Appeal number: LON/2007/1602

PROCEDURE – Application for extension of time to apply for a decision of the tribunal to be set aside - allowed - application for set aside -refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

RIONI LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at Fox Court, 30 Brooke Street, London on 5 November 2015

Mr Kovalevsky QC, counsel, for the Appellant

Ms Goldring, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

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DECISION

1. The appellant applied (a) on 15 May 2015 for the tribunal to exercise its discretion under rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") for an extension of time in which to make an application to set aside the decision of the tribunal released on 20 April 2015 (the "**decision**") and (b) on 7 September 2015 for the tribunal to exercise its discretion under rule 38 of the Rules to set aside the decision, if the extension of time is granted.

2. In brief, in the decision the tribunal dismissed the appellant's appeal against HMRC's decision denying the appellant's claim to input tax on the purchase of mobile phones and other electronic components in the VAT periods 10/05, 04/06, 07/06 in the total sum of £22,367,334. The hearing took place on 1, 2, 5, 8, 9, 11, 17 and 18 September 2014.

3. The decision records (at [77] and [78]) that, prior to this appeal, Mr Gligic had instructed solicitors to sue HMRC in the High Court for the balance of monies owed to the appellant following the denial of its input tax repayment claim. The amount claimed was stated to be £2,448,215.93. The High Court proceedings were stayed and the matter of whether or not HMRC were entitled to withhold the input tax was referred to the tribunal.

Applications

4. The appeal was brought on behalf of the appellant by Mr Nick Gligic the director and owner of the appellant. Mr Gligic was appointed as a director of the appellant on 1 July 2006. Both before and after his appointment as director he was responsible for the trading/transactions undertaken by the appellant which were the subject of the appeal. It was agreed, as recorded in the decision, that at all material times he was the controlling mind of the appellant. At the time of the hearing and for some time before that Mr Gligic was residing in Tanzania.

5. The application for an extension of time was made by Mr Gligic on behalf of the appellant on the basis that the appellant could not comply with the usual 28 day time limit as it was in the process of instructing a new legal team to represent it. Mr Gligic said that the appellant had finalised the required funding but drawdown of the funding would not be possible until the end of May 2105. Until that point the legal team could not be put in funds and start to act. The appellant asked for a further 21 days in which to serve an application for the decision of 20 April 2015 to be set aside. Mr Gligic provided an update on 17 July 2015 stating that he had had his first conference with counsel that week, who had now been put in funds, but that they asked for certain information which he was endeavouring to provide to them within as timely a manner as possible. He said he would keep the tribunal updated and that the application would be filed shortly. He noted he had not heard if the application for the extension of time had been granted.

6. Mr Gligic submitted the application for the decision to be set aside on 7 September 2015 in the form of a skeleton argument from his counsel. The arguments put forward are set out in the submissions but essentially the application is made on the basis that (a) the appellant was not present and was not represented at the hearing due to circumstances beyond its control and (b) it is in the interests of justice for the appellant to have the case heard with its principal witness, Mr Gligic, present and with the benefit of legal representation.

Background – postponement applications and 2014 hearing

7. Prior to the hearing of the substantive appeal in September 2014, the appellant had made two postponement requests which were refused.

8. The hearing was organised by the tribunal over a year in advance; the tribunal gave the parties notice on 21 August 2013 that the hearing was arranged for 1 September 2014 to 3 October 2014. In the few months before the hearing it appears that HMRC became concerned as to the appellant's progress in preparing for the hearing. They contacted the solicitors who appeared to be acting for the appellant at that time (the "**Solicitors**") for clarification. The Solicitors informed HMRC on 17 June 2014 that they were no longer instructed to act and that they assumed the appellant would be representing itself.

9. On 24 June 2014 HMRC wrote to the tribunal noting that Mr Gligic had told them on the phone that morning that he wished to fight the appeal but he did not think that he could be absent from a project that he was then working on in Tanzania for the 5 week hearing as it would set the project back years. He had also indicated that he may wish to instruct new representatives. HMRC noted that they wished to put the appellant on notice that they would not consent to the hearing being vacated. In their view there was enough time for the appellant either to reinstruct the appellant's former representatives or to obtain new representatives.

10. On 30 July 2014 Mr Gligic wrote to the tribunal asking for the hearing to be postponed as he, as the main witness for the appellant, was not able to attend as he did not have a valid passport. He said the following:

> (1) He had been trying to renew his UK passport, which had expired on 31 December 2013, since 22 April 2104.
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> (2) The difficulty was that the UK Passport Office (the "**UK PO**") had changed their procedure and now required the original expired passport (and not just a copy).
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> (3) He found that he could not deliver the old passport except in person which was impossible as it was not valid. No courier would accept the passport for delivery under international rules.
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> (4) He had approached the British High Commission in Dar es Salaam (the "**Tanzania BHC**") which said that under new regulations they had nothing to do with passport renewal.
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> (5) He was awaiting advice from the UK PO.

11. He enclosed a copy of an email from the UK PO dated 22 April 2104 acknowledging receipt of his online application and asking for the original documentation before the process could be started.

12. On 4 August 2014 Mr Gligic wrote to the tribunal noting that he was still waiting for the UK PO to make contact with him as to how to resolve his problems. He said that he spoke to the UK PO last week and, whilst they were supposed to make contact with him direct within 3 working days, he was still waiting. He said "there is no way for me to call them direct as all telephone lines go via a call centre which then escalates the calls and a representative should then call me back directly. This situation is a mess".

13. On 4 August 2014 also HMRC wrote to the tribunal objecting to the postponement application. In outline, they stated that:

> (1) They did not accept that Mr Gligic's assertions were factually correct; in what he said were true, he would never be able to leave Tanzania.
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> (2) They had contacted the Foreign and Commonwealth Office who had said that Mr Gligic could obtain a temporary travel document to allow him to return to the UK without a passport. This was available from the Tanzania BHC for a fee of £95.
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> (3) In any event, even if Mr Gligic were not able to attend the hearing, it would not be in the interests of justice to postpone it. The appeal dates back to 2006. The memories of witnesses were already old and would fade with time such that an adjournment would potentially degrade the available evidence. HMRC and their witnesses were entitled to finality in this matter which began by HMRC issuing a decision notice on 21 August 2007 and had been ongoing for nearly 7 years. HMRC had already had to replace witnesses because of their retirement. The appellant has required the attendance of all 35 of the appellant's witnesses. It would be unfair that, having expected to give evidence during the listed dates for the hearing, those expectations were not met because Mr Gligic had failed to complete a routine administrative task.
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> (4) HMRC had expended considerable resources in the preparation for the appeal much of which would have to be repeated if there were to be an adjournment. There are other litigants who have been waiting for hearings and at this point it is unlikely that the tribunal could fill a 5 week slot.

14. On 7 August 2014 the tribunal notified the parties that the postponement was refused as the Judge who considered the matter was not satisfied that Mr Gligic was unable to travel to the UK. It was also noted that the hearing had been listed since August 2013 and it would not be in the interests of justice to permit further delay.

15. On 19 August 2014 HMRC wrote to the tribunal noting (amongst other matters) that they were having difficulty serving the trial bundles on the appellant. HMRC said they had asked the appellant for an address for service and the appellant had given one in Lancashire but HMRC had not been able to deliver to that address as no

one was there. HMRC noted that the appellant had not replied to their subsequent request for an alternative address or an agreed time for delivery. HMRC had written to Lucas Accounting Services, who were appointed to correspond on behalf of the appellant, but they responded that there were not on the record as acting for the appellant.

16. The appellant made a further request for postponement of the hearing on 20 August 2014. Mr Gligic said the following in the application:

> (1) He still had not been able to obtain a new passport or an emergency travel document ("**ETD**") despite continued efforts; he was still waiting to be contacted by the UK PO as regards a new passport and/or ETD.
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> (2) The Tanzania BHC could no longer issue a temporary travel document/ETD as he had confirmed with the Tanzania BHC in numerous calls. He said the procedure, which was contrary to what was posted on the UK PO website, which was published 30 March 2013 before the current changes, was to make contact with the UK PO call centre. He had done so and was waiting to be contacted by a representative. He was still waiting despite the intervention of the Home Secretary herself.
>
> (3) He could not book a flight until he had valid travel documents. To satisfy ETD requirements essentially he would need a confirmed booking or ticket. There is only a 2 to 3 hour window for booking a flight in Tanzania and he could not see how the authorities would be able to turn around an application and provide an ETD within that time frame.

17. Mr Gligic enclosed a copy of an email to the Home Secretary dated 6 August 2014 in which he stated that he had found out that the Tanzania BHC no longer dealt with passport renewals and that he had to apply to the UK with his original expired passport. He had been unable to achieve this via courier service as "none of the courier companies the likes of DHL, FedEx, Aramex etc are legally allowed to transport such documents under international laws" and therefore would not accept the carriage of his expired passport to the UK PO together with his renewal application and "I would certainly not risk sending such an important document via Tanzanian postal service nor would I expect the [UK PO] to even suggest such a solution". He said that "I have on multiple occasions, the latest being today, checked with [the Tanzania BHC] as to whether they can accept my passport and organise its return to the UK on my behalf. They cannot."

18. In the bundle there is also a copy of further correspondence with the Home Secretary's office but it is not clear whether that was provided with the postponement application or at a later time. This correspondence is set out at 32 below.

19. On 26 August 2014 Judge Berner issued directions refusing the postponement application which, in summary, stated the following:

> (1) Judge Berner's own search of the UK PO website revealed that, on a page stated to have been updated on 27 June 2013, an ETD can be applied for by British nationals outside the UK if, amongst other things, a passport

has expired. The website stated that an application had to be made in person to a British High Commission; a link was provided to a list of embassies and commissions and the Tanzania BHC is listed. The page for the Tanzania BHC also expressly referred to the service of ETDs.

(2) From this he was not persuaded that Mr Gligic had a genuine problem in obtaining an ETD. He thought Mr Gligic was seeking to confuse the position by referring to the renewal of his passport rather than the issue of an ETD. His email to the Home Secretary was sent only after the refusal of his original application and does not refer to the matter of an ETD but only a renewal of his passport. The relevant part of the website of the UK PO was updated after the date on which Mr Gligic says the procedure was changed but continues to refer to the obtaining of ETDs by application in person to a commission.

(3) He accepted that the appellant would be disadvantaged if Mr Gligic did not attend the hearing. However, in the context of a 5 week hearing which was arranged as long ago as August 2013 and, in the light of Mr Gligic having failed to convince him that he had genuinely been prevented from obtaining the necessary documents in order to return to the UK in time for the hearing, it would not be in the interest of justice to postpone the hearing.

(4) He noted that the appeal related to VAT accounting periods in 2005 and 2006 and a decision of HMRC made on 21 August 2007 and that the appeal had been before the tribunal since September 2007. There was substantial documentary and witness evidence. Any postponement would run the risk that evidence could become stale, witnesses might cease to be available and memories might fade. The interests of justice pointed clearly towards ensuring these proceedings were dealt with without further delay.

20. Mr Gligic did not in fact attend the hearing and the appellant had no legal representation. As noted his Solicitors were not acting for him and the counsel Mr Gligic instructed to act for the appellant was barred from practising at the time (as set out in further detail below).

21. On the first day of the hearing Mr John Bowers attended the hearing to explain the circumstances of Mr Gligic's non-attendance which he reported as follows (as set out in the transcript from the hearing):

"The situation is that I was consulted by the family on Saturday, who informed me that Mr Gligic, on Friday evening had had a stroke and a heart attack in Dr es Salaam, and could I come along this morning – there were aware of these proceedings – and explain to the tribunal that this is the case. They went on to tell me ….that there had been some issues with regard to travel documents for Mr Gligic, but they did not tell me what the result of those issues were….But he is not able to travel in any event because of the medical situation that has happened to him.

I explained to the family I would need some medical evidence on this and they said they were in the process of obtaining the same. I spoke to Mrs

> Gligic again this morning, sir, and she said she had not got it, but she was hopeful of having it later today or tomorrow. She did point out to me that we are within the aegis of East Africa and things don't move too fast, but that is the situation, sir."

22. Judge Hacking noted that the travel document issue had been dealt with by another Judge and the postponement application was refused. He said that he was sorry to hear that Mr Gligic was not well but obviously he was not going to be able to appear anyway, even if he was able to resolve his travel document problems. He said that the tribunal would not adjourn the case. "The case has been in train now for many years and it really has to be brought to a head. There have been previous applications to adjourn and in all the circumstances I am not minded to adjourn".

23. Ms Goldring, who appeared as counsel for HMRC, noted that for the tribunal to proceed they would need to be satisfied that the appellant had been notified of the hearing (which she said was clearly the case as Mr Gligic had made 2 postponement requests) and that it was in the interests of justice to proceed. She said that, for the reasons given by Judge Berner in his earlier directions, it was in the interests of justice to proceed. The appellant had provided insufficient evidence that it could attend and the appeal was fixed back in 2013. If the appeal was adjourned it could not realistically be heard until late 2015 and there had to be some finality to the litigation. Judge Hacking said that he was satisfied that the proceedings could go ahead.

24. On 11 September 2104 Mr Bowers handed to the tribunal certain witness statements which he said Mr Megessa Nyilgana, a friend of Mr Gligic in Tanzania, had managed to access from Mr Gligic's computer whilst Mr Gligic was still in hospital. Mr Bowers said Mr Nyilgana had emailed these to him.

25. On 17 September 2014 the appellant sent the tribunal a letter which stated it was from Doctor Eric Muhumba (surgeon) of Mwananyamala Hospital in Tanzania. This was addressed "To whom it may concern" and stated:

> "Please be informed that [Mr Gligic] was attending at our hospital and admitted 29 August 2014 up to 11 September 2014 complain of heart attack and Hypertensive stroke.
>
> After thorough investigation we found that he was suffering from heart attack and hypertension stroke.
>
> He was on treatment during period of admission [and there are set out details of the medication]. He attended a recheck up on 15 September 2014.
>
> He is in no way mentally impaired and we expect a full physical recovery from the mild paralysis within the next 3-4 weeks when he will be able to restart work and perform duties."

26. On 17 September 2014, Mr Gligic also sent the tribunal an application asking for the admission in the proceedings of the witness statements, which were apparently sent by his friend to Mr Bowers (as set out in 24). Further details of the application are set out below.

Evidence produced to the hearing

27. Mr Gligic gave evidence in the form of a witness statement and orally at the hearing. He also produced a letter signed by Mr Bowers and various items of correspondence such as additional email correspondence with the UK PO. Prior to the hearing Mr Gligic was asked by HMRC to produce a witness statement from Dr Muhumba and the original of the letter from Dr Muhumba (being the letter set out in 25 above). These were not produced and the appellant was questioned as to the reasons why he was not able to provide these as set out below. The parties also produced a bundle with correspondence recording the history of this matter.

Lack of representation at the hearing

28. It is clear from the correspondence that the Solicitors, who it appeared had been acting for the appellant, were definitely not acting at least from sometime in June 2104 onwards. As set out above they notified HMRC that they were not instructed to act for the appellant any more on 17 June 2014. Subsequently (as confirmed in email correspondence) Mr Gligic reported the Solicitors to the Solicitors' Regulatory Authority ("**SRA**") on 16 August 2014. He alleged that funds destined for counsel he had previously instructed were misappropriated by the solicitors. On 20 August 2014 he sent the SRA a bill which he said had been sent to him by the solicitors in which they claimed to have paid counsel. He noted that the counsel in question said payment had not been received.

29. Mr Gligic gave evidence that he had appointed counsel, Mr Matthew Boyden, to represent the appellant but as at 2 May 2014 he was suspended from practice for 6 months (following disciplinary complaints). It is clear that Mr Boyden was suspended from practice at that time as this is a matter of public record. Mr Gligic gave evidence that, before this, Mr Boyden had sought to take instruction from Mr Gligic on a visit to Tanzania over a number of days in July/August 2013 which included preparing a draft witness statement. He said that there was subsequently a breakdown in the relationship with Mr Boyden, in particular, when he found out about the complaints that had been made against Mr Boyden. It appears the draft witness statement which Mr Boyden is said to have assisted with was one of the statements produced to the tribunal by Mr Bowers being that dated 8 August 2013.

30. Mr Gligic said in his witness statement that it must be remembered that he was resident in Tanzania and, therefore, was unable to brief an alternative legal team even if there had been time to do so before the hearing in September 2014. He said that there was also the matter of cost in that his resources were already depleted by sums already paid to counsel and the solicitors. He said that "due to the inadequacies of his legal team I was left between a rock and a hard place."

Mr Gligic's non-attendance at the hearing

31. In his witness statement Mr Gligic stated that he was aware that Dr Muhumba is a highly respected practitioner in Tanzania and he would have expected HMRC to have accepted that fact carrying out such checks as to the "bona fides" of the doctor as they

saw fit. He noted that Tanzania is an African country where "life moves more slowly and at its own pace and what we in the West consider as urgent means frankly nothing to them, I am not sure whether I can obtain a witness statement from the said doctor but I will try although this will not be provided within any timescale set down by HMRC".

32. Further email correspondence was produced to the tribunal as regards Mr Gligic's passport application which was intended to demonstrate that he had made on-going efforts to obtain a new passport. A summary of the correspondence is as follows:

(1) On 6 August 2014 the Home Secretary's office responded to Mr Gligic's email of that date asking for his date of birth and application reference stating that they would then pass this to the UK PO and ask them to contact Mr Gligic.

(2) On 18 August 2014 Mr Gligic wrote to the Home Secretary again noting that he had responded to the previous request on the same day but had still not heard from the UK PO regarding his passport application and the possibility of obtaining an ETD.

(3) On 19 August 2014 the Home Secretary's office replied to say they would pass this on to the UK PO.

(4) On 6 September 2014, Mr Friar of the UK PO wrote to Mr Gligic that he had sent a request to the case worker for his online application and had asked the case worker to contact Mr Gligic direct.

(5) On 2 October 2014:

(a) Mr Gligic wrote to Mr Friar stating that he was still waiting to be contacted by the UK PO. He said that, as he had not been able to renew his passport, he had not been able to renew his residency permit in Tanzania and therefore was an illegal alien a risk of being deported. He said this was due to the incompetence of the UK PO and asked for urgent action.

(b) Mr Friar responded that he had checked Mr Gligic's case notes and it appeared that his declaration documentation had not been received. He asked Mr Gligic to confirm how he had sent this.

(c) Mr Gligic responded that he had sent his online application on 22 April 2014 and had sent a signed copy of the application and a scanned copy of his old passport by courier within a few days after that. He said that he was then told that his application could not be processed without the original passport being sent to the UK PO. He then said that no courier would handle the passport and the Tanzania BHC was no longer allowed to accept an application with the expired passport and ensure the safe passage of the documents back to the UK. He asked how he could get his old passport back to the UK. He noted that British outposts have stopped verifying UK

passports and said that if he ever got a renewal he hoped it would not be sent by post as he had had previous difficulties with the Tanzanian postal service.

(6) On 8 October 2014:

(a) Mr Gligic wrote to Mr Friar stating "Your silence is defeaning. I must travel to Dubai in the next week for emergency business meetings and I still have no passport. I expect some prompt action now as this manner is impeding and destroying my business and investment in Tanzania."

(b) Mr Friars responded that he had that morning contacted the Durham office directly as they processed Tanzanian applications. He was advised that the Tanzania BHC may forward your application to the UK PO for a fee. Unfortunately "if no courier service is willing to deliver your passport to us you may have to rely on a registered postal service".

(c) Mr Gligic wrote back saying he had two concerns. The BHC had continually told him they could no longer handle passports and he did not understand, therefore, why this offer was not made before. He noted that the Tanzania BHC would have to rely on a courier service, "even you yourself appear to be doubtful that this will be possible or in the alternative registered Tanzanian mail, a service that has on 3 occasions failed to deliver a replacement bank card to me". He noted he needed to travel urgently to Dubai on business. He suggested that he would scan his application with digital photographs and a scan of his expired passport. He said original copies could then be taken to the Tanzania BHC for them to confirm that what was sent electronically was the same. He concluded "you have taken the decision to move to online applications, therefore, I suggest you have a complete digital process not a half-baked hybrid that is not fit for purpose".

(d) Mr Gligic sent a later email asking for a response as regards his suggested solution.

(e) Mr Friar responded that all documents have to be hard copies and "have to be sent to the UK by whatever means you deem secure". He said it would not be possible to expedite an overseas application nor could the UK PO accept scanned copies. He said that the UK PO could not process his application until the necessary documents were received in the UK, including his expired passport as explained in full on the UK PO website. He said this was the information from the Durham office which "routinely process many applications from Tanzania without incident". He provided a phone number for the Durham office.

(7) On 9 October 2014 Mr Gligic wrote to Mr Friar, copying in the Home Secretary, complaining about the procedure. His view was that scanned copies and the procedure he had suggested should suffice.

(8) On 10 October 2014 Mr Gligic wrote to Mr Friar, again copying in the Home Secretary, saying that his passport declaration, photos and expired passport would be with the Durham passport office by Monday morning. He noted that, from a meeting with the Tanzania BHC that morning, he understood that an ETD was not accepted by the UAE authorities. He asked for the application to be expedited so that the replacement passport could be completed on Monday and returned to DHL in the next few days. He also said that, on speaking to the Tanzania BHC, it was very obvious that he had not been the only one in a predicament. He said that the changes to the system had meant where "previously a passport was renewed within 5 days maximum from start to finish it is now taking 2 months and more."

(9) On 14 October 2014 Mr Gligic wrote to the Home Secretary complaining that he had been told that the fastest turnaround of his application was 2 to 4 weeks as they had to make enquiries with Tanzania. He complained of the procedure and that his previous suggestion (for scanned copies to be sent) was rejected and "instead it has taken me since Tuesday 22 April 2014 until Friday 10 October 2014 to get a courier company to handle my original expired passport, a time period of 25 weeks". He asked for intervention to speed matters up.

(10) On 16 October 2014 Mr Gligic wrote to the Durham PO with a copy of a letter from Hyatt confirming that hotel as his address in Dar es Salaam and that the hotel would accept receipt of his passport at their address.

(11) On 17 October 2014 the Durham office replied to say they had accepted this evidence and issued his new passport which would shortly be delivered by DHL.

Witness statements presented to the tribunal in 2014

33. Mr Bowers confirmed in his witness statement that he had attended the tribunal as set out above and also on 8, 11 17 and 18 September 2014. He also confirmed that on 10 September 2014 he had been sent by Mr Nyilgana a copy of Mr Gligic's witness statement drafted by his then counsel dated 8 August 2103. He said he had been asked to seek the tribunal's permission to admit this evidence so as to demonstrate to the tribunal some part of what Mr Gligic would have tendered in evidence had he been capable of attending. He had presented this on 11 September 2014 and it was admitted. He said that throughout the days during which he was in attendance at the tribunal "I was forcibly struck by the number of times the respondents were asked by the Tribunal Judge to elucidate on how the appellant could have known about the bona fides of others in the trading chains, it being accepted that the appellant must have known about the bona fides of both its immediate supplier and customer."

34. The witness statement dated 8 August 2013 contains the following statements of potential relevance here:

> (1) Mr Gligic stated that he realised that he was not being properly advised by the Solicitors in July 2013 and that he dis-instructed them at the end of July 2013. He said he then transferred his instructions to Consilium Legal, who had acted with extreme urgency in assisting with the drafting of the "properly considered statement". He asked the tribunal to disregard his previous statements and to focus on this one.
>
> (2) Mr Gligic set out that he would not be available to attend a trial in the UK until at the earliest 2015. In outline he said that he had been in Tanzania since July 2010 working on researching a gold production project with a business partner. He said that he had spent very little time out of Tanzania since that time (fewer than 30 days) as any absence represented a serious risk to the security of the enterprise. This was stated to be because:
>
> > (a) Even a single day's absence invited threats to the stability and security of his on-going licence to mine.
> >
> > (b) The maintenance of the established infra structure would be subject to sabotage by rivals and bandits.
> >
> > (c) He had received numerous threats of violence and attempts on his life which meant he had to have personal security around the clock.
> >
> > (d) His associates and employees now had to live also with threats of violence and intimidations.
> >
> > (e) On 18 June 2013 a former business associated of his was murdered. Since his state funeral the pressure on Mr Gligic to remain in control of the site had considerably intensified not least because of the reasonable concerns of investors.
>
> (3) He concluded that he was unable to risk any absence from Tanzania until the site was fully operational which was unlikely to occur until a date in 2015. He said it would be commerciality negligent of him, therefore, to act against the interests of investors or to provoke the displeasure of the authorities in Tanzania whose interest in the project had been amplified significantly since the death of his former business associate. He asked therefore if he could give evidence by video link.

35. As noted, on 17 September 2014 Mr Gligic wrote to the tribunal making an application on behalf of the appellant for the tribunal to accept the 5 witness statements sent to Mr Bowers by Mr Nyigana as the statements of Mr Gligic. In outline the following is stated in the application:

> (1) All of the statements had been given to the appellant's solicitors at the time they were signed and dated and it was assumed that they had been filed with the court.

(2) However the Judge had confirmed they had not been filed and it "has been by chance" that these statements were actually sent to the court when a friend of Mr Gligic, after discussions with a family representative, accessed his computer to identify and send anything to the tribunal that might be useful to the case.

(3) When perfecting the statements with the appellant's former counsel Mr Gligic was informed that counsel had been suspended from practice and that remained the case.

(4) The Solicitors should have ensured the statements were filed. They were moved from the record in July 2014 following a "catalogue of inferior service". The appellant "became disenchanted with them as a result of their poor housekeeping and administration". Furthermore as they were instrumental in recommending and instructing former counsel and introducing him to the case the appellant considered their integrity could be called into question.

(5) Consilium Legal were included on the witness statement by Matthew Boyden for reasons that the appellant did not understand. Although Matthew Boyden undoubtedly knows that firm he was in fact instructed by the Solicitors.

(6) It had been extremely difficult for Mr Gligic to "always deal with matters whilst he had been in Tanzania for the past 4 plus years, where most of the time he has been based at site, deep in the bush without the communication we are now used to and dependent upon." Therefore the appellant was very dependent on the actions of its solicitors and barrister which have been found wanting.

36. In his witness statement prepared for this hearing, Mr Gligic stated that the witness statement dated 8 August 2013 was prepared by counsel as he had said but "I acknowledge that it was incomplete, and indeed that I had made some further notes upon it." He said that the completion of this documentation could only have been undertaken by him, but he was not in a position to do so due to his life threatening illness and hospitalisation or, by the new legal team, which he was not in a position to assemble or raise funds for. He said he wanted to make it clear that the filing of these documents by Mr Bowers with the tribunal was no more than an attempt to assist the tribunal and to avoid "an open goal" for HMRC in light of the proceedings continuing. Even though this documentation was incomplete it had always been his intention to attend the tribunal hearing to represent the appellant having stood down the legal team for self-evident reasons but he was totally thwarted in carrying out that intention firstly by the issue with his passport and secondly his unforeseen hospitalisation. His absence from the tribunal hearing was not voluntary but arose from circumstances wholly beyond his control.

Mr Gligic's oral evidence

37. Mr Gligic confirmed that Mr Boyden had gone to Tanzania in August 2013 to help him with his witness statement. At that time he was under the impression that the hearing would be in or around October 2013. Counsel was working with him on

the draft for around 8 days. He spent a lot of money, around £25,000, on the fees and expenses of counsel in this respect. He regarded what was produced as a rough draft. He had in total spent over £100,000 on legal fees. The costs were so high to some extent because the solicitors had misappropriated funds intended for his previous counsel so that he had ended up paying twice over.

38. As regards his passport, he had initially just forgotten to renew it. He thought initially that a scanned application and copy of his old passport would suffice for the application for a new one but he had been told, as set out in the correspondence above, that he would need to send the original. He did not want to send the original as it had his residency stamp in it as regards his ability to stay in Tanzania. He could not in any event find a courier to take the passport as it is illegal to do so in Tanzania; everything has to be inspected before it goes in the envelope and is accepted. The procedure had changed. Previously it was possible to take the expired passport to the Tanzania BHC and they handled the application and sent the passport back to the UK. He had tried very hard but failed to make progress and that was why he had contacted the Home Secretary.

39. He did also discuss the procedure for ETDs with the Tanzania BHC and UK PO. The procedure for that had also changed. You had to lodge the documents with the passport office for them to approach the Tanzania BHC. The difficulty was that such an ETD would only be valid for a specified date and a reserved booking was needed to get one which would only cover the specified flight. In Tanzania a flight can only be held for a couple of hours or at most half a day which would not be long enough to obtain the ETD. By the time you had the ETD you would no longer have the flight. The problem was made worse as regards the UK as there are no direct flights to the UK.

40. In cross examination Mr Gligic was questioned about the delay in applying for a new passport. He repeated that he had just forgotten in the beginning but it was the need for a renewal of his residency permit in Tanzania that had reminded him. It was pointed out that Judge Berner had noted in his directions refusing the postponement application made prior to the hearing (see 19 above) that what Mr Gligic said about the UK PO's website was not correct and that he thought Mr Gligic was trying to confuse matters as regards an ETD. He said he was not trying to confuse anyone he had just thought it better to focus on the passport renewal.

41. It was put to Mr Gligic that there was no evidence he had made any attempt to obtain an ETD to enable him to travel to the UK to attend the hearing. He said he had mentioned it in his email to the Home Secretary and, as at that point he was dealing with the Home Secretary, a lot of the dealings were verbal with the passport authorities. It was noted to him that on 4 August 2014 he had written to the tribunal complaining of the difficulty of making phone contact with the UK PO (see 12 above). He said he had called the UK PO about an ETD but, as set out in that email, he had to wait for a call back. He was taken to the emails with the UK PO and Home Secretary and shown that they focus on the passport renewal. He spoke of the difficulty with the flights and using an ETD and said that he had expected a call from the UK PO about an ETD but he had never been called back (see 39 above).

42. He was questioned about how it was that he had repeatedly said that he could not get a courier to deliver his old expired passport from Tanzania to the UK but then in October 2014 he sent the documents for his passport application, including the expired passport, to the UK PO with DHL. He said that eventually he was told by the Tanzania BHC he could use DHL.

43. As regards his illness he described he had felt a pain, mostly in his back; it was rather like being winded and he had trouble breathing. He went to hospital and they said he had had a heart attack and prescribed injections of drugs. He had mild paralysis on his left side but was told this would rectify itself. He was in hospital under medical supervision. He lost a lot of weight, around 3 stones. He was very stressed as he was not able to represent himself at the hearing. He was at the local hospital as he could not afford a better one where the medical care could have cost him as much as £20,000. In September 2015 HMRC had asked for more evidence from the doctor/hospital. He had tried to get the doctor on telephone but he would not accept his calls. Mr Gligic speculated this was because he did not know who it was calling. It was around election time in Tanzania when people go home to vote or are on the campaign trail. The appellant finally managed to make contact only last week with Mr Muhumba on "WhatsApp" and asked if he could confirm the position. Mr Gligic had received an email from him just this morning confirming the position. This was handed to the tribunal.

44. In cross examination Mr Gligic was asked why he had not been able to produce the original letter from Dr Muhumba (being the letter described in 25 above). He said that he could not obtain it as it was locked in the Hyatt Regency in Dar es Salaam. He could not access it until he had paid an outstanding hotel bill and he could not afford to pay the bill. He had not got to Dubai in time to sort out his financial affairs and there was no one in Tanzania who could help him. It was noted that Mr Bowers reported to the tribunal that Mrs Gligic said that she would be able to produce medical evidence soon after the start of the hearing but nothing was produced until the last day of the hearing. Mr Gligic said it was his mother who was helping Mr Bowers at the time but she was based in the UK. It had just not been possible to get a letter until then. It was noted that he had referred to providing a witness statement from Dr Muhumba (in an email to HMRC dated 29 September 2015) but that had not been produced. He said that he had hoped to do so but he had had the difficulties he had explained and had only just been able to make direct contact with Dr Muhumba using "WhatsApp".

45. It was put to Mr Gligic that it was something of a fortunate coincidence that the email from Dr Muhumba had apparently arrived just that morning. It was noted that it is very easy to set up a gmail account (as the email was sent on a gmail account) and this was not satisfactory evidence that the email was in fact from Dr Muhumba. It was also noted that his name was spelt differently in the email and in the copy of the letter. Mr Gligic said it should be possible to check the IP address to show the email came from Africa and people in Africa sometimes spell their names differently.

46. Mr Gligic was questioned about the fact that he had said in his witness statement of 8 August 2013 that he would not be able to attend a hearing until 2015 but then he

said he was very willing to attend in 2014 but for the fact that he could not obtain a passport/ETD. He was asked to explain why this change happened. He said that in 2013, when his former counsel had come to Tanzania to help prepare a witness statement, a local man had been murdered and Mr Gligic was a suspect. He needed to protect his assets. He was having to deal with a major dispute over a licence relevant to his project in Tanzania which had belonged to the man who was murdered. However, the murdered man's family then started to be reasonable and negotiated about the licence and engaged in a proper legal process. He asserted, therefore, that the problems had been resolved sooner than he had anticipated when he had made the witness statement of 8 August 2013.

47. It was put to him that in fact he did not attend the hearing in September 2014 as he was prioritising his business interests above pursuing the proceedings in the tribunal. He said that in 2013 he had thought there was a problem as he had explained but that had calmed down by the end of 2013 but not by the time he made the witness statement. He also noted that the witness statement was only a draft which was incomplete.

48. It was also put to Mr Gligic that HMRC reported that in the summer of 2014 he said he would not be able to attend a 5 week hearing because he could not be away from Tanzania because of a work project and that his absence could set that back years. He agreed he had said this to HMRC. He said that at that time he had been putting together funding for another project but that had fallen through. He did not accept that he took a decision not to be at the hearing for business reasons. It was just that circumstances changed.

49. Mr Gligic was asked why he did not obtain new representatives for the appellant given he had told HMRC in June 2014, when the Solicitors had said they were no longer acting, that he may seek new representatives. He said that initially he had not been aware that Mr Boyden could no longer act for him as that had not come out until later in the summer, so he thought Mr Boyden was still preparing. He said he had phoned a number of solicitors; he had a conversation with Consilium Legal and Mr Boyden as to whether he could assist from the sidelines. However, it was very difficult particularly as he was struggling to get hold of the old files from the Solicitors. He did not think anyone could get to grips adequately with the case without the files. Also he was constrained in who he could instruct due to the depletion of his financial resources in having paid the previous advisers (in particular, as they had, as he alleged, misappropriated funds such that he had had to pay previous counsel twice over).

50. It was noted that in the last few weeks before the hearing HMRC had trouble delivering the hearing bundles to the appellant at the address provided (see 15 above). It was put to Mr Gligic that this was further evidence of his lack of engagement with the proceedings at that time. He said there had been a confusion. His accountant was to take delivery but the accountant's wife had not realised that the bundles were for the accountant as Mr Gligic's name was on the address on the packages.

51. It was noted that Mr Gligic had signed the 8 August 2013 witness statement as a true statement but he was now saying it was incorrect and incomplete. It was pointed out that it was inconsistent with his current evidence and the application sent to the tribunal in September 2014. In the application he said he did not know why Consilium Legal were recorded in the witness statement but in the statement itself he said that he had instructed them having become dissatisfied with the Solicitors. He said that the Solicitors had refused to send documents so that Mr Boyden could access them whilst in Tanzania. So he had instructed Consilium Legal as they were willing to do that. Mr Boyden said, however, that he had to continue with the Solicitors and reinstruct them and that is what he had done. He said he had not given all of these details before as he was just trying to be succinct.

52. He was asked why he had signed a document off as final if it was in fact incomplete and why a document apparently dated in 2013 was not produced until September 2014. He said that was one of the reasons he had reported the Solicitors to the SRA. They had failed to provide the witness statement.

53. Mr Gligic also noted in his oral evidence that having reviewed the decision he felt that there were a number of areas he could have assisted with had he been present to give evidence and where HMRC's expert witnesses should have been cross examined. Examples are given in the submissions below.

Tribunal Rules

54. Under the Rules:

> (1) The tribunal can set aside a decision of the tribunal if the tribunal "considers it is in the interests of justice to do so" and one or more of the specified conditions are satisfied (under rule 38). These include that "a party, or a representative's party, was not present at a hearing related to the proceedings". An application under this provision must be made by written application to the tribunal so that it is received no later than 28 days after the date on which the tribunal sent notice of the decision to the party.
>
> (2) The tribunal has the power by direction to extend the time for complying with any rule, practice direction or direction, (unless such extension would conflict with a provision of another enactment setting down a time limit) (rule 5(3)).
>
> (3) In exercising that power (and all powers of the tribunal) and in interpreting any rule, the tribunal must seek to give effect to the overriding objective set out in the rules of dealing with cases fairly and justly which includes:
>
> > (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues

Appellant's submissions

55. Mr Gligic was not in attendance at the final hearing in September 2014 because he was in hospital in Tanzania as Mr Gligic had stated in evidence. His absence was not voluntary. But for his incapacity and hospitalisation it had been Mr Gligic's clear intention, as evidenced by his continued endeavours, to obtain a travel document to attend the hearing to give evidence and to make submissions on behalf of the appellant. Mr Gligic was in any event unable to attend the hearing because he could not obtain a travel document to travel from Tanzania to the UK.

56. The appellant was not legally represented at the hearing due to the default of his legal advisers as set out in the evidence. It was never the wish or intention of Mr Gligic but, due to these circumstances, by the time of the hearing and at the hearing itself the appellant was unrepresented.

57. On 1 September 2014 Mr Bowers attended the hearing to explain Mr Gligic's circumstances as regards his illness. It is understandable that, as Mr Bower attended the hearing on 1 September 2015 with no supporting documentation, notwithstanding that he is a man of good standing, the tribunal felt they could not rely upon the assertions he merely passed on behalf of Mr Gligic and decided to proceed to hear the matter in the absence of Mr Gligic.

58. The litigation in this matter is serious and complex with the outcome and its effect bearing significant consequences for each party. It is clear from the judgment of the tribunal that, without further explanation from Mr Gligic, the written materials presented over time on behalf of the appellant were viewed as inconsistent in important detail. It must have been appreciated that, in making the decision to proceed in the absence of any representative of the appellant, the case of HMRC would go through uncontested. Given that this was the inevitable consequence, it seems likely that the tribunal came to the conclusion that there was no valid reason for the non-attendance of any representative for the appellant. It is understandable why the tribunal would decline to act on an unsupported message passed by an individual with no standing in the proceedings.

59. However, as set out above, the evidence demonstrates that the position was such that Mr Gligic and his former advisers did not attend for explicable reasons. The fact his counsel could not attend was nothing to do with the appellant or Mr Gligic. The

appellant directly suffered as a result of not having representation. Significant sums were spent by the appellant to ensure that counsel was fully briefed. The appellant was let down by Mr Boyd. His Solicitors ceased to act in June 2014 and it is not reasonable to expect new solicitors to act with no time for preparation or consultation.

60. On 17 September 2014 Mr Gligic sent the tribunal a copy of a letter from Dr Muhumba confirming the medical position as set out above. This letter was obtained at the first opportunity. It was certainly not available on 1 September as Mr Gligic was only admitted on 29 August 2014.

61. This is a complex matter. The interaction between the appellant and HMRC initially commenced in the High Court (see 3 above). The appellant was successfully represented in those proceedings by solicitors and counsel who were also assisted by Cowgill Associates Limited. They were not retained to conduct the proceedings before the tribunal as it was beyond their capacity to do so. The fact that the appellant brought the proceedings in the High Court demonstrates that he was keen to engage in this matter.

62. The scale and complexity is demonstrated by the fact that HMRC were represented at the hearing by 3 counsel and had assistance from a solicitor from HMRC and case workers. Their evidence amounted to 150 lever arch files. In addition they relied upon expert evidence. The hearing lasted approximately 3 weeks.

63. The grounds of appeal served by Cowgill Consultants Limited simply stated that "the assessment is wrong in law". It was merely a holding document served to preserve the appellant's positon in the tribunal during the High Court proceedings. No perfected grounds of appeal, written submissions or skeleton argument was served by the Solicitors or Mr Boyden. The appellant was let down by these representatives. No written response was served to HMRC's statement of case save for certain witness statements from Mr Gligic, which were handed to the tribunal by Mr Bower. These were not comprehensive documents. They did not address key areas of evidence nor make submissions on the evidence. As they were not prepared in substitution for attendance and representation at the hearing they were wholly inadequate for that purpose. It was the appellant's intention to be represented by counsel and these documents would not have been the last word of the appellant before the tribunal if that had happened.

64. As regards the application under rule 38:

(1) Mr Gligic did not waive his right to attend the hearing. He was not present for the reasons set out above. No mention is made of these circumstances in the decision although Mr Bowers informed the tribunal of the situation on the first day and Mr Gligic sent medical evidence on 17 September 2014.

(2) It appears that previous applications by Mr Gligic to postpone the hearing date due to work commitments and the difficulty with his passport and inability to obtain an ETD may have caused the tribunal wrongly to treat the information it received that Mr Gligic was in hospital with some

scepticism. Mr Gligic is able to demonstrate that both previous applications were genuine.

(3) The tribunal appeared to conflate the application to postpone the hearing due to Mr Gligic being in hospital with the earlier applications to postpone. It appears, without any evidential foundation, to question the merit and legitimacy of the earlier applications.

(4) In any event it is clear that it is in the interests of justice to set the decision aside:

(a) HMRC's evidence was not tested or challenged. The expert witnesses were not cross examined and no evidence was called for the appellant. No proper case was put, no legal argument or submission based on the evidence called were put to the tribunal for the appellant. This would have been possible if the appellant was represented. The appellant wished and intended to be legally represented but that was not possible for the reasons set out above.

(b) The appellant's basic right to be present and heard before the tribunal has been breached. Where the absence is not voluntary and the proceedings are both adversarial and complex there is a real and inherent risk that justice will not be seen to have been done.

(c) HMRC called an expert, Mr Stone, to give evidence as to the position of the appellant in the supply chain. His evidence was accepted unchallenged and it is clear from the decision that the tribunal place significant weight on that evidence. It is a fact that whilst other companies in the chain changed position and became missing traders the appellant remained constant. The appellant remained in the chain, continued to trade, did not disappear and at all times submitted VAT returns. This is significantly inconsistent with a company acting in concert with others as part of a carousel or an MTIC scheme where disappearance is the norm. This significant point was never opened with the expert or put to the tribunal.

(d) HMRC relied extensively on the level of profits made by the appellant in the trades. These levels were not properly explored as would usually be the case given these products are traditionally "fast moving goods" which are characterised by narrow profit margins on sale due to the quantities involved in each sale. The expert evidence of Dr Findlay in this respect was not challenged.

(e) The connected nature of buyers and sellers was a point heavily relied on and accepted by the tribunal. This is common within the industry and such links are well known and an accepted feature of the market.

(5) In light of the simple points given above, which are not exhaustive, there is a real possibility that significant points and issues have been accepted by the tribunal whilst in reality they are susceptible to cogent challenge. As these are matters the tribunal relied on in making their conclusion, there is a real possibility of injustice in the circumstances of this case.

(6) Whilst not binding on the tribunal the principles applied in the criminal court are informative and warrant consideration. In *R v Jones (Anthony)* [2003] 1. AC 1 the House of Lords set out a list of considerations which ought to be in a judge's mind when considering whether it is in the interests of justice to proceed to trial in the absence of the accused. The House of Lords made it clear that the list was not exhaustive

> (a) The circumstances of the defendant's behaviour in absenting himself and in particular whether his non-attendance was voluntary. The appellant's absence was not voluntary in this case.
>
> (b) Whether an adjournment would resolve the matter. The answer is clearly that it would, as Mr Gligic has now been able to return to the UK.
>
> (c) The likely length of such an adjournment. It is clear that HMRC's case is formulated and ready and any delay need only be as short as allowing for preparation of a legal team for the appellant to meet that case.
>
> (d) Whether the defendant's representatives were able to receive instruction from him and the extent to which they could present his defence. The appellant had no representation.
>
> (e) The extent of the disadvantage to the defendant in not being able to present his account of events. The disadvantages in this case were clear. In fact they were recognised by the tribunal in the decision at [207] and [208] - "any such allegation of fraud would normally be required to be put to the alleged fraudster in the court or tribunal so that he or she may respond and the evidence both for and against the allegation be tested by cross examination".
>
> (f) The risk of the jury reaching an improper conclusion about the absence of the defendant. The correct approach is to ask whether in the circumstances a reasonable observer of the process may come to the conclusion that there is a real risk that this had occurred. On an examination of the decision we are of the view that there is material which would support such a view. We make clear that such support does not mean that the tribunal were so influenced but we consider that there is material which presents, to the reasonable observer of the process, the risk that they were.

(g) The general public interest that the trial should take place within reasonable time. Clearly this is an important principle. Its operation is to be weighed with all the other factors to achieve a just result.

(h) The effect of the delay on the memory of witnesses. This was a documentary case and therefore there is no prejudice suffered by HMRC.

(i) Where there is more than one defendant the undesirability of having separate trials which is clearly not applicable

65. As regards the tribunal's exercise of discretion under rule 5(3)(a) of the Rules to allow the application to made after the expiry of the 28 day time limit:

(1) The decision was released on 20 April 2015 and Mr Gligic contracted Mr Sean Hammond with a view to him representing the appellant on 27 April 2015. Mr Gligic was not in a position to raise the necessary funds to instruct counsel within the 28 days. He has subsequently raised the funds and has instructed Mr Kovalevsky QC and Mr Hammond to represent him.

(2) Mr Gligic has endeavoured to keep the tribunal updated as to his position and wrote to the tribunal within the 28 day period asking for the time limit to be extended to allow time for funding to be raised.

(3) In *Dhaska Fraser v HMRC* [2012] UKFTT 189 (TC) the tribunal expressly adopted the approach taken in *R (On the application of Brwaillia Cal Limited v General Commissioners of Income Tax for the City of London* [2003] EWHC Admin and *R (on the application of Cook) v General Commissioners* [2007] EWHC Admin that the tribunal's discretion is not limited to ascertaining whether or not there is a reasonable excuse for the lateness of the appeal and that the tribunal should consider the overall fairness to the respective parties and the risk of injustices being caused by the right of appeal being denied or allowed.

HMRC's submissions

66. HMRC submitted that the appellant has not provided sufficient evidence to make good the contentions as regards Mr Gligic's inability to attend and why the appellant was unrepresented. There is little evidence and what has been provided is contradictory and unreliable.

(1) The only evidence provided in support of the appellant's claim that he was ill at the time of the hearing is a copy of a letter asserted to be from the doctor treating the appellant, Mr Muhumba. This was provided only on 17 September 2014 some time after Mr Gligic claims he was taken ill (on 29 August 2014) and right at the end of the hearing of the substantive appeal. The reasons why Mr Gligic says that he has not been able to provide further evidence are implausible. He says the original of the letter is locked in a hotel room. He says that he could not get hold of the doctor

in order to obtain a witness statement from him but eventually got in contact with him on "WhatsApp". It is implausible that the doctor sent an email on the very morning of the hearing. The email was sent on a gmail account which it is not possible to verify and the name spelling in the email is different to that in the letter.

(2) As regards his passport, for the reasons set out by Judge Berner when he refused the postponement applications, it was clear Mr Gligic gave inaccurate information and was trying to confuse matters when he made those applications. The new email trail provided to the tribunal does not affect the conclusions reached by Judge Berner. It provides no new information as regards the period before the hearing. Mr Gligic claimed repeatedly that he was not able to find a courier to take his old passport to the UK. However, in the end, after the hearing, he arranged for it to be delivered to the UK PO by DHL. Mr Gligic says that this was because he became aware that there was an arrangement with DHL and the passport authorities but this is not a point raised at any time previously. No credible explanation has been offered as to why this was asserted to be wholly impossible but then became possible. The new emails establish that the appellant was then able to obtain a new passport in order that he could travel to Dubai on business in October 2014.

(3) The current position Mr Gligic asserts, that he was very willing to attend the hearing (albeit he was not able to do so), is inconsistent with Mr Gligic stating that he could not attend until 2015 in his witness statement of 8 August 2013 and his statement to HMRC in June 2014 that he could not attend the 5 week hearing arranged due to a work project as it would "set the project back years".

(4) It is clear that in the weeks before the hearing the appellant was simply not engaging with the proceedings, hence HMRC's difficulties in serving the papers required for the hearing.

(5) The appellant has produced a complaint made to the Solicitors Regulation Authority in relation to the Solicitors but refused to waive his privilege with regard to the Solicitors so there is no evidence as to whether the complaints were valid. Mr Gligic's statements as regards his legal advisers are inconsistent (for example as regards when the Solicitors ceased to act and the role of Consilium Legal). In light of the lack of credibility of the assertions made as regards the position relating to his passport renewal/obtaining an ETD and given these further inconsistencies, no real weight can be placed on Mr Gligic's representations as regards the appellant's legal advisers.

67. HMRC conclude that Mr Gligic chose not to attend the hearing in September 2014 for business reasons and, similarly, the appellant in effect chose not to be represented as there is no real evidence of any steps taken to achieve that result. The appellant was simply absent voluntarily.

68. The appellant refers to the considerations set out in the criminal cases which are not relevant to these proceedings, but in any event, those principles support HMRC's position. In the *Jones* cases the appellant refers to it was held at [11] that "one who voluntarily chooses not to exercise a right cannot be heard to complain that he had lost the benefits which he might have expected to enjoy had he exercised it…..If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented." Given the lack of evidence supporting his contentions, it seems clear that the appellant voluntarily chose not to attend.

69. In such circumstances, where there is no good reason for the appellant's failure to attend (whether itself or through a representative), it is not appropriate to consider what might have happened if the appellant had attended/been represented. The appellant has chosen to bring about that situation with the attendant consequences that non-attendance brings. In view of that and the obvious prejudice to HMRC in having to re-litigate such an old matter with the additional costs and difficulties associated with evidence, in particular, that of witnesses so long after the event (as referred to by Judge Berner (see 19 above)), it is not in the interests of justice to set aside the decision. It is not correct that there is little witness evidence. The appellant had wanted all of the many witnesses to attend.

70. As regards the extension of time for the application to be made, HMRC referred to the factors set out in the case of *Data Select* (see 77 below for the reference and further details) as follows:

> (1) What is the purpose of the time limit? To ensure finality in litigation which HMRC submit is a significant concern bearing in mind the age of the proceedings.
>
> (2) How long was the delay? The delay in making the application was over 3 months.
>
> (3) Is there a good explanation for the delay? No –the ground relied upon is absence of funding which cannot be a ground for a failure to comply with a time limit (see 71 to 73 below).
>
> (4) What will be the consequences for the parties of an extension of time? It will expose HMRC to the possibility of this litigation being resurrected with the attendant costs and difficulties of dealing with such an old matter including the problems of lapse of time as regards witness evidence (as set out above).
>
> (5) What will be the consequences for the parties of a refusal to extend time? Finality in litigation will be preserved.

71. As noted, the only ground put forward for the extension of time is that the appellant was out of funds. There is case law authority that a lack of funding cannot be a ground for a failure to comply with a time limit. In the absence of any other grounds put forward by the appellant its application must fail. HMRC referred to the decision of Judge Berner in *Lighthouse Technologies Ltd v HMRC* [210] UKFTT 374

at [23] which was followed by Judge Walters QC in *Corporate Synergy International (in Liquidation) v HMRC* [2011] UKFTT 352(TC) at [44] and Judge Herrington in *London Cellular Accessories v HMRC* [2012] UKFTT 583 (TC) at [49], all of which decisions related to appealing out of time. In *Lighthouse* it was held at [20] that:

> "insufficiency of financial resources to fund legal representation cannot in my view be a valid reasons for failing to appeal on time. It was open to the Appellant, which on its own evidence researched questions around its appeal on the internet, to access the relevant forms and procedure and to make the appeal without legal representation."

72. It was also held in *Lighthouse* that the burden was on the appellant of showing why the tribunal should exercise its discretion to permit a late appeal and that the fact that a considerable amount of money was at stake was not a material consideration.

73. In any event there is no evidence of the lack of funds. Mr Gligic has presented a very confused picture on this. On the one hand he refers to having a gold mining business but on the other hand he is unable to access documents in a safe in a hotel room in Tanzania due to his inability to pay his hotel bill. He claims to have paid £100,000 in legal bills already on this matter but has difficulty getting further funds together although apparently he has done so now. No substantiating evidence has been produced as to his/the appellant's financial circumstances. He initially asked for a 21 days extension of time on the basis he needed the time to raise funds but there is no evidence as to what he was doing in this period.

74. A relevant factor is the merits of the substantive application and of the substantive appeal. As set out above the application is without merit. The tribunal's assessment of Mr Gligic's evidence in the substantive appeal was damning, even without the benefit of cross examination.

Discussion

75. The task of the tribunal is to consider whether to allow the appellant to make a late application to set aside the decision (under its general powers) and, if the late application is allowed, whether to set aside the decision. I have decided to deal with both these matters together as they are interdependent and linked. A consideration in deciding whether to allow the late application is whether the application is likely to succeed. It would be wasteful of time and resources to require the application for the decision to be set aside to be dealt with separately.

76. There is no guidance or restriction in the Rules as to when the tribunal may allow a late application or set aside a previous decision but the tribunal must exercise its powers in this regard to give effect to the overriding objective of acting justly and fairly. However, looking first at the application for an extension of time, there have been a number of cases on the correct approach to be adopted by the tribunal in considering whether to allow additional time and to allow appeals out of time.

Application for extension of time to make the set aside application – cases

77. In the case of *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), to which HMRC refer, Morgan J set out (at [34]) five questions which the tribunal should ask itself in deciding whether an extension of time is permitted:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. 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."

78. Mr Justice Morgan went on to note (at [35]) that the Court of Appeal had held that when considering an application for an extension of time for an appeal to the Court of Appeal it will usually be useful to consider the overriding objective and checklist of matters set out in rule 3.9 of the Civil Procedure Rules ("**CPR**") governing court procedure. The text of 3.9 as in place at that time setting out a list of factors is set out in the Annex. He also noted (at [36]) that he was shown a number of decisions of the tribunal which had adopted the same approach and he concluded (at [37]):

> "In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases."

79. In the same passage he also noted that some of the cases he had referred to stress the importance of finality in litigation. Whilst those comments are not directly applicable where an application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position:

> "Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

80. Following the decision in *Data Select*, changes were made to the CPR. Under the new version of rule 3.9, rather than requiring the court to consider a list of factors, only two factors were specifically referred to as follows:

> "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."

81. The question then arose of what effect the new CPR rules had on an application for extension of time or to make a late appeal and whether this altered the approach to be adopted by the tribunal as set out in *Data Select*. There have been two conflicting decisions on this in the Upper Tribunal.

82. In the case of *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) Judge Sinfield concluded that the introduction of the new CPR 3.9 and comments made by the Court of Appeal on its application clearly showed that the courts must be tougher and more robust than they had been previously in dealing with whether to extend time limits. He referred in particular to the Court of Appeal decisions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624. He rejected the argument that differences in the wording of the overriding objectives of the Upper Tribunal rules and the CPR meant that the tribunal should adopt a different approach to that taken in those cases. He thought the tribunal should apply the same approach as in the *Mitchell* case that although consideration should be given to all the circumstances of the case these should be given less weight than the two conditions specifically mentioned in rule 3.9.

83. However, in the case of *Leeds City Council v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 596 (TCC) Judge Bishopp rejected the approach taken by Judge Sinfield. He decided that the correct approach was still to follow the principles set out in *Data Select* as described in 30 to 32 above.

84. In considering to what extent the tribunal should have regard to the CPR, Judge Bishopp noted (at [16]):

> "As Judge Sinfield said, the CPR do not apply to the tribunals, and they cannot be used as they stand in order to fill gaps. They offer no more than a guide; and in using the CPR for that purpose the tribunal must not lose sight of the surrounding circumstances. The correct approach, at least until *Mitchell*, was described by Morgan J, sitting in this tribunal, in *Data Select*…," [he then set out in full the passages from *Data Select* referred to above.]

85. Judge Bishopp continued that the changes made to the overriding objective and rule 3.9 of the CPR were made with the express purpose of ensuring that time limits and similar requirements were more strictly enforced in the courts (at [17]). However, as those changes had not been introduced in the tribunal rules (and may or may not be in future) (at [18]):

> "It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in

relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance; their adoption in the Upper Tribunal, by contrast, was not. I do not think it is appropriate to introduce significant changes in practice without warning.

86. He concluded at [19]:

> "In my judgment, therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*

87. This issue has subsequently been considered by the Court of Appeal in *BPP Holdings v HMRC* [2016] STC 841 as regards the whether this tribunal was correct to barr HMRC from proceedings for non-compliance with its directions. The Court of Appeal noted at [15] the two conflicting decisions in the Upper Tribunal as set out above which they described as concerning "whether the stricter approach made under the CPR as set out in *Mitchell* and *Denton* [*Denton v TH White Ltd [2014] WLR 3926*] applies in relation to cases in the tax tribunal". The Senior President of Tribunals stated at [17] that "I am of the firm view that in the tax tribunals the stricter approach is the right approach".

88. At [37] he continued that a different approach is not appropriate in the tribunal:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals … to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in Mitchell and Denton. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunal and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's.

89. At [38] and [39] he continued to warn against a more relaxed approach:

> "A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to

comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

…… I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that it has some preferred status – it does not."

90. At [39] the Senior President of Tribunals noted the decision in *Data Select* but thought that was a different situation which it would not be appropriate to analyse in *BPP*. He continued that:

> "Suffice it to say that the question in that case was the principle to be applied to an application to extend time where there had been no history of non-compliance. In this case, HMRC neither acknowledged that they had breached a time limit nor made an application for an extension of the same. In my judgment, therefore, the question in this case turns on an antecedent principle of compliance. Had I been minded to analyse *Data Select*, that would have created a further difficulty for HMRC. Morgan J applied CPR 3.9 by analogy without waiting for the TPC to amend the UT Rules in just the manner I have suggested is appropriate.

91. In the *Denton* case to which the Court of Appeal referred in *BPP*, the court considered (at [24]) that judges should adopt a 3 stage approach when considering whether to grant relief from sanctions for failure to comply with any rule or direction of the relevant court:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court 15 order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in CPR 3.9]."

92. As regards the third stage the court said that all the circumstances of the case must be considered but (at [37]) the two factors set out in rule 3.9 of the CPR, being the need for litigation to be conducted efficiently and at proportionate cost and to ensure compliance with rules and directions, are of particular importance and should be given particular weight.

93. I take from the above that the general approach in *Data Select* remains the correct one to follow in cases where the tribunal is considering an extension of a time limit (or whether to allow a late appeal). The Court of Appeal noted that it did not need to consider that decision in full in the different circumstances of the *BPP* case and does

not indicate that it does not remain applicable in extension of time/late appeal cases. However, what is not clear is the extent to which we are required, in applying that approach, nevertheless to follow the approach in *Denton* in giving particular weight to the factors in CPR 3.9 as regards the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules. In any event I consider my decision on this to be consistent with both *Data Select* and the approach in *Denton*.

Application for extension of time – decision

94. Accordingly, I have approached our decision on whether to allow the application for the decision to be set aside to be made after the 28 day time limit on the basis of the principles set out in the *Data Select* case:

> (1) *What is the purpose of the time limit*? It seems to me that the time limit of 28 days for a party to make an application to set aside a decision is to provide parties with a reasonable period to consider whether to make an application without unduly delaying the efficient conduct of the proceedings should the application succeed. A party is required to act reasonably promptly if they wish to make such an application thereby providing efficiency in the conduct of the dispute (should the proceedings continue) or finality (should they not continue).
>
> (2) *How long was the delay?* The delay was a period of around 3 months.
>
> (3) *Is there a good explanation for the delay?* The only reason put forward is lack of funding. As noted by HMRC the tribunal has held that lack of funds is not generally a good reason for failing to make an appeal on time
>
> (4) *What will be the consequences for the parties of an extension of time or a refusal to extend the time*? The consequences are that the appellant would lose its ability potentially to have the decision set aside as regards proceedings with a substantial amount in issue. On the other hand HMRC stand to face having to re-litigate the matter if the application's application for the decision to be set aside is granted.

95. Looking at these factors in the round, I have decided to allow the appellant to make the application for the previous decision to be set aside outside the time limit. I note that, whilst there is not a particularly good reason for the delay, the appellant was in contact with the tribunal from 15 May 2015 noting that it intended to make the application and Mr Gligic provided the tribunal with an update on 17 July 2015. HMRC was in effect on notice that the application was to be made from May 2015. It is difficult to see any material prejudice to HMRC as a result of this relatively short delay in itself. Whilst the delay is not inconsequential, overall I do not consider it as sufficiently serious that the appellant should be denied the opportunity for the application for the decision to be set aside to be heard given that the substantive appeal is a substantial matter with serious consequences. I note that in deciding whether to extend a time limit the underlying merits of the application and the appeal may be considered to be relevant factors. However, in this particular case, I consider

it would be more appropriate to consider that in the context of the application for the decision to be set aside.

96. On the approach in *Denton* my decision would be the same. In my view the delay is not, in the particular circumstances and context of this case, sufficiently serious of itself (applying the first test in *Denton*) to warrant the consequence of the appellant being denied the opportunity to apply for the decision to be set aside.

Set aside application – CPR rules and cases

97. As set out above, whilst the CPR are not binding on the tribunal, the tribunal does commonly look to those rules for guidance. Rule 39.3 of the CPR provides that a court may grant an application for decision to be set aside where a party did not attend and judgment was made against him only if the applicant:

> "(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
>
> (b) had a good reason for not attending the trial; and
>
> (c) has a reasonable prospect of success at the trial."

98. In *Bank of Scotland v Pereira* [2011] EWCA Civ 241 Lord Neuberger MR (as he then was) gave guidance as to the application of that rule (at [24]):

> "An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.
>
> On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention, that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order."

99. Whilst the tribunal is not subject to the same prescriptive set of conditions, the considerations set out in *Pereira* seem no less applicable as factors to be taken into

account in deciding whether it would be just to set aside a decision of the tribunal where a party did not attend the hearing.

100. I note also the comments set out above by the Court of Appeal in *BPP*. Although the comments in *BPP* were made in the different context of the appropriate sanction for not complying with the tribunal's direction, it seems they are also of some relevance to an application to set aside a decision under rule 38. The comments indicate that the tribunal ought at least to be mindful that it is desirable for litigation in this tribunal to be conducted efficiently and at a proportionate cost. The tribunal should take into account the impact on the efficient administration of the tribunal as a whole and the interests of other litigants as well as the impact on the parties to these proceedings.

Decision on application for set aside

101. Looking at the factors set out in *Pereira* above, I note that there was some delay of over 3 months in the appellant submitting the application. Whilst this was not in my view sufficient for the appellant to be denied the opportunity to make the application, it is a factor to take into account. It is not evident that there was any good reason for the delay. Whilst Mr Gligic cites difficulties in obtaining funding for a new legal team to represent the appellant, it is not clear why he did not proceed to make the application on behalf of the appellant albeit that he wanted the legal team to become involved. In any event, my view is that this factor is not, in these circumstances, a very material factor, given the delay was not very long and Mr Gligic did at least contact the tribunal within the initial 28 day time limit.

102. I turn next to the reason for the appellant not attending and not being represented at the hearing. I am unconvinced that there was any good reason either for Mr Gligic not being at the hearing or for the appellant having no legal representative.

Mr Gligic's non-attendance

103. As regards Mr Gligic, I note that Judge Berner refused the postponement applications made prior to the hearing in September 2014 on the basis that he was not convinced that Mr Gligic was making serious attempts to attend the hearing and indeed he considered that Mr Gligic was trying to confuse the position as regards his ability to travel to the UK (see 19 above). From the evidence presented to the tribunal now, I do not see that there is anything which would lead to a different conclusion.

104. In fact what subsequently happened with the passport application, in my view clearly indicates that, had Mr Gligic simply got on with what he clearly knew was required, namely the submission of his old passport and original application, it is likely he would have received a new passport in plenty of time to attend the hearing. None of his reasons as to why he could not do that prior to the hearing are plausible. This is further set out at 106 to 110.

105. As commented on by Judge Berner, Mr Gligic could have applied for an EDT prior to the hearing to enable him to travel to the UK without his passport but he did

not do so. There is nothing in the correspondence now produced to the tribunal which indicates that Mr Gligic made any effort to make such an application and his explanations as to why this was not a solution to his travel difficulties are again implausible. This is considered at 111 and 112.

Passport application

106. Mr Gligic was clearly aware since 22 April 2014 that in order to make a valid passport application to the UK PO he would need to send the original passport with a hard copy of his application. He was told this in the email he received from the UK PO when he initially submitted his online application on that date. He could not comply with this, he said repeatedly in the correspondence, because no courier company, including DHL, would take his original passport as that is contrary to international laws and he would not trust the Tanzanian postal system. He has also mentioned that he was reluctant to part with his passport as it had his Tanzanian residency stamp in it.

107. However, it is clear from the later correspondence now produced to the tribunal (see 32 above) that eventually, in October 2014, DHL did take Mr Gligic's old passport to the UK PO and delivered his new one to the appellant's hotel address in Tanzania. This followed a period of correspondence with the UK PO and the Home Office in early October 2014 in which Mr Gligic complained about the system for passport renewal for persons based in Tanzania. It is very clear that he was entirely aware (and, as noted, had been since 22 April 2014) that the UK PO required the actual expired passport and a hard copy of the application. However, Mr Gligic thought that the UK PO should accept scanned copies of his application and passport which could then be verified by the Tanzania BHC. It was made very clear to him that was not acceptable. It was also noted to him by the UK PO that the Durham office, which dealt with applications from Tanzania, did so regularly without incident.

108. In an email of 10 October 2014, Mr Gligic confirmed that he had in fact sent the old passport and his application to the UK PO and it is apparent that this was done by DHL. In a further email of 14 October 2014 to the Home Secretary complaining of the time the UK PO had said it would take to turn around the application Mr Gligic claimed that "it has taken me since Tuesday 22 April 2014 until Friday 10 October 2014 to get a courier company to handle my original expired passport, a time period of 25 weeks". The UK PO confirmed on 17 October 2014 that the passport would be delivered shortly. Therefore, it appears that the new passport was delivered within 2 weeks of Mr Gligic complying with the procedure for doing so.

109. No plausible reason has been given as to why the delivery of Mr Gligic's expired passport and application by courier, DHL, suddenly became possible when previously Mr Gligic repeatedly asserted that it was impossible and not legal in Tanzania. When questioned at the hearing he said that this was because he was finally informed of this as a possibility by the Tanzania BHC. Given Mr Gligic claims to have spoken to the Tanzania BHC many times as regards how to deal with his passport/obtaining an ETD, it is implausible that he could not have found out that DHL could be used for passport delivery before October 2014. Moreover, either it

was illegal for a courier in Tanzania to accept an expired passport for delivery, as the appellant claims, or it was not. As DHL took the passport I can but assume it was not illegal. Mr Gligic has not made any claim that there was any change in the rules in Tanzania in this respect at the relevant time. Nor are Mr Gligic's claims credible as regards problems with his residence status in Tanzania, if he were to send his old passport to the UK PO. He then did exactly that it appears with no adverse consequences on that front. I also note that in any event Mr Gligic said in the correspondence with the UK PO that, as his passport had expired, his residency visa for Tanzania was invalid.

110. All in all there is no credible reason as to why Mr Gligic could not have simply complied with the passport renewal process, as he eventually did, and obtained a passport in plenty of time to attend the hearing. It seems the delay was caused only by Mr Gligic's refusal to comply with the requirement to send the expired passport and a hard copy of his application.

Application for EDT

111. There is no real evidence that Mr Gligic made any attempt to obtain an ETD in the period prior to the hearing. It was for this reason that Judge Berner refused the two postponement applications. Judge Berner noted in his directions that the account presented by Mr Gligic to the tribunal as regards the relevant procedures when he made the postponement applications did not accord with what was said in the UK PO's website at the relevant time. Judge Berner concluded that Mr Gligic was trying to confuse matters. Mr Gligic said at this hearing that discussions regarding the ETD were on the phone with the UK PO; he had awaited a call back from them on how to take that forward. He also said in this evidence that anyway the ETD process would not have worked as there was a timing difficulty in obtaining an ETD for a specific flight when that flight reservation could be held for a couple of hours only.

112. I note that Judge Berner pointed out that in fact it was possible to apply for an ETD through the Tanzania BHC as was set out in the UK PO's website at the relevant time and also confirmed on the Tanzania BHC's website. Therefore, Mr Gligic's claims that he was dependent on awaiting a call from the UK PO in effect as his only option, is not credible. As regards the claims regarding the difficulty with timing the obtaining of an ETD with the flight reservation system in Tanzania; if what Mr Gligic asserts were true, ETDs would be of no use for travel from Tanzania.

Mr Gligic's illness

113. Mr Gligic gave evidence that he was taken ill immediately before the hearing on 29 August 2014 and remained ill throughout the hearing such that he could not have attended the hearing even if he did have a valid passport or ETD. He recovered sufficiently by October to want to attend a business meeting in Dubai and hence he contacted the UK PO again and this time complied with the passport process as set out above.

114. The timing of Mr Gligic's illness, as coinciding with the hearing in September 2014 but such that he recovered sufficiently quickly to be able to attend business meetings in Dubai in October 2014, could be purely co-incidental. However, there is little reliable supporting evidence that Mr Gligic was ill as he asserts and the findings on the position as regards his passport application/the ETD process and other inconsistencies in his evidence cast considerable doubt on his overall credibility as a witness.

115. A copy of a letter was produced to the tribunal at the end of the hearing of the substantive appeal purporting to be from the doctor who Mr Gligic says treated him, Dr Muhumba. Mr Gligic said that he was not able to produce the original of this letter as it was locked in a safe in a hotel room in Dar es Salaam which he was unable to retrieve as he had been unable to settle the hotel bill. Prior to this hearing Mr Gligic was asked by HMRC to provide a witness statement from Dr Muhumba. Mr Gligic said that he would do this but in fact was not able to produce a statement. He said that he had much difficulty getting hold of Dr Muhumba but finally managed to contact him on "WhatsApp" whereupon he apparently sent an email (via a gmail account) on the morning of the hearing confirming what the letter said about Mr Gligic's asserted illness. The email was handed to me. It is of course not possible to verify its origination in any way and I note HMRC's concern as to the different spelling of Dr Muhumba's first name. The timing of the email, like the timing of the illness of itself raises a question mark.

Prior assertions as to non-availability

116. Finally I note that in the witness statement of 8 August 2013 Mr Gligic said that he would not be able to leave Tanzania until sometime in 2014 (as set out in 34) and in June 2014 he told HMRC on the phone that he was not able to attend a 5 week hearing in the UK as that would set a work project back by years. I also note that in the run up to the hearing, Mr Gligic does not appear to have been engaged with the process (other than as regards seeking postponement requests). The Solicitors appear to have been unclear whether they were instructed or not until they let HMRC know on 17 June 2014 that they were no longer acting. HMRC had difficulty serving the documents for the hearing on the appellant (see 15).

Conclusion on Mr Gligic's non-attendance

117. Overall I do not accept that Mr Gligic had any serious intention of attending the hearing in September 2014 or that he was prevented in doing so by illness, given my findings on the inaccurate information given by Mr Gligic in respect of the passport and ETD position, the lack of evidence supporting his claims that he was ill and lack of credibility of his assertions as to why such evidence is not available, his contradictory assertions in the witness statement of 8 August 2013 that he would not be able to leave Tanzania until sometime in 2015 and his comments to HMRC in July 2014 as regards not being able to attend a 5 week hearing for work reasons and his lack of engagement with the proceedings in the period leading up to the hearing.

Lack of legal representation

118. As regards the lack of legal representation at the hearing, it is a matter of public record that Mr Boyden was suspended from practice at the relevant time. The Solicitors confirmed that they were not acting on 17 June 2014. Mr Gligic subsequently complained to the SRA about those Solicitors, in particular, that they had misappropriated funds. We have no further information about the complaint or the outcome. Mr Gligic was asked to waive privilege in this respect to provide further information but declined to do so.

119. The witness statement of 8 August 2013 suggests that the Solicitors were no longer acting in July 2013 and that a different firm was engaged. Mr Gligic said at the hearing that was because the Solicitors were being unhelpful in assisting with sending documents to Tanzania. The other firm had assisted with sending the documents to Tanzania but then he had re-engaged the Solicitors as that is what Mr Boyden insisted upon. This seems odd given that in the witness statement itself, which was apparently prepared with the assistance of Mr Boyden, Mr Gligic expresses his dissatisfaction with the Solicitors, notes that they were not acting and expressly states that the other advisers assisted with the witness statement. To add further to the confusion, in the application of September 2014 for the witness statement to be admitted at the hearing in September 2014 Mr Gligic stated that he did not know why that different firm of solicitors were referenced in the witness statement. He said at the hearing that he was just being concise in his earlier descriptions.

120. It is difficult to draw much in the way of conclusion from this contradictory and confused position except that it further undermines Mr Gligic's credibility as a witness. It is not possible to conclude when and why Mr Gligic became dissatisfied with the Solicitors or what advisers were acting for the appellant at particular points of time except that it is clear that the Solicitors were not acting by 17 June 2014 and Mr Boyden was barred from practising as a barrister for a period of 6 months from early May 2014.

121. However, in any event, no real reason has been given as to why the appellant could not have arranged alternative legal representation for the hearing in September 2014 other than that advisers could not have been expected to take over so quickly, Mr Gligic was in Tanzania and he was having difficulty getting the files from the Solicitors. I can see that new advisers would have had a large task on their hands but the appellant did have quite some time to sort this out. As noted, Mr Boyden was suspended in May 2014 although it is not clear precisely when Mr Gligic found out that he was suspended. Some of the evidence suggests that Mr Gligic was dissatisfied with the Solicitors as early as August 2013 (as set out in his witness statement of 8 August 2013). Whether and in what capacity they continued to act is unclear but even if they were still actively engaged until 17 June 2014, when they confirmed that they were not instructed, Mr Gligic still had over 2 months to arrange a hand over to new representatives.

122. Mr Gligic has also referred to the difficulty of funding further advice. However, even if that were a valid consideration, I agree with HMRC's comment that there is a confused picture as regards finances. Mr Gligic is apparently involved in

mining projects in Tanzania, conducts business affairs in the Middle East and has funded the proceedings to date in an amount of over £100,000. He says, however, that he cannot retrieve items from a hotel safe in Dar es Salaam due to lack of funds, he had some difficulty funding the legal advice he wished to obtain as regards this application but then he was able to do so.

Conclusion on lack of legal representation

123. Overall, whilst it is accepted that Mr Boyden and the Solicitors were not acting at the time of the hearing, I can see no reason why Mr Gligic could not have attempted to organise representation for the appellant in time for the hearing. Again given the evidence as to his own lack of engagement with the process at the time, it appears he chose not to do so and whether that was due to lack of funds or otherwise is a matter of speculation.

Consequences of setting aside the decision or not

124. It must also be relevant to consider the consequences of setting aside the decision or not setting it aside. Clearly if the decision is set aside HMRC will face considerable additional costs in the re-hearing of the matter and the difficulties which can be expected in such circumstances in particular as regards the inevitable potential degradation of witness evidence over time. On the other hand, if the decision is not set aside the appellant will lose the ability to have the case heard by the tribunal with Mr Gligic, its main witness, present and with the benefit of legal representation. As Mr Kovalevsky noted inevitably there must be some disadvantage to the appellant as a result of not having attended and not having assistance from legal advisers as regards the presentation of its case and cross examination of witnesses (and I note the examples put forward by the appellant). However, when the appellant has effectively absented itself from the proceedings, such disadvantages necessarily follow. Although the *Jones* case which the appellant cited relates to criminal proceedings, the same principle must be in point in looking at whether it is just for a decision of this type to be set aside if the appellant decided not to attend. If the appellant has decided not to take part, it can hardly complain of the consequences of doing so and that proceedings would have followed a different course had it attended.

125. It was submitted for the appellant also that no adequate arguments/documents had been presented to the tribunal at the hearing in September 2014. The grounds of appeal simply stated that "the assessment is wrong in law" as it was merely a holding document served to preserve the appellant's positon in the tribunal during the High Court proceedings. No perfected grounds of appeal, written submissions or skeleton argument was served by the Solicitors or Mr Boyden. No written response was served to HMRC's statement of case save for certain witness statements from Mr Gligic which, it is asserted, are not comprehensive documents; they did not address key areas of evidence nor make submissions on the evidence. As they were not prepared in substitution for attendance and representation at the hearing they were wholly inadequate for that purpose.

126. As regards this evident lack of preparation, to my mind it demonstrates further the appellant's lack of engagement with this case. The grounds of appeal were prepared in 2007. The hearing was in 2014. The failure to provide properly formulated grounds of appeal and arguments by 2014 cannot be attributed entirely to failings by the appellant's advisers (which in any event is somewhat speculative). The appellant, as the party bringing the appeal, must bear some responsibility for the appeal's conduct. It is not credible that an appellant which is actively engaging in a process such as this, as this appellant claims to be, would not take steps to ensure that it has prepared its full grounds of appeal and arguments 7 year later.

127. Overall, in circumstances where I have concluded that it is more likely than not that the appellant in effect chose not to attend and not to arrange legal representation, I do not consider that considerations regarding the inability of the appellant to present its case and cross examine at a hearing hold sway. Inevitably the failure to attend results in those disadvantages. Rather, in such circumstances, the balance is pushed the other way given the clear prejudice to HMRC in re-litigating this matter and the need for finality given how long this matter has been going on for. I have concluded therefore that it is not in the interests of justice for the decision to be set aside.

Conclusion

128. For all the reasons set out above, the application for an extension of time to make an application for the decision to be set aside is approved and the application for the decision to be set aside is refused.

129. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 4 October 2016