Appeal number: TC/2013/00293

PROCEDURE – application to reinstate an appeal out of time – refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

RE SHENG HUANG **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 28 March 2018

Mr M Feng, tax adviser, for the Appellant

Mr D Wilson, HMRC officer, for the Respondents

DECISION

1. The appellant's appeal was struck out on 27 August 2016. On 20 October 2017, the appellant lodged an application for the appeal to be reinstated; as the application was made outside the 28 day time limit permitted by Rule 8(6), his application was also treated as an application for permission to make a late application for reinstatement.

2. A hearing was called to consider the application to be permitted to make a late application for reinstatement, and, if that application succeeded, to decide the application for reinstatement. I reserved my determination at that hearing and that determination is now set out in this decision notice.

3. I note in passing that at the start of the hearing I was under the mistaken impression that the appellant had not complied with directions I had issued a few weeks earlier for a witness statement and skeleton argument. Mr Feng was able to correct my misapprehension and I was satisfied that the appellant had complied with the directions to file a witness statement and skeleton argument for the hearing. I was given copies of both during the hearing and have considered them in reaching this determination.

The facts

The evidence

4. I make the following findings of facts based on the documentary evidence in front of the Tribunal (comprised in the bundle produced by HMRC and reconstituted Tribunal file), none of which appeared to be in dispute.

5. Mr Huang submitted witness statements and gave oral evidence (via an interpreter provided by the Tribunal Service who assisted him throughout the hearing). I was unable to accept his evidence as entirely reliable for reasons discussed below.

Findings of facts – the appeals

6. The appellant ran a takeaway at premises in Railton Road, London. After a compliance check by HMRC, he was assessed on 5 December 2012 to VAT on underdeclared sales of £139,753.00. That assessment was upheld on review on 17 December 2012.

7. An appeal was lodged on behalf of the appellant by his then adviser, N (14) Ltd, in January 2013. The appeal was stayed behind the litigation in the Court of Appeal in the appeal of Sub One Ltd as that concerned the extent to which takeaway food was properly zero rated.

8. On 12 August 2014, the appellant was assessed to an inaccuracy penalty of £125,777,70 in relation to the earlier assessment. A review upheld this on 10 October 2014. Again, N (14) Ltd lodged an appeal against it on behalf of the appellant: the notice of appeal and notification of appointment of a representative were both signed by Mr Huang.

9. The appeals were consolidated on 8 May 2015. The consolidated appeal ceased to be stayed at around this time (the Sub One litigation having concluded) and case management directions were issued for the appeal to proceed to hearing. In November 2015, the appeal was stayed as the parties attempted ADR

10. On 2 October 2015, the Tribunal was notified by STF (30) Ltd ('STF') that it was the new agent of the appellant; Mr Huang signed an authority for STF to act on his behalf in this appeal on 30 September 2015. On 9 October 2015, STF filed a witness statement on behalf of Mr Huang.

11. ADR failed by March 2016 and so further case management directions were issued. However, on 5 May 2016, the Tribunal received notification from STF that it was no longer acting for Mr Huang. STF asked the Tribunal to communicate directly with the appellant at the Railton Road address.

12. On 18 May 2016, the Tribunal wrote to the appellant asking him to notify the Tribunal within 14 days whether he wished to continue with his appeal now that STF were no longer acting for him, and asked whether he was appointing a new representative. The letter was sent to the residential address at Sutton Coldfield contained in his original notice of appeal.

13. The letter was re-sent on 20 June 2016 to the Railton Road address.

14. No reply was received to either letter and the Tribunal issued an unless order on 22 July 2016 requiring the appellant to notify an intent to proceed with the appeal by 5 August 2017. The documents before me contain no record of the address to which this order was sent, although it was clearly sent to HMRC, as they responded.

15. No reply was received from the appellant and a Judge struck out the appeal on 27 August 2016.

Mr Huang's knowledge and actions

16. Mr Huang has always lived in London. At some point prior to the period in question, he rented premises in Railton Road from which he operated the takeaway restaurant on which he was then assessed as set out above. He lived above the shop.

17. In October 2012, it was his evidence before the assessments were actually made on him, he left the rental premises at Railton Road and moved to Norbury (also in London).

18. I find Mr Huang was aware of the assessments and approached a Mr Simon Poon about his appeal. Mr Poon worked for N 14 Ltd, and, as I have said, Mr Huang

appointed N 14 Ltd as his representative in this appeal in January 2013. That firm completed the notice of appeal. In the space for a 'representative' the form gave N 14 Ltd's name and address. But in the space for the address of the appellant it gave an address in Sutton Coldfield. The second notice of appeal form, for the penalty assessment, gave Mr Huang's address as the same address as for his representative (Ethel Street, Birmingham).

19. I find that Mr Huang has never lived outside London and knew and knows nothing about the Sutton Coldfield address. At that point in time, his evidence was that he had already been living at his Norbury address for a few months and it was that address he gave to Mr Poon.

20. Mr Huang paid N 14 Ltd £1000 up front to represent him in this appeal. His evidence was that had not been asked to pay anything further and had not done so.

21. Mr Huang's evidence was that he heard nothing further from N 14 Ltd or Mr Poon until September 2015, and in the interim made no attempt to contact them. In September 2015, N 14 Ltd wrote to Mr Huang to say that the company had passed his case on to a company called STF (30) Ltd who would in future represent him in this appeal. Mr Huang's evidence was that he spoke to Mr Poon to express dissatisfaction with how long the appeal was taking to resolve. His evidence was that Mr Poon told him there was nothing to worry about and that he (Mr Poon) would contact Mr Huang if there was an issue. His evidence was that he heard nothing further from Mr Poon nor N 14 or STF.

22. In October 2017, the new tenant of the Railton premises contacted Mr Huang. Mr Huang's evidence was that they had had no previous contact and Mr Huang says he does not know how the new tenant got his contact details (although he makes the assumption it was through 'friends of friends'). The reason the new tenant contacted him was because she had received a letter from HMRC threatening distraint on the assets of the business because of Mr Huang's unpaid debt to HMRC.

23. At that point Mr Huang tried to contact Mr Poon. He was unsuccessful. He then appointed Mr Feng to act on his behalf. Mr Feng investigated matters and found that HMRC had been writing to STF; the Tribunal had been writing to Mr Huang at Railton Road since May 2016 (as set out above). The application for reinstatement was then made.

24. The appeal is important to Mr Huang: he is at risk of bankruptcy if the appeal is unsuccessful.

Do I accept Mr Huang's evidence?

25. I have some serious reservations about the reliability of Mr Huang's evidence.

26. Firstly, I was not satisfied with his explanation of his relationship with STF. His position was that he paid N (14) Ltd £1,000 up front to represent him but had never been asked to provide any further funds. While it certainly appears that STF

was a successor firm to N (14) Ltd, the records show that after the Sub One litigation failed, in August/September 2015 STF (30) Ltd (acting via Mr Poon) then submitted a detailed new statement of case on behalf of Mr Huang and witness statement which dealt with matters specific to his business, such as the date Mr Huang arrived in the UK, the details of the purchase of the business at Railton Road, the impact of (a) recession and (b) local improvement works on the business and other such matters. It is difficult to see how or why STF would have done so without instructions from Mr Huang, although Mr Huang denies giving such instructions. And STF's letter of 5 May 2016 saying that they were no longer instructed is at complete odds with Mr Huang's evidence: again, particularly having not long before submitted a detailed ground of appeal, it is difficult to see why STF would tell the Tribunal they were no longer instructed unless Mr Huang had actually withdrawn instructions.

27. Secondly, the evidence, if taken at face value, was very odd. It amounted to saying that Mr Huang was content to leave the resolution of a dispute over a very large sum of money entirely in the hands of his agents, did not expect ever to receive any updates about it, and apart from complaining once that it was taking a long time to resolve, heard nothing and did nothing about it for a span of four and a half years. He did not explain how he thought his agent could resolve the dispute without his instructions. It does not explain why he did not keep HMRC up to date with his address details, despite knowing that HMRC had assessed him for (in total) about a quarter of million pounds. It does not explain why he thought that a single payment of £1,000 in 2013 was and would remain sufficient to keep agents busily defending his appeal on his behalf, how ever long it took to resolve.

28. Thirdly, HMRC's self-assessment record for Mr Huang shows that HMRC's information is that since November 2008, Mr Huang lived at Railton Road (having previously lived in Sutton). This is not of itself odd as it appears to indicate no more than that neither Mr Huang or anyone on his behalf bothered to keep HMRC up to date with his current address. That is consistent with his evidence that he did not complete a tax return nor has been employed since the date in 2012 that he says he left Railton Road. However, the self-assessment record also indicates that Mr Huang received tax credits while at the Railton Road address. When Mr Huang was given the opportunity to comment on this, Mr Feng said his client had nothing to say on point.

29. In conclusion, there were serious inconsistencies in the story given by Mr Huang. His actions as he explained them did not make sense, and his story was inconsistent with how STF acted. There was no explanation for the inconsistencies. I was therefore unable to accept as reliable Mr Huang's evidence.

30. In particular, I am unable to accept as reliable that he was unaware that STF (30) Ltd ceased to act for him in or around the time that STF (30) LTD wrote to the Tribunal to that effect.

31. What parts of his evidence do I accept as reliable? I accept he did not live in Sutton Coldfield at any point. But I find he has not proved that he was unaware that N 14 Ltd failed to give his residential address on either notice of appeal form: while it is

possible he never saw the first notice of appeal form (N 14 Ltd signed it on his behalf), Mr Huang did sign the second notice of appeal form. Moreover, he has failed to keep either the Tribunal or HMRC appraised of his address change. I am not satisfied that N 14 Ltd completed the notice of appeal form other than in accordance with his instructions.

32. I also find he has not proved the date on which Railton Road ceased to be an address at which he could be contacted. Irrespective of the date he says he moved out, his advisers appeared to consider Railton Road to be an address at which he could be contacted in 2016 as that is the address they provided to the Tribunal. This followed a time when even Mr Huang admits he was in contact with his advisers. I also note that even Mr Huang accepts that a letter from HMRC to Railton Road in 2017 ultimately reached him.

33. That leaves me unable to accept as reliable his evidence that he was unaware of letters sent to Railton Road by the Tribunal. And unable to accept his (implied) evidence that STF knew that Railton Road was not his address at the time they told the Tribunal that it was a method of contacting him.

Was the appeal properly struck out?

34. As there was some query over addresses, the first issue I had to consider was whether the appeal had been properly struck out. It could only have been properly struck out if the unless order and strike out order were served on the appellant in accordance with the rules.

35. Were they served at all? The Tribunal's file was destroyed in accordance with its destruction policies before the application for reinstatement was made: the Tribunal now only has the copy letters and orders provided by HMRC and HMRC do not have copies of the letters (if any) sent to the appellant with the unless and strike out orders.

36. Were either order issued? I find HMRC clearly received both. I find it more likely than not that (in accordance with the Tribunal's normal practice) the orders would have been sent to both parties, the appellant's copies going to the address the Tribunal held on its database as the current address.

37. It seems to me more likely than not that the Tribunal, having recognised on 20 June 2016, that the Sutton Coldfield address was no longer the correct address and that the Railton Road was the correct address, would have updated the appellant's address in its database and all future correspondence would automatically be sent to the Railton Road address. I therefore find it more likely than not that the address used on correspondence after 20 June 2016 would be the Railton Road address. So I find it more likely than not that, like the 20 June 2016 letter, both orders would have been sent by post to the appellant at the Railton Road address.

38. Did they arrive at the Railton Road address? Section 7 Interpretation Act 1978 deems letters sent be post (as it seems more likely than not that these were) to be

received in the ordinary course of post unless it is proved otherwise. It is not Mr Huang's case that the letters did not arrive at Railton Road: his case is that he no longer had any connection with the property at that date and could not have known about the orders. I do not accept his evidence, but in any event, he has certainly not proved that the letters did not arrive at Railton Road. They are therefore deemed to have arrived.

39. The next question is whether the orders were correctly addressed to the Railton Road address. Rule 20(2) requires a notice of appeal to include:

> "(a) the name and address of the appellant;
>
> (b) the name and address of the appellant's representative (if any);
>
> (c) an address where document for the appellant may be sent or delivered...."

40. In this consolidated appeal, as I have said the appellant's original adviser, N (14) Ltd completed both notices of appeal. Neither contained 'the ...address of the appellant'. Whether or not this rule refers to a residential and/or business address, the two notices of appeal contained neither. In the space for the appellant's address, the first gave the Sutton Coldfield address and the other N 14 Ltd's address.

41. Both notices of appeal contained the name and address of his adviser. The form did not require, and the appellant did not state, an address where documents might be sent or delivered. Nevertheless, Rule 11(4) provides that:

> A person who receives due notice of the appointment of a representative –
>
> (a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party.....

Therefore, it seems to me, that in stating the name and address of his representative, the appellant's notices of appeal stated an address where documents for the appellant must be sent.

42. In failing to state an address of the appellant's both notices of appeal form were defective and in breach of the rules. That breach has never been waived under Rule 7(2) but it seems to me that the defect does not make the notices of appeal void (see Rule 7(1)). If the appeal is reinstated, it would seem appropriate to simply require the defect to be remedied under Rule 7(2)(b).

43. But to what address should the two orders have been sent? Rule 13(5) provides:

> "The Tribunal ...may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary."

44. It seems to me that, once the Tribunal had been informed that STF were no longer the appellant's representative, they were entitled to use the address stated in the Notice of Appeal form even if it was the wrong address. However, that would only be

true if the Tribunal had not been notified later of a different address. It seems to me that at the same time as notifying that they had ceased to be the appellant's agent, STF notified the Tribunal of a new address.

45. This matter was not addressed at the hearing. I recognise that STF's letter of 5 May 2016 contained two matters: the first was to notify that STF were no longer acting, and the second was to notify a new address at which the appellant could be contacted. Were STF still an agent of the appellant when notifying this change of contact address? I consider that they were. I consider the entire letter must be regarded as written by the appellant's agent at the time it was written, albeit STF then immediately ceased to be the appellant's agent. Therefore, the change of address notification was valid under Rule 13(5) albeit made by the appellant's agent rather than the appellant himself.

46. So I find that the Tribunal's letter of 18 May 2016, being sent to the Sutton Coldfield address, was sent to the wrong address under the Tribunal's rules. Under Rule 13(5) the Tribunal should have treated the Railton Road address as the appellant's address in accordance with STF's notification of 5 May 2016. It seems to me that the Tribunal must have come to the same conclusion, as the letter was re-sent on 20 June 2016 to the Railton Road address. I find that that second letter was sent to the right address.

47. Both unless order and strike out order were therefore also validly served under the Tribunal's rules. They were sent to the Railton Road address, and correctly sent to the Railton Road address. My conclusion is that the appeal was validly struck out. Mr Huang's appeal is therefore at an end unless I extend time in which he can make an application for reinstatement, and then, if successful, if I am persuaded it is right to reinstate the appeal. I move on to consider those applications.

The legal test for relief from sanctions

48. Both applications before me were applications for 'relief from sanctions'. In other words, the appellant applied to be excused from a legal sanction that would otherwise apply to these proceedings. The first application was to be relieved from the sanction of being too late to apply for reinstatement; the second application was for reinstatement, reinstatement being relief from the sanction of the appeal being struck out.

49. The same legal test applies to both applications for relief from sanction, although of course the outcome of each application would not necessarily be the same, as each would depend on its own individual circumstances. But I will deal only once with the legal test.

50. Mr Feng's position was that an appeal should be reinstated if the grounds of appeal are arguable. For this proposition he relied on *Jumbogate* [2015] UKFTT 64 (TC) and the overriding objective of the Tribunal (Rule 2) to deal with cases fairly and justly.

51. I do not accept that this is the right test. I also do not accept that the only reason the appeal was reinstated in *Jumbogate* was because the underlying grounds of appeal were found to have a real prospect of success: on the contrary [51] of *Jumbogate* makes it clear that in addition the Tribunal considered the appellant to have an excusable reason for its non-compliance. But it does not matter: *Jumbogate* is only an FTT decision and not binding on me.

52. The appropriate test is quite clear following other, binding, recent cases, and in particular the Court of Appeal's decision in *Denton* [2014] EWCA Civ 906 and the Supreme Court's decision in *BPP* [2017] UKSC 55. In summary, in *Denton* the Court of Appeal set out the approach to when to grant relief from a sanction in cases in the courts: in *BPP* the Supreme Court said this tribunal should follow a 'similar' approach to compliance to that in the courts.

53. In *Denton*, the Court of Appeal had set out a three stage approach when considering relief from sanctions:

(1) The first stage is to identify and assess the seriousness and significance of the failure to comply;

(2) The second stage is to consider why the failure occurred;

(3) The third is to consider all the circumstances of the case.

54. In the earlier case in the Upper Tribunal of *Data Select* [2012] UKUT 187 (TCC), which was a case where a time limit was breached, the Upper Tribunal had said that considering all the circumstances of the case would include consideration of:

(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 the extension of time?

(5) What will be the consequences for the parties of a refusal to extent time?

55. As was commented by the Upper Tribunal in *Romasave (Property Services) Limited* [2015] UKUT 254 at [89] there is no real difference between the tests in *Data Select* and *Denton.* That must be so because in *Denton* the Judge accepted that the court would move on from the first stage test to the second stage test in all cases other than where breach was not serious or significant [28], and that having done so the seriousness and significance of the breach would be factors considered in the balancing exercise.

56. There was discussion in *Denton* at [26] about what serious and significant meant in this context. It is clear from what the judges there said that a breach is serious and/or significant if it puts a hearing date in danger or otherwise impacts on the conduct of the litigation. Certain other breaches might be serious and significant.

57. Of course, I recognise that the *Data Select* criteria were specific to an application for relief from the sanction of being out of time to make an application;

one of the applications here, however, is for reinstatement. Reinstatement was considered in *Pierhead Purchasing* [2014] UKUT 321 (TCC) where the Judge said it was relevant, when considering the over-riding objective and all circumstances of the case, to focus on:

> [23] .....
>
> The reasons for the delay, that is to say, whether there is a good reason for it.
>
> Whether HMRC would be prejudiced by reinstatement
>
> Loss to the appellant if reinstatement were refused
>
> The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration
>
> Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained

58. It seems to me that the Judge was here saying much the same as in *Denton* and *Data Select:* the Tribunal must consider all circumstances relevant to the particular application it was hearing and perform a balancing exercise.

The relevance of the merits of the appeal

59. Mr Feng referred me to the case of *Maltavini* [2016] UKFTT 267 (TC) as an example of a case where reinstatement was refused because the underlying appeal lacked a reasonable prospect of success and *Jumbogate* [2015] UKFTT 64 (TC) as an example of an appeal which was reinstated because the underlying dispute had a reasonable prospect of being decided in favour of the appellant.

60. His position was that on the basis of his analysis of these two cases that the most significant factor for the Tribunal to consider was the merits of the underlying appeal: his view was that it was not in accordance with justice to deny an appellant a chance to bring an appeal which had a good prospect of success, as he believed Mr Huang's appeal had.

61. I do not accept that his analysis of the legal position is correct: firstly, if either of those cases had given paramount importance to the merits of the underlying appeal, they would be inconsistent with binding authority such as *Denton, BPP* and *Pierhead Purchasing* discussed above. Secondly, neither of those cases did in fact give paramount importance to the merits of the underlying appeal: both considered other relevant factors in addition and performed a weighing exercise.

62. My view is that the merits of the underlying appeal would normally only influence the balancing exercise if the appeal was either a very strong or a very weak one. This was because the Tribunal hearing the application for relief from sanctions should not conduct a mini-trial and reach its own view on whether an appeal would succeed or fail: so in a situation where the underlying appeal simply had a reasonable prospect of success, being neither very strong nor very weak, its merits, as such, would not normally tilt the balance of the application one way or the other. On the

other hand, there is strong prejudice to an appellant if an appeal which was clearly very likely to succeed is struck out, and a clear lack of prejudice to an appellant (such as in *Maltavini)* if an appeal which is clearly very likely to fail is struck out.

The importance of compliance

63. Mr Feng considered that the Tribunal's overriding objective of dealing with a case fairly and justly meant ensuring that the final outcome of the appeal was in accordance with the rights and wrongs of the underlying dispute. That would require the Tribunal to consider the correctness of the assessment on Mr Huang.

64. Mr Feng did not consider 'procedural fairness' to be significant. By procedural fairness I refer to the process adopted by the Tribunal in order to bring the appeal to a final resolution being fair.

65. But it is clear that procedural fairness is important: there is no true justice unless the legal process is fair to both parties in order to avoid unnecessary costs and delay in the litigation and to allow both parties to properly present their case at the final hearing. The Tribunal encourages parties to avoid delay by imposing sanctions on those parties who cause delay and if it did not do so, it could not deliver procedural fairness and would not be dealing with appeals fairly and justly.

66. The Tribunal must ascribe importance to the need for compliance with directions of the Tribunal: if it did not do so, directions could be safely ignored. The weight given by courts and tribunals to the need for compliance has increased (see *BPP* and the cases cited therein)

67. This new approach requires the Tribunal to give significant (but not paramount) weight to the need for litigants to respect the Tribunal's rules and directions. If the litigants do not respect the need for compliance, the Tribunal might be unable to meet is overriding objective of dealing cases fairly and justly, as it would be building into the litigation process procrastination and delay. Where a Tribunal excuses a delay which has occurred for no good reason, the result is not only that the litigants concerned are encouraged to think non-compliance will not receive a sanction but that litigants in other cases also get the message that procrastination is permitted.

The relevance of reliance on an advisor

68. Mr Feng's case was that Mr Huang's erstwhile adviser, STF, let Mr Huang down: they did not respond to or comply with the unless order; they did not tell Mr Huang they were not acting for him; they did not notify the Tribunal of his correct address. Mr Feng's position is that Mr Huang was not aware of any of STF's failures and should not be punished for them.

69. Putting aside that I have not accepted what Mr Huang said about his relationship with STF as reliable, I do not agree with this proposition of law. While an appellant does nothing wrong in seeking to appoint a representative, the appellant has chosen to bring legal proceedings, and must accept the responsibility to pursue them as directed

by the Tribunal. The appointment of a representative does not absolve the appellant from such a duty: that would be unfair on the other litigant, who has no choice over whether the appellant appoints a representative or as to who that representative is. It is the litigant who appoints a representative who must (in general at least) take the burden as well as the benefit of what his representative does (or fails to do) in his appeal. The risk of a poorly performing representative must (in general) fall on the litigant appointing that representative and not on the other party to the appeal. To rule otherwise is manifestly unfair to HMRC, who had no choice or control of Mr Huang's decision to appoint a representative, and to whom the appellant's representative owed no duty of care.

70. It is not for the respondent to underwrite the appellant's choice of representative. And while the Tribunal's rules, no doubt intended to improve access to justice, permit the appointment of anyone, whether or not legally qualified, as a representative, it is not responsible for the appellant's choice of representative.

71. In any event, on the facts, I find for the reasons given above, Mr Huang has not made out his case that the failings were STF's.

72. Having considered the principles to apply, I now consider the two applications for relief from sanctions in respect of the particular failures in these proceedings.

The application for an extension of time to apply for reinstatement

The seriousness and significance of the failure to comply with the time limit

73. The appeal was struck out on 27 August 2016; the appellant (at the Railton Road address) was (more likely than not) notified of this by letter of the same date. That order notified the appellant of the right to apply for reinstatement within 28 days. So the application should have been made by 25 September 2016.

74. The application was actually made on 20 October 2017, one year and 25 days late. By any measure that delay is a very serious delay which has certainly impacted on the course of the litigation as it has seriously delayed its progress. There should be finality in litigation; HMRC had clearly proceeded on the basis that the appeal was over as they had moved on to enforcement action (they attempted distraint at Railton Road, see §22). Moreover, the Tribunal had destroyed the file as it was more than a year since it was struck out.

75. This was not a trivial or insignificant breach so I must move on to consider the reasons for the breach and all the circumstances of the case.

The reason for the failure

76. I have largely rejected Mr Huang's evidence. I reject as reliable his explanation that the failure to apply for reinstatement in a timely fashion occurred without fault on his part because he believed that STF were dealing with the appeal on his behalf. In particular, I am not satisfied that he was unaware that STF no longer acted for him. A

person who knows that their representative has ceased to act for them acts unreasonably if they fail to either contact the Tribunal direct to progress the appeal or appoint a new representative. Mr Huang did neither.

77. Moreover, I am not satisfied even that after 2012 he received none of the post addressed to him at Railton Road. I am therefore not even satisfied he was unaware that the appeal was struck out. There is therefore no satisfactory explanation whatsoever for the delay of over a year in making the application for reinstatement.

78. Even if I had considered his evidence reliable, I would not consider he was acting reasonably in having no contact with his agent since 2015 on an appeal of such importance to himself; I consider he ought to have checked on progress with his agent but (even on his story) he did not. Had he done so, he ought to have discovered they were not acting: he ought to have then contacted the Tribunal and discovered the appeal was struck out much earlier than he ultimately did so.

79. In conclusion, I am not satisfied that there was a good reason for the delay in over a year in failing to make the application for reinstatement.

The prospects of success

80. I move on to consider the prospects of success because, as I have said, at §59-62 it may be relevant if the appeal is very likely to succeed or very likely to fail. If the appeal merely has a reasonable prospect of success, the prospects of success are unlikely to tilt the balance one way or the other.

81. Ultimately, the question is the prospect Mr Huang has of upsetting or reducing the VAT and penalty assessments on him: to do that he has to succeed in his application for reinstatement and succeed in his underlying appeal. So I will look first at the prospects of success of the underlying appeal.

82. Mr Feng disavowed any suggestion that Mr Huang wished to make an allegation that the assessments were not to best judgment. Nevertheless, I considered whether such a case would have a reasonable prospect of success. On what little I was informed of this appeal, I did not think that such a case would have a reasonable prospect of success: there was nothing to show bad faith by HMRC or to suggest the assessments were capricious.

83. Mr Huang wishes to challenge the quantum of the assessments, but Mr Feng on his behalf appeared to accept that there was some suppression of takings. Yet his grounds of challenge were that the assessments were based on overly unfavourable assumptions. This overlooked the fact that to successfully challenge the quantum of the assessments he must prove the correct amount of the assessments. There was no suggestion that the appellant had any evidence to prove the correct amount of the assessments: Mr Feng appeared to rely in this appeal on challenges to HMRC's evidence of the invigilation exercises which led to the assessments.

84. Firstly, he identified what he said was a discrepancy with an invigilation exercise where the HMRC officer recorded an undeclared transaction at a time which Mr Feng said was after the officer left the premises: however, my reading of the evidence is that a Tribunal would be able to conclude that that was not what happened.

85. Secondly, Mr Feng had a somewhat ingenious argument that *Souliman* (2005) VTD 19200 established a rule that suppression observed on one day of the week could not be presumed to occur on other days of the week. Both of the invigilations in this case occurred on the same day of the week, 7 days apart. Mr Feng discounts one of the exercises due to the lack of what he said were details about the observations. His argument was therefore that, at best, HMRC could only assume suppression of takings took place once every 14 days, so that assessment should be reduced by 13/14ths.

86. *Souliman* was a first tier decision and is not binding on the FTT. In any event, the decision was based on the facts that in that appeal in two days of observation by HMRC, suppression was only observed to take place on one of the two days. The case did not establish a rule that suppression observed on one day of the week could not be presumed to occur on other days of the week and had it done so it would have conflicted with binding authority. In this appeal, HMRC's evidence was that suppression was observed on *both* days invigilated. And while Mr Feng's case was that the invigilation on one day was flawed, I was not satisfied that he had a reasonable prospect of success of showing that no suppression had been observed at all on one of the days.

87. So at best the appellant's case was that the estimates made by HMRC of the suppression could have been done on a different and lower basis, but without any evidence of the actual level of suppression.

88. There was one specific criticism of HMRC's calculation and that concerned whether an allowance had been made for own use (as the evidence on which HMRC relied was suppression of both takings and purchases). Nevertheless, it appeared that this criticism was fallacious as the figures showed that an allowance for own use had been made.

89. There was also a criticism that the 76% suppression of sales rate used by HMRC was not mathematically sound even on their invigilation exercise: yet it seemed to me the maths was obvious: HMRC's evidence was that some 17 purchases were observed or made by HMRC officers on two separate visits, only 4 of which (on their evidence) were declared. This led to the estimate of a 76% level of suppression: the maths seems correct.

90. In conclusion, it seems to me that all the appellant has is HMRC's evidence from the invigilations. Nevertheless, I accept that once it is clear that an assessment is to best judgment (and Mr Feng does not suggest otherwise) the Tribunal's job is to

> '[look] at all the material put before it by the appellant and indeed by the Commissioners, considering any evidence that is given to it and

> deciding for itself what should be the correct amount of any assessment'

And that the Tribunal's

> 'primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer…..'
>
> *Mithras (Wine Bars) Ltd* [2010] UKUT 115 (TCC

In other words, it seems to me that the appellant can rely on the evidence on which HMRC made the assessment to try to prove that the assessments are excessive. Nevertheless, while the appellant can rely on HMRC's evidence, he can only rely on it to prove (in other words, to show more likely than not) that the level of suppression was lower than the amount for which he was assessed. It is not enough merely to show that that the evidence could have supported a different, lower assessment.

91. Yet here, many of Mr Feng's criticisms of the assessments seemed weak, and the argument raised in reliance on the *Souliman* case seemed doomed to failure. I was not satisfied that, relying solely on HMRC's evidence, as it appeared the appellant planned to do, the appellant had a reasonable prospect of success of making out a case that the assessments should be significantly reduced.

92. Although Mr Wilson for HMRC appeared to concede that the appellant's appeal had a reasonable prospect of success, I considered this somewhat generous.

93. Moreover, so far as the prospects of success of his application for reinstatement were concerned, these appeared weak in view of my inability to accept as reliable Mr Huang's evidence surrounding his relationship with STF.

The consequences to the parties of refusing or allowing an extension

94. The consequence of refusing the extension of time is that Mr Huang cannot challenge assessments amounting to around a quarter of million pounds. Nevertheless, for the reasons given immediately above I do not consider that, as the case was explained to me, he had a reasonable prospect of succeeding in an application for reinstatement or of successfully challenging the quantum of the assessment to any great extent.

95. Mr Huang's case is that if the appeal was reinstated, HMRC would accept the appeal into ADR. However, I find that the evidence only shows that HMRC would consider an application for ADR if the appeal is reinstated.

96. The consequence to HMRC of allowing the extension is that they must continue to defend (at their expense) an appeal I am not satisfied has a reasonable prospect of significant success.

Conclusion

97. I accept that the assessments are a very important matter to the appellant. Nevertheless, the delay of over a year in making the application for reinstatement was serious and significant and prejudiced HMRC. I was not given a good reason for the delay because I was unable to accept Mr Huang's evidence that he had been let down by his advisers; even if I had accepted it, I did not think that Mr Huang had acted reasonably in not chasing his advisers nor do I think (for the reasons given at §§68-72) that Mr Huang can rely on the failures of his own advisers. Because I am dubious about the prospects of success of the proceedings overall, I consider extending time would be procedurally prejudicial to HMRC while in effect of little prejudice to the appellant who would be saved defending proceedings he was unlikely to have significant success in.

98. Even if I considered the appeal had a reasonable prospect of success, it would not alter my view that it should not be reinstated because of the length of the delay and the lack of good reason for it.

99. In all the circumstances, I do not grant the application for an extension of time.

The application for reinstatement

100. As I have refused to extend time in which to lodge an application for reinstatement I do not need to consider the application for reinstatement. Nevertheless, I make a few brief comments on this.

The seriousness and significance of the failure to comply with the unless order

101. It was a serious and significant failure. The Tribunal asks an appellant to confirm an intention to proceed with the appeal in order that the other party and the Tribunal should know whether to continue to spend time and money on the resolution of the dispute. Failing to respond to such a request is a very serious matter and (in my opinion) justified the striking out of the appeal.

The reason for the failure

102. I have largely rejected Mr Huang's evidence. I reject as reliable his explanation that the failure to comply with the unless occurred without fault on his part because he believed that STF were dealing with the appeal on his behalf. In particular, as I have said, I am not satisfied that he was unaware that STF no longer acted for him. A person who knows that their representative has ceased to act for them acts unreasonably if they fail to either contact the Tribunal direct to progress the appeal or appoint a new representative. Mr Huang did neither.

103. As I have also said, I am not satisfied that after 2012 he received none of the post addressed to him at Railton Road. I am therefore not even satisfied he was unaware of the letter of 20 June, the unless order and the strike out order. In circumstances where I am not satisfied he was unaware of them, I have no acceptable explanation for the failure.

104. Also, as I have said, even if I accepted as reliable his explanation of his relationship with STF, I do not think he acted reasonably in leaving matters entirely to STF. Moreover, to the extent it is his case that the fault lay with STF, for the reasons given at §§68-72, I think his agent's failures must be treated as his failures.

The prospects of success

I have already dealt with my views of the prospects of success of his challenge to the underlying assessments.

The consequences to the parties of reinstatement/non-reinstatement

105. I have already largely dealt with this.

Conclusion

106. If I had extended time in which to apply for reinstatement, I would not reinstate the appeal, for much the same reasons as I have decided not to extend time. I accept that the assessments are a very important matter to the appellant. Nevertheless, the failure to respond to the unless order was serious and significant and prejudiced HMRC. I was not given a good reason for the failure because I was unable to accept Mr Huang's evidence that he had been let down by his advisers; even if I had accepted it, I did not think that Mr Huang had acted reasonably in not chasing his advisers nor do I think that Mr Huang can rely on the failures of his own advisers.

107. I would not reinstate the appeal; this conclusion is reinforced because I am dubious about the prospects of success of the appeal, so I consider extending time would be procedurally prejudicial to HMRC while in effect of little prejudice to the appellant who would be saved defending proceedings he was unlikely to significantly succeed in.

108. In all the circumstances, I would not grant the application for reinstatement.

109. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 30 MAY 2018