



[2022] UKFTT 00135 (TC)

**TC 08466/V**

Application for permission to appeal out of time, fraudulent agent made claims for EIS, Martland principles applied, permission granted.

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2021/00324/V**

**BETWEEN**

**J HUNTLY**

**Applicant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE GETHING**

The hearing took place on 1 February 2022. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face-to-face hearing was not held because of covid 19 restrictions The documents to which I was referred are a hearing Bundle of 175 pages and a supplementary bundle of 77 pages which included a witness statement of the Appellant (Mr Huntly).

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

Mr Paul Rippon of Independent Tax ("*Independent Tax*") for the applicant ("*Mr Huntly*").

Ms Gemma Truelove, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents ("*HMRC*")

## DECISION on PRELIMINARY ISSUE

### INTRODUCTION

1. Mr Huntly seeks permission to appeal against:
  - (1) a discovery assessment under section 29 Taxes Management Act 1970 (“*TMA*”) for 2015-16 for the sum of £7,300.60, and
  - (2) an amendment to a self-assessment made under section 28A TMA for 2016-17 in the sum of £15,596.00both issued on 27 November 2018.
2. The TMA requires an appeal against these assessments to be made within 30 days, i.e. by 27 December 2018. A late appeal was made by Independent Tax on 28 August 2020, 20 months late. The Tribunal may give permission to appeal late under section 40(2)(b) TMA if HMRC refuse to do so. The principles in *Martland v HMRC* [2018] UKUT 178 (TCC) (“*Martland*”) apply.

### THE FACTS

3. I received a witness statement of Mr Huntly but he was not present at the hearing so there was no opportunity to cross examine him. Nor was Officer Bromley, the investigating officer present. I find the following facts as set out in paras [4] to [14] below.
4. Throughout the period under enquiry Mr Huntly was an electrician and, when he was employed, he worked in the offshore oil and gas industry. His work pattern was 8/10 weeks on the rigs and two weeks off. His wife gave birth to a son in 2013. The work pattern required him to pack his private life into five or six two week breaks each year. Contact with Mr Huntly when he was on the rigs was difficult at best and impossible at worst. Mrs Huntly did not attempt to forward mail to Mr Huntly when he was on the rigs.
5. Mr Huntly asked his accountant Mr Stefan Brown to file a return to claim expenses incurred in providing equipment he had incurred wholly, exclusively, and necessarily for the purpose of his employment and to recover any consequential tax due to him due to any period of unemployment.
6. Unknown to Mr Huntly Capital Allowances Consultants Limited (“*CAC*”) filed tax returns in Mr Huntly’s name for 2015-16 and 2016-17 stating that Enterprise Investment Scheme (“*EIS*”) investments had been made into Eco-Cooling Systems Limited of £28,000 for 2015-16 and £52,000 for 2016-17.
7. HMRC gave relief for the EIS investments without checking the validity of the claims or even making a sense check as to whether Mr Huntly could have made such enormous investments given the level of his salary. In consequence, HMRC made payments to CAC of £7,816 for 2015-16 and £15,080.60 for 2016-17. CAC received these payments into a bank account under their exclusive control. Mr Huntly was not aware of the sums received by CAC. CAC paid c 30% of each payment to Mr Huntly and unknown to him retained the rest. Mr Huntly expected a tax rebate for equipment purchased and used wholly exclusively and necessarily in his employment and a repayment of tax overpaid under PAYE because of any period of unemployment.
8. On 21 May 2018 - HMRC’s records show that HMRC suspected fraud.
9. On 1 June 2018 – HMRC’s records show the officer specifically considered the issue of Mr Huntly’s limited means and questioned his ability to make EIS investment of £52,000 given the level of his income.

10. On 4 June 2018 - HMRC opened an enquiry into Mr Huntly's 2016-17 tax return. HMRC's focus was a claim for EIS relief in 2016-17. A letter dated 4 June 2018 was sent to Mr Huntly. The letter says no more than this is a random check and HMRC will be liaising with CAC. The letter to CAC indicates HMRC are looking at the investment of £52,000 in Eco Cooling Solutions Ltd in respect of which an EIS claim was made. Mr Huntly was working off the Shetland Islands at the time and did not receive the letter from his wife.

11. In August 2018 Mr Huntly became unemployed and was desperately seeking employment to be able to maintain his wife and child and himself. Mrs Huntly did not work and was engaged full-time caring for their son.

12. On 8 October 2018 HMRC's records show HMRC opened an enquiry into Mr Huntly's 2015-16 return and sent a letter dated 9 October 2018 by post to Mr Huntly and CAC. The letter indicates HMRC have checked the return and consider the claim for EIS investment was incorrect as no EIS3 form had been received and no investment had been made. It states that no further information is needed unless Mr Huntly has an EIS3. An EIS3 form is issued by the investing company and confirms the company has satisfied the conditions for EIS relief. A company must receive a prior authorisation from HMRC to issue an EIS3.

13. On 27 November 2018 – HMRC's records show that as no reply had been received from Mr Huntly or CAC, HMRC issued a closure notice and an amended assessment for 2016-17 and a discovery assessment for 2015-16 for a total amount of tax of c. £23,000.

14. The closure notice contained the following statement:

***'What to do if you disagree***

*If you disagree with this notice of assessment, you can appeal. To do this, you need to write to us within 30 days of the date of our assessment, telling us why you think our decision was wrong. We'll contact you to try to settle the matter. If we can't come to an agreement, we'll write to you and tell you why. You can then either:*

- *have the matter reviewed by an HMRC officer who has not previously been involved in the case*

- *ask an independent tribunal to decide the matter*

*If you choose a review, you can still go to the tribunal if you're not satisfied with the outcome.*

*To find more information about appeals and reviews go to [www.gov.uk](http://www.gov.uk) and search for 'HM Revenue and Customs decisions – what to do if you disagree'.*

15. The discovery assessment contained the following statement:

***'What to do if you disagree***

*If you disagree with our decision, you can appeal. You need to write to us within 30 days of the date on this notice, telling us why you think our decision was wrong. We will then contact you to try to settle the matter. If we cannot come to an agreement, we will write to you and tell you why. We will then offer to have the matter reviewed by someone who has not previously been involved. We will also tell you about your right to go to an independent tribunal.*

*If you appeal, you can ask for payment of all or part of the tax in dispute to be postponed until the matter is resolved. If you want to apply for postponement, please tell us the amount of tax that you think you are being overcharged and the reasons why you think you should not have to pay this. We will continue to charge interest on any tax that is postponed. Once the dispute is settled, the interest will be payable if the tax is found to be due.*

*You can find more information about your appeal and review rights in factsheet HMRC1, 'HMRC decisions – what to do if you disagree'. For a copy of this:*

- go to [www.gov.uk](http://www.gov.uk) and search 'HMRC1'
- phone our orderline on **0300 200 3610.**'

16. On 3 December 2018 HMRC's records show that Mr Huntly telephoned HMRC. The note states that "*Mr Huntly was confused by the letter as the figures did not add up. I called him back after looking at the statement and the letters. I explained the £23K had been incorrectly used in the 2016-17 letter. I went through the calculation with him and explained how the amount of £23K had been calculated Mr Huntly accepted the explanation but stated he could not afford that amount as he had just been made redundant. I advised him to look at the website and call the helpline.*"

17. I find as a fact that for Officer Bromley to have explained the computation she would have had to explain that two claims for EIS relief had been made, that the claims were invalid as no investment had been made by Mr Huntly and no EIS3 had been issued but that HMRC had accepted the claim at face value and paid tax of £23,000 to CAC. As no such investments had been made by Mr Huntly the claims were invalid and the tax had to be repaid implying that there are no legitimate grounds for appeal, which is of course what HMRC state in their Notice of Objection to this late appeal at [58]. That would explain why officer Bromley was able to say that Mr Huntly had accepted the calculations. It would also explain why no written notice of appeal had been made by Mr Huntly. I find as a fact that Mr Huntly was being directed to the guidance on how to pay and not how to appeal.

18. Mr Huntly secured employment on an off-shore rig starting in December 2018.

19. On 21 June 2019 - HMRC's record states, "*Information obtained from SCEC and the Dishonest Agent Team suggests that two linked agents have submitted claims for EIS without following the correct procedure. There is doubt the client has invested in the company. X of the DA team produced an opening letter to be sent to the clients and a copy to the agent. One of the agents is now RLS so no copy has been sent to this agent. Activity to test: Has the EIS 3 certificate been obtained and has the investment been made by the client*".

20. 21 June 2019 HMRC's record states that Officer Bromley notes "*MDTRC The Driver of the behaviour was the agent. The behaviour has been signed off at senior leadership team at Grade 7 level.*"

21. In December 2019 Mr Huntly contacted Independent Tax along with nine other off-shore workers who had engaged CAC as their agent. CAC had filed returns purportedly on behalf of the nine other offshore workers and made fraudulent claims for EIS relief. Independent Tax mistakenly assumed that Mr Huntly had made a written appeal to HMRC and so there was no urgency to take any particular step on his behalf.

22. On 11 December 2019 HMRC received a request to communicate with Independent Tax, Mr Huntly's new agent. Independent Tax was seeking to ascertain the position of each of the offshore workers.

23. The covid 19 restrictions in March 2020 lead to the employee handling Mr Huntly's case at Independent Tax being furloughed which caused further delay in the due diligence until 30 June 2020 when that employee was made redundant. That employee's case load was reallocated.

24. The replacement employee contacted HMRC on behalf of Mr Huntly and on 27 July 2020 HMRC sent to Independent Tax the enquiry correspondence between HMRC and Mr Huntly and his former agent.

25. On 25 August 2020 HMRC reject a request made by Independent Tax for Alternative Dispute Resolution.

26. On 27 August 2020 Independent Tax appealed against the closure notice and discovery assessment.
27. On 21 September 2020 HMRC's records show they rejected the appeal by letter because it was out of time and no reasonable excuse had been provided for the late appeal. That letter was not received by Independent Tax.
28. On 25 November 2020 Independent Tax contacted HMRC to enquire about progress of the appeal. On 26 November Independent Tax ask for a copy of the 21 September letter to be sent by post.
29. On 30 November 2020 there are several entries in HMRC's record:
  - (1) The case has been reopened but Officer Bromley intends to close the case again after updating.
  - (2) Agent Paul Rippon of Independent Tax had been in contact. He had not received HMRC's letter of 21 September 2020. He asked for it to be sent by mail. There is no email disclaimer held for Mr Huntly. The request to communicate by email had been sent and asked Mr Rippon to seek Mr Huntly's agreement to correspond by email. Previous correspondence had been by emails but there had been no reference to Unique Tax References.
  - (3) An out-of-date email authority to correspond by email had been produced by the agent. As the case has been closed by HMRC for some time and as no authority to reopen has been given, HMRC required a new authority from Mr Huntly.
30. On 15 December 2020 HMRC's record states that as no authority to correspond by email has been received, a copy of the 21 September 2020 letter rejecting the late appeal was sent by post to Mr Huntly and Independent Tax, the agent.
31. The letter of 15 December was received, and date stamped by Independent Tax on 3 January 2021. The delay in receipt was due to the Christmas break.
32. On 28 January 2021 HMRC receive an appeal out of time against the Closure Notice and the Discovery Assessment.
33. Mr Huntly was engaged in the following roles during the period 4 June 2018 to August 2020:
  - (1) April 2015 to August 2018 for Amec Foster Wheeler on Clair Ridge Platform 50km west of the Shetland Islands
  - (2) December 2018 to May 2019 for Aker Solutions Ltd
  - (3) October 2019 to October 2020 for PHS Compliance.
34. The nine other offshore workers who instructed Independent Tax have appealed against assessments to recover payments made to CAC which payments were made by HMRC in consequence of claims made to HMRC for EIS relief for investments that had never been made. These appeals have been joined. Independent Tax have sought to have Mr Huntly's appeal joined. The application was unsuccessful as HMRC had objected to the late appeal. Independent Tax suggest that if Mr Huntly's appeal is joined or stayed behind the joint appeal HMRC will not be prejudiced in terms of expense and time and resources in handling the appeal.
35. The Northumberland Police are investigating the fraudulent conduct of those working for /with CAC and engaged in the fraudulent claims for EIS relief without the knowledge of the taxpayers concerned.

36. Independent Tax believe that HMRC fraud group are also investigating the fraud.

#### **TAX JURISDICTION OF THE TRIBUNAL**

##### **Section 49 TMA 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.

37. In *Martland* at [29] The Upper Tribunal indicates that the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.

38. The Upper tribunal set out the principles that this Tribunal must take into account in determining an application for late appeal at [44],[45] and [46]:

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

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

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

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

*45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in Aberdeen and Data Select will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially*

*by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.*

*46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. ...”*

#### **MR HUNTLY'S POSITION**

39. Mr Huntly considers that each of the conditions in section 49 is satisfied.

40. Condition A is satisfied because Mr Huntly made an appeal in writing on 28 January 2021.

41. Condition B was satisfied because Mr Huntly had a reasonable excuse for the delay, namely that he was unaware that he had a right of appeal following his call with HMRC in December 2019 when he was directed towards the assistance to pay section of HMRC's website. Had he realised he had a right to appeal he would have made an appeal in writing. Mr Huntly considers HMRC's officer failed in her duty of care to him by failing to direct him to his appeal rights during the call. The duty of care is set out in the taxpayer's charter. In particular para 16(a) which requires HMRC to get things right, to be accurate and the need to inform taxpayers of their options. Further Para 16(b) requires the officers to listen to concerns, be mindful of the circumstances and provide extra support where necessary. Had Officer Bromley discharged her duty Mr Huntly would have made a written appeal on time. Mr Huntly had not read the parts of the closure notice and discovery assessment letters which set out appeal rights. He called HMRC in a state of anxiety as soon as he saw the amount of tax demanded. he was unable to pay the sum in view of his modest income and his financial obligations towards his wife and son.

42. Condition C is satisfied as the appeal was made as soon as the reasonable excuse ceased, in that Mr Huntly instructed Independent Tax in December 2019 once he became aware from fellow off-shore workers that the issues could be challenged in a Tribunal. The delay thereafter was not his fault. This was due to the time taken to do due diligence by Independent Tax, the furlough and subsequent redundancy of the employee of Independent Tax assigned to his case. The second employee assigned to Mr Huntly's case made an appeal in August 2020. There was no way of Mr Huntly being able to prevent the delay that ensued between December 2019 and July 2020. He left the case in the hands of the professionals.

43. HMRC rejected the July 2020 appeal as it had not set out the reasons for the delay as it was a late appeal. HMRC's letter rejecting the appeal of 21 September 2020 had not been received by Independent Tax who chased for a reply in November. A fresh copy was sent dated 15 December which was eventually received by Independent Tax on 3 January 2021. Failures in communication between independent Tax and HMRC after August 2020 was exacerbated by HMRC's refusal to accept communications by email because the original authority by Mr Huntly was received before HMRC had closed the enquiry. HMRC required a fresh instruction by Mr Huntly. Mr Huntly's work off-shore inhibited communications. But the delay between July 2020 and January 2021 should not be attributed to Mr Huntly. The written appeal out of time was made on 28 January 2021.

44. Following the Martland principles the Tribunal must take into account all material circumstances in determining whether to allow an appeal out of time:

(1) **The length of the delay.** Mr Huntly accepts that the delay in the making a written appeal is significant and serious. The written appeal ought to have been made no later

than 27 December 2018. In the event an appeal was made on 27 August 2020 some 20 months late. That is a serious delay. (The written appeal with reasons as to why it should be heard late was made on 28 January 2021, 610 days late. I note HMRC consider the delay to be 20 months for the purpose of this application.)

(2) **The reason for the delay in making a written appeal.** As set out above, Mr Huntly called HMRC upon receipt of the assessments and seeing the amount of tax demanded without reading the letters in full. Officer Bromley failed to point Mr Huntly to his appeal rights.

(3) Mr Huntly acted by appointing Independent Tax as soon as he became aware from colleagues at his new employment who had been victims of fraud by CAA in the same way as Mr Huntly, that he had a right to appeal to a Tribunal. HMRC say a reasonable taxpayer would not wait a year to contact HMRC and progress the appeal. Mr Huntly was inexperienced. Mr Huntly considers HMRC's approach may be reasonable in ordinary circumstances. These were extra ordinary circumstances. The fraud was perpetrated by Mr Huntly's own agent. (HMRC continued to investigate the behaviour of CAA after issuing the assessments and became aware of the fraudulent conduct of CAA in July 2019.) Mr Huntly's work pattern on the off-shore rigs results in isolation from family and makes communication with HMRC and agents difficult. The hypothetical taxpayer is not in such a situation.

(4) The delay by Independent Tax to file an appeal as soon as was instructed is explicable because Mr Huntly was one of ten offshore workers who approached Independent Tax and it took time for the employee to realise Mr Huntly had not filed a written appeal as the other nine had done so. The delay was exacerbated due to the employee being absent due to sickness, then furlough and redundancy in 2020 due to the covid 19 pandemic. The replacement employee, Mr Rippon, acted quickly and contacted HMRC to ascertain the status of Mr Huntly's appeal and upon discovering no written appeal had been made in July 2020 he asked for all correspondence between HMRC, Mr Huntly and his agent. A written appeal was made on 27 August 2020. The delay between July 2020 and 3 January 2021 was due to failures of the post -Independent Tax did not receive HMRC's rejection letter dated 21 September and when chased in November HMRC send a further copy by letter dated 15 December 2020 which was finally received by Independent Tax on 3 January 2021. HMRC refused to rely on the former authority to communicate by email. There was a delay but the reasons for the delay are understandable, and in the circumstances, reasonable per *HMRC v Perrin* [2018] UKUT 0156 (TC) at [81] ("*Perrin*"). Mr Huntly says that this is a reasonable excuse but if not, the delay should not be attributed to Mr Huntly. There was no delay between 3 January 2021 and 28 January 2021.

(5) Following the guidance given in *Perrin* on the issue of reasonable excuse the tribunal must ascertain the facts, whether the facts are proven and whether in all the circumstances including the attributes of the taxpayer the excuse is reasonable.

(a) The facts of Mr Huntly's awareness or lack of awareness of rights of appeal are proved as shown in his witness statement. And, following *Helanthus (London) Ltd v HMRC* [2014] UKFTT 03192 (TC) ("*Helanthus*") at [53], there may be no statutory obligation on HMRC to inform taxpayers of their appeal rights but there was a lack of help by HMRC, Mr Huntly was also let down by an adviser, and the issues were compounded by Mr Huntly's working hours, covid restrictions and the delays in correspondence between HMRC and Independent Tax.



- (b) The facts underlying the failure of Independent Tax to make a written appeal between December 2019 and August 2020 are also proved.
- (c) The facts surrounding the delay in Independent Tax receiving HMRC's refusal of the appeal until 3 January 2021 are proved.
- (d) The fact of the written appeal being made by 28 January 2021 is proved.
- (e) In the circumstances there was a reasonable excuse for each delay in filing an appeal. And the position was corrected as soon as reasonably possible after the delay was identified.

45. Mr Huntly reminded the Tribunal that in determining whether to allow a late appeal the Tribunal must balance the merits of the reasons for the delay, the prejudice caused to the parties of permitting and refusing a late appeal and all the circumstances. In this case Mr Huntly says that the balance points to permission being granted.

(1) Mr Huntly has been the victim of crime. HMRC are aware of the criminal conduct of the fraudulent agent from their own investigations. HMRC are pursuing Mr Huntly for the monies paid by HMRC to CAA even though CAA paid only c30% to Mr Huntly. Mr Huntly considers he would be materially prejudiced by an inability to appeal the assessments. HMRC consider the demand for tax is only for the sum due to be repaid by Mr Huntly because of an inaccurate claim for EIS relief. HMRC are not seeking any penalty for an inaccurate return. Mr Huntly considers that the prejudice to Mr Huntly would be substantial unless the appeal is heard. Further it is in the public interest for the appeal to be heard, and in the interests of justice for the appeal to be heard. HMRC would be prejudiced by allowing the appeal but the prejudice to HMRC would be minor compared to Mr Huntly. Further the situation has been brought about by HMRC's process of "*pay now, investigate later*" in relation to EIS claims and failure of the officer in receipt of the EIS claim to even make a sense check as to whether the claim is legitimate, which Officer Bromley patently did before opening an investigation into Mr Huntly's returns, having regard to the income of the taxpayer. She doubted that Mr Huntly had the means to make the EIS investments.

(2) Further prejudice in terms of cost and time to deal with the issues would be immaterial for HMRC as it is proposed that Mr Huntly's appeal be joined with or stayed behind, nine other appellants. Mr Huntly's costs will also be diminished as a result of the joinder. HMRC's costs will be diminished if a lead case procedure is followed or if an appeal is pursued on the points of principle. HMRC will incur costs in defending the appeal but the extra costs enquiring into facts of Mr Huntly's appeal will be marginal, if not immaterial.

In consequence the appeal should be allowed.

#### **HMRC'S POSITION.**

46. On 27 November 2018 HMRC issued a closure notice in respect of 2016-17 and a discovery assessment in respect of 2015-16 denying claims for relief for EIS investments and seeking repayment from HMRC. The letters set out appeal rights.

47. In the call on 3 December 2018 Officer Bromley explained the calculation and as Mr Huntly had lost his job and was unable to pay Officer Bromley directed Mr Huntly to HMRC's website and advised him to call the helpline.

48. No further contact was received by HMRC until 27 July 2020 when Independent Tax asked for copies of the correspondence between Mr Huntly and his agent, and HMRC and Independent Tax, sought mediation of the issue.

49. The application for appeal was rejected by HMRC on 21 September 2020 and a further copy of the letter was sent to Independent Tax on 16 December 2020. The application for late appeal was made on 28 January 2021.

50. HMRC state that following *Martland* the presumption should be that the statutory time limits should be adhered to unless the applicant can persuade the Tribunal that permission to appeal late should be granted. There is no need for the case to be exceptional. The Tribunal must however adopt a three-stage approach:

- (1) Establish the length of the delay
- (2) Establish the reasons for the delay
- (3) Evaluate all of the circumstances of the case. This involves a balancing exercise which will assess the merits of the reasons given for the delay and the prejudice that would be caused to both parties by granting or refusing the permission.

51. As for length of delay HMRC say Mr Huntly made an appeal on 28 August 2020 which is a delay of 20 months. HMRC refer to the UT decision in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) ("*Romaserve*") that the length of the delay has to be assessed by reference to the time permitted for an appeal. A delay of more than three months for a decision where the appeal right must be exercised within 30 days of a document containing the decision must be regarded as serious and significant. HMRC consider the delay is serious and significant.

52. As for the reasons for the delay HMRC consider there are no good reasons for the delay:

- (1) HMRC consider that there are inconsistencies in Mr Huntly's explanations for the delay. There are differences between his witness statement and the notice of appeal as to whether he believed he had made an appeal. HMRC considers that Mr Huntly could not hold such a view given the closure notice and discovery assessment contained a statement that to appeal Mr Huntly had to write to HMRC within 30 days. Further the contemporaneous note of the call to HMRC in December only refers to Mr Huntly's inability to pay. Even if Mr Huntly had referred to appealing the decisions, he had not complied with the formalities required by Statute and no reasonable taxpayer would wait a year to instruct another agent. Further no reasonable taxpayer in receipt of the letters from HMRC could hold such a belief. This is not objectively reasonable.
- (2) In relation to the delays by Independent Tax in filing the notice of appeal, HMRC consider that the covid restrictions did not occur until 23 March 2020 by which time the appellant's appeal was already 14 months 25 days late.
- (3) The fact that other appeals by taxpayers in a similar situation are being considered by HMRC should not have any bearing. This application for late appeal and the reasons for the delay ought to be considered on its own merits.
- (4) As for the lack of prejudice for HMRC, HMRC are entitled to finality of outcome once a time limit has been missed. Also HMRC will need to allocate resources and money in defending the appeal which HMRC rightfully considered closed.
- (5) HMRC's rejection of the appeal was set out in a letter of 21 September 2020 which Independent Tax say was not received although a copy of it dated 16 December 2020 was sent to the same address and was received.
- (6) HMRC considers the prejudice to Mr Huntly in having to pay £23,000 is no more than a repayment of the sums paid because of erroneous claims for EIS relief.

53. In relation to stage three, and the balancing exercise, HMRC point to *Martland* at [45] which requires all of the circumstances of the case to be considered including the requirement that litigation be conducted efficiently and at proportionate cost and for statutory time limits to be respected. Further at [46] the Upper Tribunal indicates that the FTT can have regard to obvious strengths and weaknesses of an appellant's case, this goes to the question of prejudice. There is obviously a greater prejudice if the appellant is unable to put a really strong case than a very weak one. It is important however that the FTT does not descend into an analysis of the underlying merits.

54. HMRC considers that adhering to statutory time limits is in the public interest from the point of view of both the taxpayer in question and the wider public and refer to para [34] in *Martland*. Failure to take due notice of the time limits is an error of law. Compliance is expected unless there is good reason to the contrary, *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 (“**BPP**”).

55. The Closure Notice and Discovery Assessment letters clearly set out the requirements. The Appellant read the letters as he contacted HMRC by telephone. Mr Huntly failed to follow the instructions and therefore failed to meet the statutory time limits. His appeal is 20 months late.

56. In relation to the need to conduct litigation efficiently and at proportionate costs, this issue was stressed by the UT in *Websons (No 8) Limited v HMRC* [2020] UKUT 154 (TCC) at [8]. Should the appeal be allowed HMRC will be subject to obvious prejudice by being required to allocate resources to the defence of the appeal. The wider taxpaying public would also be prejudiced as the resources of the Tribunal will be engaged and diverted away from other taxpayers whose appeals are in time. To allow this appeal out of time would be inconsistent with the principles of good administration of justice which require cases to be conducted efficiently and at proportionate cost.

57. When considering all the other circumstances of the case, HMRC consider that HMRC should be able to rely on the statutory time limits to ensure good administration of the tax system. HMRC acknowledge that Mr Huntly will be prevented from presenting his case and that will cause him prejudice but that alone should not justify the grant of permission to appeal out of time. Further although the FTT is prevented from undertaking a detailed review of the merits of the case, where very strong or very weak merits can be identified without much investigation, they can they have a significant role to play. In this case HMRC considers that the merits are very weak for the following reasons:

- (1) The jurisdiction of the FTT is limited. It can only consider whether assessments were raised in accordance with the law and whether the relief was correctly denied.
- (2) The Taxes Acts do not allow for tax to be waived or assigned to another party.
- (3) The appeal has no prospects of success because Mr Huntly accepts that the claims for SEIS relief were invalid.
- (4) Mr Huntly's claim that there was no valid declaration given by CAA and therefore no valid return and enquiry is incorrect. Section 8 of TMA only requires that a return contains a declaration. It need not be made by Mr Huntly.
- (5) A valid claim for SEIS relief can only be made if Mr Huntly had a form EIS3 which would have been issued by the investee company concerned. HMRC authorises the issue of EIS3 certificates. No such authority was given. Indeed, Mr Huntly has not been able to produce a form EIS3. The decisions to deny EIS relief were valid decisions.

- (6) The assessments were therefore correctly made in relation to 2016-17 and 2015-15 (the requirements for the issue of a discovery assessment under section 29 were satisfied.)

## **DISCUSSION**

58. The Tribunal must follow the three-stage process set out in the guidance of the Upper Tribunal in *Martland* when considering whether to exercise the discretion to grant permission to make a late appeal late.

### **Stage One- identify the Delay**

59. Mr Huntley's written appeal ought to have been made no later than 28 December 2018. A written appeal was made by Independent Tax on behalf of Mr Huntly on 25 August, 20 months late. I conclude the length of the delay is serious and significant.

### **Stage Two- ascertain the reason for the delay**

60. I consider that Mr Huntly was likely to have been in a state of anxiety when he received the letters from HMRC in late November 2018 and saw the amount of tax demanded, in view of his modest earnings and lack of employment, and failed to read to the end when he would have discovered his appeal rights. Instead of dealing with the assessments calmly he called HMRC on 3 December 2018. That was incredibly swift action. Mr Huntly was shocked by the assessments and told Officer Bromley that there must have been a mistake. Officer Bromley explained the calculations. I have found as a fact that for Officer Bromley to have explained the assessments for tax she must have explained to Mr Huntly that his tax returns for 2015-16 and 2016-17 had included claims for EIS relief in respect investments of £28,000 and £52,000 in those years in Eco Cooling Limited. HMRC had accepted the claims and repaid £23,000 to CAC. As no such investments had been made by Mr Huntly, the claims had been denied, and the tax must be repaid by Mr Huntly no matter who received it, i.e. she implied at the very least that there is no legitimate ground of appeal. Mr Huntly explained that he was unable to pay, and Officer Bromley directed Mr Huntly to the HMRC website concerning time to pay and not how to appeal. I consider this telephone conversation explains why Mr Huntly did not file a written appeal within the statutory period of 30 days of the assessments. Mr Huntly started a new job offshore, in December 2018 which would have put him out of contact for another two months.

61. HMRC consider there were inconsistencies between Mr Huntly's witness statement dated 24 January 2022 and his notice of appeal as to whether Mr Huntly thought he had appealed by telephoning HMRC in December 2018 or whether he only became aware he had rights of appeal after instructing Independent Tax. Having read the documents carefully I consider there is no real inconsistency. It is likely he thought he had contested the assessment by calling HMRC on 3 December 2018 and saying there must have been a mistake. I also accept he only realised formal steps were needed i.e. a written notice of the objection to the assessment had to be filed after he instructs Independent Tax and they inform him that a written notice has not been filed in July 2020.

62. I also accept as a fact that he instructs Independent Tax in December 2019 on the recommendation of and alongside nine fellow offshore workers who had been the victim of fraud by CAC and had received assessments to repay tax in respect of invalid claims for EIS relief. These fellow off-shore workers are likely to have put Mr Huntly on notice that something can be done notwithstanding Officer Bromley's explanation in December 2018.

61. I accept the difficulties in communicating while working on off-shore rigs and the dislocation from life caused by the working pattern of workers on off-shore rigs, working 8-

10 weeks on the rigs and two weeks off. It is inevitable that it would have been a large contributing factor in Mr Huntley's delay in instructing an advisor to pursue his appeal.

62. Following the guidance in the UT in *Perrin*, in considering whether the excuse for the delay is reasonable the Tribunal must take into account the attributes of the taxpayer. I accept Mr Huntly was inexperienced and unfamiliar with tax appeals. He was understandably panicked by the assessments and failed to read properly the letters of 27 November 2018 which set out his rights of appeal but after the call with Officer Bromley in which he advised her there must have been a mistake he believed he had made an appeal. He was unemployed and desperately seeking new employment. He had a wife and son to provide for, I consider that Mr Huntly had a reasonable excuse for failing to file a written notice of appeal within 30 days of the assessments.

63. I also accept that when it became apparent in July 2020 when Mr Rippon of Independent Tax asked HMRC about the progress of Mr Huntly's appeal that it became apparent that no written appeal had been made, Independent Tax acted swiftly and filed a written notice of appeal without unreasonable delay. The notice of Appeal was filed on 28 August 2020.

64. As to whether Mr Huntly's error could have been uncovered earlier by Independent Tax, I accept that the covid working restrictions from mid-March to July 2020 impeded the work of Independent Tax. The employee engaged to look after Mr Huntly and the nine other off-shore workers had treated Mr Huntly as if he had made a written appeal. There is in my opinion nothing Mr Huntly could have done to prevent this error by the employee of Independent Tax. The failure ought not to be attributed to Mr Huntly, he did all he could to comply with his obligations by appointing a legitimate and reputable firm of tax accounting advisers. Mr Huntly only became aware of the need to file a written appeal in July 2020 at the same time as Mr Rippon. I consider that Mr Huntly acted as quickly as he was able having regard to his capabilities.

**Stage Three - consider all the circumstances of the case including the prejudice to both parties and the merit of the reason for the delay.**

65. The adherence to statutory time limits is of course important not just for HMRC but for the wider public for the efficient handling of the tax system and the efficient management of tax disputes. Allowing appeals late means HMRC need to reallocate resources from current cases to deal with cases HMRC had thought were closed. Officers have to reacquaint themselves with the facts of the case of the late appeal which can be time consuming and burdensome for the officers concerned. Costs of appointing counsel may be incurred. HMRC are most certainly prejudiced by allowing a late appeal.

66. The prejudice to Mr Huntly if his late appeal is not allowed is that he is unable to present his case. Mr Huntly's case is he appointed Mr Brown to file a return claiming relief for expenses and repayment of tax for periods of unemployment. A return containing a fraudulent claim for EIS relief was made by CAC. It is not clear to me whether Mr Brown was employed by or a director of CAC at the time and that raises the issue of whether CAC was a duly authorised agent. If not duly authorised, the return filed by CAC was not Mr Huntly's return. In cases concerning confidential matters such as the filing of a tax return, an agent may not appoint a sub-agent without the principal's express consent or express ratification. This is a very important principle of law.

67. Further CAC were enabled to perpetrate the frauds because of HMRC's policy of "pay now enquire later" and the failure of the officer handling the claims for EIS to undertake a simple sense check before making a payment. Such a sense check was patently made by Officer Bromley. Officer Bromley recognised in June 2018 upon a review of Mr Huntly's return that he did not have sufficient income to be able to make investments of £25,000 and £52,000. She opened an enquiry immediately.

68. Further Mr Huntly did not receive 70 per cent of the £23,000 payment made to CAC. Mr Huntly and HMRC have been the victims of fraud. HMRC are aware that CAC is insolvent and Mr Huntly does not have the resources to pursue the fraudsters and has no realistic possibility of discovering Mr Brown or any director or employee of CAC and recovering the monies stolen by CAC.

67. Independent Tax are representing nine other offshore workers who were victims of fraud brought about by CAC making fraudulent claims for EIS relief without their knowledge or consent. Mr Huntly's case can be joined with those cases. A lead case may be identified, or particular points of law may be determined. These are not fact heavy appeals. HMRC's own records record that the fraud is caused by the so-called agent. The additional time spent by officers investigating Mr Huntly's facts and the associated cost to HMRC of handling the appeal would in my view be limited.

68. Although the delay in this case was very significant, having regard to all of the circumstances I consider it in the interests of justice that the late appeal be allowed.

#### **DECISION**

68. The permission to appeal be granted. The parties to follow the following directions:
- a. HMRC to file a statement of case within 56 days of the date of this decision
  - b. Mr Huntly to file a reply within 56 days of receipt of HMRC's Statement of Case
  - c. Parties to jointly apply to join the group litigation involving the nine other appellants represented by Independent Tax, immediately thereafter.

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

63. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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 Tribunal hereby directs that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings. 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.

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**HEATHER GETHING  
TRIBUNAL JUDGE**

**Release date: 14 APRIL 2022**