerns. HMRC had resorted to Schedule 36 Notices to obtain information, and even then had to issue penalties for non-compliance.

47. Although Mr Archer had a disability, HMRC did not accept that this provided a reasonable excuse for the delay, or that it should be accorded any weight by the Tribunal. Mr O'Reilly said that Mr Archer was capable of running his business; was well aware of the existence of the enquiry; had received the relevant post (which was in large print) and had an accountant to assist him.

48. In relation to the estimated assessments, Mr O'Reilly said that they were made in accordance with the principle of continuity and were not unfair.

49. He asked the Tribunal to dismiss Mr Archer's application for permission to make late appeals. He submitted that this would be in accordance with the overriding objective at Rule 2 of the Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") to deal with cases fairly and justly.

The case law

50. Mr O'Reilly said HMRC were relying on the principles set out in *Data Select Ltd v R&C Commrs* [2012] UKUT 187 (TCC) ("*Data Select*"), a copy of which was provided to the Tribunal and Mr Archer.

51. The Tribunal asked whether either party had any submissions on *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 ("*Mitchell*") and explained the *ratio* of the case. Neither representative was familiar with the case and no submissions were made.

The law on time limits in the context of this case

52. The statutory provisions are set out in full in the Appendix. Their interaction with the facts of this case are as follows.

53. On 6 August 2012, Mr Perry amended Mr Archer's self-assessments for 2005-06 and 2006-07 and issued discovery assessments for the following three years. Mr Archer had the right to appeal these amendments and assessments under TMA s 31(1)(b) and (d).

54. The time limit for appealing was 30 days after the date on the amendments and assessments (TMA s 31A(1)(b) and 2(a)). This was 5 September 2012.

55. The appeal had to be made "to the relevant officer of the Board" (TMA s 31A(1)(c)), who is defined as "the officer by whom the notice of amendment was given" (TMA s 31A(2)(b)). This was Mr Perry.

56. HMRC are allowed by statute to accept a late appeal, but only if the taxpayer has a reasonable excuse for the delay (TMA s 49(2)(a) and (5)). Mr Mohammed's letter to Mr Perry of 17 June 2013 was treated as a late appeal. On 24 July 2013 Mr Perry refused to accept the appeal, on the basis that no reasonable excuse had been given.

57. If HMRC refuse to allow a taxpayer to make a late appeal, the Tribunal can nevertheless give permission (TMA s 49(2)(b)). Mr Perry told Mr Archer and Mr Mohammed that they had 30 days from the 24 July 2013 (his letter refusing to accept a late appeal) to ask the Tribunal for permission. There is however no statutory time limit within which the taxpayer has to ask the Tribunal for permission to make a late appeal. A second 30 day time limit only comes into play where HMRC accept the late appeal and review the decision (TMA s 49G). That provision is not relevant here.

58. A Notice of Appeal was received by the Tribunal on 14 October 2014. It purports to be a substantive appeal to the Tribunal against HMRC's amendments and assessments. However, an appeal cannot be notified to the Tribunal until it has first been made to HMRC (TMA s 49D). If the appeal is late, and HMRC refuse to accept it, the Tribunal can give permission (TMA s 49(2)(a) and (b)).

59. The Tribunal has therefore treated Mr Archer's Notice of Appeal as an application for permission to make late appeals against the amendments and assessments.

The law on allowing a late appeal

60. In considering whether to grant permission for Mr Archer to appeal after the 30 day deadline, the Tribunal must have regard to the overriding objective in Rule 2 of the Tribunal Rules.

61. In the recent case of *O'Flaherty v R&C Commrs* [2013] UKUT 161 (TC) at [26] the Upper Tribunal (Judge Berner) recently stated that in deciding whether or not to give permission, we must "consider all material factors, including the reasons for the delay, whether there would be prejudice to HMRC if the taxpayer were to be permitted to appeal out of time, and whether there would be demonstrable injustice to the taxpayer if permission were not to be given."

62. At [27] Judge Berner said that "it is clear that the FTT should consider all the relevant circumstances, and should conduct a balancing exercise in reaching its conclusion whether to grant permission for the late appeal or not." At [35] he referred to the decision of the High Court in *R (oao Cook) v GCIT* [2007] EWHC 167 where Burton J held at [27] that the depriving of a party of the opportunity to put forward an arguably meritorious appeal was an obvious prejudice which should be part of the balancing exercise.

63. Judge Berner also endorsed an earlier decision of the Upper Tribunal, *Data Select,* on which HMRC had invited the Tribunal to rely. In *Data Select* Morgan J said at [34] that:

> "As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

64. At [37] Morgan J went on to say that the Tribunal should take into account all the circumstances of the case, and that it was helpful to consider the checklist which at that time was set out in the Civil Procedure Rules ("CPR") at rule 3.9 ("old CPR 3.9"). These were:

> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; an

(i) the effect which the granting of relief would have on each party.

65. However, since *Data Select*, CPR 3.9 has been changed. The new version ("New CPR 3.9") was introduced following recommendations made by Sir Rupert Jackson[2] that there should be a tougher and less forgiving approach to non-compliance with rules and sanctions. New CPR 3.9 reads:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

66. In *Mitchell* the Court of Appeal considered new CPR 3.9 in the context of an appeal by Andrew Mitchell MP that he should be allowed to file a costs budget six days after the deadline set out in the CPR. The Court refused his appeal. Lord Dyson MR, giving the judgment of the Court, concluded at [60] that:

> "we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders."

67. At [36] Lord Dyson MR said that the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and court orders were "to be regarded as of paramount importance and be given great weight." In addition, although new CPR 3.9 opens by requiring consideration of "all the circumstances of the case", these "should be given less weight" than the two considerations specifically mentioned in the rule, see [37].

68. That general statement is, however, subject to the guidance at [40]-[41], the relevant parts of which are as follows:

> "40. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly...
>
> 41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted…the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil

[2] *Review of Civil Litigation Costs: Final Report* December 2009

> litigation which the *Jackson* reforms were intended to change will continue."

Whether the Tribunal should follow Mitchell

69. The CPR does not apply to the Tribunals, but in *Data Select* Morgan J confirmed that the approach set out in old CPR 3.9 was to be taken into account when considering whether to allow an application for a late appeal. We have therefore considered whether we should follow the new CPR 3.9 and abandon the old.

70. We start by recording the reasons why the Tribunals are not governed by the CPR. The reforming principles behind the new Tribunal system were set out in the document "*Transforming Tribunals*" published on 28 November 2007. Chapter 11 discusses the reforms which led to the creation of the Tax Chamber. At [288]-[289] the document says:

> "Users range from individuals and small businesses through to large multinationals…The new system therefore needs to be flexible. It needs to retain the best elements of the General Commissioners' system, with cases dealt with quickly, locally and informally."

71. This is reiterated at Q23 of the Response document published on 19 May 2008:

> "The Government agrees that the informality and accessibility of the present system must be retained in the design of the new one. The new tax appeals system will deal with a wide variety of matters, but many cases will be straightforward and should be dealt with promptly without the need for overly legalistic processes. The tax chamber will provide informal and accessible hearings for cases of this type, heard quickly and as locally as possible."

72. The Tribunals could have been brought within the CPR, but instead they have their own procedural rules, which reflected the government's intention that hearings should be flexible, accessible and relatively informal.

73. Although the CPR does not apply to the Tribunals, in R*&C Commrs v McCarthy & Stone (Developments) Limited, Monarch Realisations No. 1 PLC (in administration)* [2014] SWTI 626 ("*McCarthy & Stone*"), the Upper Tribunal (Judge Sinfield) applied new CPR 3.9 as interpreted by *Mitchell.*

74. The background to *McCarthy & Stone* is that HMRC had received permission to appeal to the Upper Tribunal but had forgotten to file the Notice of Appeal. When the Notice was filed it was 56 days late. Judge Sinfield decided that there was no good reason for the default, that it was not trivial and that HMRC should not be granted permission to make a late appeal. He also said that it was "no longer necessary" to consider all the factors in old CPR 3.9 or to treat it as a checklist.

75. There are, however, differences between Mr Archer's case and *McCarthy & Stone.* The latter involved a failure to comply with the Upper Tribunal Rules, so there is a direct parallel with Mr Mitchell's failure to comply with the CPR. Mr Archer has failed to comply with a *statutory* time limit, not a time limit contained in the Tribunal

Rules. We therefore asked ourselves whether it should it be less serious to breach a rule laid down by parliament than to breach a rule of the Tribunal, when the statutory provision both sets an explicit time limit which must be met if taxpayers are to access the Tribunal appeal system, and gives HMRC discretion to allow late appeals if the taxpayer has a reasonable excuse.

76. If these were the only factors, we would answer no: a breach of a statutory time limit is no less serious than a breach of Tribunal rules. But TMA s 49(2)(c) specifically allows us to give permission in cases where HMRC have not accepted that there is a reasonable excuse. In other words, Parliament has explicitly allowed the Tribunal greater discretion over and above the statutory time limit.

77. It is also significant that the TMA appeals procedure is the gateway to the legal system. Strict enforcement of the statutory time limit would not result in costs penalties (as in *Mitchell*), or prevent certain witnesses from giving evidence, as in *Durrant v Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624, another case involving the application of new CPR 3.9. As Judge Mosedale said when considering a recent application for permission to appeal "the question here is not whether the litigation is being conducted efficiently but whether the appellants are entitled to litigate at all" – see *Mr and Mrs B v R&C Commrs* [2014]UKFTT 256 (TC) ("*Mr and Mrs B*") at [45].

78. We also note that the Court of Appeal in *Mitchell* said that they hoped their decision would "send out a clear message" and that if it did, "legal representatives will become more efficient and will routinely comply with rules…" This aspiration has little application to ordinary taxpayers, who will only encounter the appeal time limits once or twice in their lifetimes: there is nothing routine about their actions. The "clear message" is more relevant to professional litigators, including those who appear before the Upper Tribunal.

79. Nevertheless, this Tribunal is part of the justice system and we should be mindful of the strong message from the higher courts that greater weight should be given to the need for litigation to be conducted efficiently and for rules and deadlines to be more strictly enforced. We note that in the more recent Court of Appeal case of *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, Davis LJ (with whom Sullivan LJ and Laws LJ agreed) said at [28] that the purpose of the Jackson reforms was:

> "to change a litigation culture…with a view to protecting the wider interests of justice including the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases by reason of non-compliance."

80. At [33] he says:

> "The emphasis thus under the new CPR 3.9 is not to be placed simply on the interests of the parties in the individual case; a wider approach is mandated, calling for protection of the position of court users generally."

81. If a person is allowed to appeal late, despite breaching the statutory time limits, he can then notify his substantive appeal to the Tribunal (TMA s 49D). This will absorb judicial and administrative resources which could otherwise have allowed another taxpayer to have his appeal heard more expeditiously.

82. Taking all the above into account, in our judgment the Tribunal should continue to balance all relevant factors in order to meet the overriding objective but with greater weight given to the need to comply with rules and regulations, including time limits contained within the statute, than was the case before new CPR3.9 was introduced.

83. In so concluding we have also considered the decision in *Peter Arnett Leisure v R&C Commrs* [2014] UKFTT 209(TC) (Judge Poole and Mrs de Albuquerque), another case about permission to make a late appeal after new CPR 3.9 and *Mitchell*. That tribunal decided that the relevant factors should normally include those in old CPR 3.9, and we agree. They also decided that in cases such as this, new CPR 3.9 should not be taken as requiring a new, tougher, approach to time limits. For the reasons given above, we consider that this tribunal too should be mindful of the message from the higher courts about the need to observe time limits and other rules. In our judgment greater weight should be given to this factor than was the case before new CPR 3.9.

Application of the law to the facts of this case

84. We have therefore conducted a balancing exercise, taking into account all the circumstances of the case, but giving more weight to the need to comply with statutory time limits than would have been the case before new CPR 3.9.

Purpose of the time limit

85. Parliament has set a 30 day time limit within which taxpayers can appeal discovery assessments or amendments to their self-assessment. Its purpose is to give finality, so that HMRC – the other party in the possible litigation – will know within that time limit whether or not they need to prepare for an appeal against their decisions. The time limit is a "rule" to ensure litigation "is conducted efficiently and at proportionate cost." It therefore comes within both (a) and (b) of new CPR 3.9.

86. As a result, we give significant weight to Mr Archer's failure to comply with the time limit.

Length of the delay and reasons for the delay

87. The total delay can be divided into three periods. The first is the two months from 5 September 2012 – the appeal deadline – to 21 November 2012, when Mr Mohammed wrote to the HMRC SA office. A valid appeal can only be made to "the relevant officer", who in this case was Mr Perry. As a result, this letter was both late and did not constitute a notice of appeal.

88. In view of Mr Perry's clear instructions as to how and where to appeal, we decided that it was not reasonable for Mr Mohammed to think he could appeal by writing to a different HMRC office.

89. The second period is the eight months from 21 November 2012 – the end of the previous period – to 17 June 2013, when Mr Perry received the letter he treated as a late appeal. During this time HMRC's SA office twice repeated Mr Perry's earlier instructions. The first letter (from Mr Powner) was ignored. Mr Mohammed received the second letter (from Mr O'Loughlin) over a month before he finally wrote to Mr Perry. His letter of 17 June 2013 does not give any reason for the delay.

90. The third period runs from 24 July 2013, when Mr Perry's replied to Mr Archer, to 14 October 2014, the date Mr Archer's Notice of Appeal was received by the Tribunal. Despite the instructions in Mr Perry's two letters of 24 and 31 July 2013 about applying to the Tribunal, Mr Mohammed wrote again to Mr Perry on 12 August 2013. Mr Perry replied with even more detail and precise instructions on 28 August. Six weeks later Mr Mohammed again wrote to Mr Perry, before finally applying to the Tribunal on 14 October 2013. The Notice of Appeal to the Tribunal has a box headed "Reasons why the appeal is made or notified late (if applicable, please specify)." Mr Mohammed has written "N/A" in that box.

91. The total delay is extensive, in total over a year. No explanations were given in any of the letters from Mr Mohammed referred to above. However, in his letter of 30 July 2013 Mr Archer gave a reason for part of the delay and during the hearing Mr Mohammed put forward two reasons. We consider these below.

92. In Mr Archer's letter he said a response to Mr Perry's letter of 24 July would be delayed because Mr Mohammed was a Muslim and the letter had arrived during Ramadan. We place no weight on this for the following reasons.

(1) In his immediate and helpful reply to Mr Archer, Mr Perry advised Mr Archer how to contact the Tribunal himself.

(2) We take judicial notice of the fact that in 2013 Ramadan began on 9 July and finished on 7 August. Even had Mr Mohammed been unable to work during Ramadan, which the Tribunal doubts, this would only have explained some two weeks of the delay.

(3) Mr Mohammed did not seek to rely on Ramadan as a reason for the delay when he made his submissions before the Tribunal.

93. In his submissions before the Tribunal, Mr Mohammed said that Mr Archer had been hospitalised for part of the period and this had caused delay. However, this was undermined by Mr Archer's own evidence, that from the beginning of the enquiry until the hearing, he visited the hospital around twice a year for check-ups.

94. Mr Mohammed also said that both he and Mr Archer had been "busy". We attach no weight to this reason. Taxpayers need to make time from their day to day lives to deal with their statutory obligations and the time limits there set out.

95. The Tribunal finds that the extent of the delay and the lack of reasons both weigh heavily against Mr Archer. In so finding, we also take into account the many helpful and detailed letters from Mr Perry, together with the the two letters from HMRC's SA office, all of which explained in detail when and how to appeal.

The consequences for Mr Archer of giving or refusing permission and the merits

96. If the Tribunal were to give permission for Mr Archer to make late appeals against the amendments and assessments, he will be then able to notify his appeals to the Tribunal under TMA s 49D. If we refuse permission, he will be unable to challenge HMRC's decisions to increase the tax payable for the five years in question, which is a significant sum being over £28,000.

97. The weight we should give to this factor is linked to the merits of his case: as Judge Mosedale said in *Mr and Mrs B* at [62]: "There is no point in extending time if all it does is delay…the inevitable."

98. The role of this Tribunal is only to take a view on whether, if permission were granted, Mr Archer has a reasonable prospect of succeeding in having the assessments reduced. It is not our task to assess the evidence or to conduct a mini-hearing. However, to take a view on the merits the Tribunal must be provided with some information.

99. Mr Mohammed said that if permission were granted, he would put forward evidence to show that HMRC's amendments to the three later years were incorrect. However, we have not been given even an outline of what evidence would be provided to support this submission. We note that the amendments to the 2005-06 and 2006-07 returns were based on a review of Mr Archer's bank accounts, which disclosed unexplained deposits of over £20,000 a year, and that HMRC have not reviewed the bank accounts for later years. It is possible that the information in these bank accounts might support Mr Mohammed's submission that Mr Archer's assessable income for later years was lower than that for 2005-06 and 2006-07 but it is equally possible that the income for those later years was higher.

100. We therefore find that granting permission *might* result in a lower assessment for Mr Archer in relation to the three later years, but it is equally possible that it might not. As a result, in relation to the three later years, the merits of the case have some but very little weight.

101. No argument on the merits was put to us in relation to the two earlier years, so we place no weight on the merits in relation to the assessments for 2005-06 and 2006-07.

The taxpayer's fault or the adviser's?

102. One of the factors in old CPR 39.1 is "whether the failure to comply was caused by the party or his legal representative." The underlying principle is that if the fault is that of the representative rather than the taxpayer, this weighs in the balance in favour of giving permission.

103. We therefore considered whether the delays were the fault of Mr Mohammed, or of Mr Archer. A relevant factor is Mr Archer's disability: we have found as a fact that he always passed his HMRC correspondence to Mr Mohammed because of his difficulty with reading. However, we also take into account the following facts:

(1) The key letters were sent to Mr Archer, with copies to Mr Mohammed.

(2) They were all in large print, which Mr Archer is able to read, albeit with difficulty.

(3) Mr Archer sometimes asked other people to read HMRC's correspondence to him, and sometimes asked Mr Mohammed to read his draft letters before sending them out. On occasion he visited Mr Mohammed at his home to discuss the enquiry.

(4) If he did not read or have the letters read to him, this was his choice.

104. We consider that Mr Archer is more reliant on his adviser than a person without his disability, so we give some weight to this factor. But it is not significant, given that he was aware of the course of the enquiry and (to the extent that he was not fully informed) this was his choice.

The consequences for HMRC of giving or refusing permission

105. If we were to allow Mr Archer to bring his appeal, HMRC will have to re-open five years which were closed over a year before Mr Archer sought the Tribunal's permission to appeal. HMRC will have to allocate staff to this case, diverting them from their other work. There will be other consequential costs. This factor weighs against Mr Archer.

The delays and lack of co-operation

106. Mr O'Reilly submitted that this late appeal application was another step in a long history of Mr Archer's delayed compliance with statutory obligations, and that this background should be taken into account by the Tribunal when deciding whether or not to grant permission. In particular, he says that both Mr Archer and Mr Mohammed showed little co-operation with HMRC, who had to issue Schedule 36 Notices and penalties to obtain some of the relevant information.

107. The Tribunal is required to consider all the circumstances of the case, and our discretion is at large. We considered carefully whether Mr Archer's actions before the appeal deadline forms part of the circumstances we are required to consider when deciding whether to give permission to appeal out of time.

108. We think that it is relevant but only in this sense. If a person's actions before the appeal deadline showed him to be diligent in responding to HMRC's requests, so that the subsequent delay was out of character, a tribunal can take this history into account when assessing the credibility of any reasons given for the delay. It might make a tribunal more likely to accept an otherwise improbable story. In other words, the recent history acts as touchstone which may assist the Tribunal, and in that sense may be part of the "circumstances".

109. On the facts of this case, we find that Mr Archer's delay in making his appeals is entirely consistent with his behaviour during the enquiry process. There is nothing in the history or background which jars with his delay in seeking to appeal the assessments.

110. In our judgment, the proper route for dealing with a lack of co-operation during an enquiry is through the penalty system. In Mr Archer's case, although HMRC decided to issue penalties, these were then suspended. Except to the limited extent set out above, Mr Archer's behaviour during the enquiry process cannot be weighed in the balance as part of our consideration of this application.

The overriding objective and the balancing exercise

111. We must balance all these aspects in order to deal with the case fairly and justly, in accordance with the overriding objective. One side of the scales - in favour of giving permission for the late appeal – is Mr Archer's greater reliance on his accountant on account of his disability, and the possibility that on appeal he might succeed in reducing one or more of the discovery assessments. For the reasons already stated, neither of these are of any significant weight.

112. On the other side of the scales, against giving permission for the appeal, are the length of the delay and the lack of reasons for the delay, both of which carry substantial weight; added to this are the costs in time and money to HMRC if permission is given. Even before we add the extra weight attaching to Mr Archer's breach of the rules following new CPR 3.9, it is clear that the balancing exercise is strongly against granting permission.

Decision

113. We refuse Mr Archer's application. This means that we do not give him permission to appeal against the closure notices amending his 2005-06 or 2006-07 SA returns, or to appeal against the discovery assessments made for to 2007-08, 2008-09 or 2009-10.

114. For completeness, we record that our decision would have been no different, had we been considering the same facts in the absence of new CPR 3.9. As already stated, the balancing exercise is overwhelmingly in favour of not giving permission, even before any extra weight is added to the scales as a result of the new approach.

115. Had the facts been different, so that our decision turned on the role of new CPR 3.9, and noting that neither representative was aware of *Mitchell*, we would have considered whether it was in the interests of justice to adjourn for submissions on whether, and if so to what extent, new CPR 3.9 should be taken into account in a case such as this. In the event, this was unnecessary.

Appeal rights

116. 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 Rules 2009.

117. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 6 May 2014

EXTRACTS FROM TAXES MANAGEMENT ACT 1970

31 Appeals: right of appeal

(1) An appeal may be brought against—

(a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),

(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),

(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or

(d) any assessment to tax which is not a self-assessment.

31A Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given—

(a) in writing,

(b) within 30 days after the specified date,

(c) to the relevant officer of the Board.

(2) In relation to an appeal under section 31(1)(a) or (c) of this Act—

(a) the specified date is the date on which the notice of amendment was issued, and

(b) the relevant officer of the Board is the officer by whom the notice of amendment was given.

(3) In relation to an appeal under section 31(1)(b) of this Act—

(a) the specified date is the date on which the closure notice was issued, and

(b) the relevant officer of the Board is the officer by whom the closure notice was given.

49 Late notice of appeal

(1) This section applies in a case where—

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

49A Appeal: HMRC review or determination by tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D).

(3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).

49D Notifying appeal to the tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Subsections (2) and (3) do not apply in a case where--

(a) HMRC have given a notification of their view of the matter in question under section 49B, or

(b) HMRC have given a notification under section 49C in relation to the matter in question.

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H.

EXTRACTS FROM TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (TAX CHAMBER) RULES 2009

2 Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly 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.

(3) The Tribunal must seek to give effect to the overriding objective when it--

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must--

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.