



TC05004

Appeal number: TC/2015/02693

Application to reinstate appeal against penalties for evasion of customs and excise duties – appeal struck out for failure to comply with Tribunal directions and an “unless order” – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OMAR BARAKAT

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE AND CUSTOMS**

TRIBUNAL JUDGE: THOMAS SCOTT

The Tribunal determined the appeal on 29 March 2016 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 14 April 2015, HMRC’s Statement of Case dated 2 July 2015, the Appellant’s application for reinstatement of his appeal dated 6 November 2015, and HMRC’s submissions in respect of that application submitted on 26 February 2016.

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DECISION

Introduction

1. Mr Barakat applied for reinstatement of his appeal against HMRC's decision to impose civil evasion penalties of £1,257 in respect of customs duty, excise duty and VAT.
2. The appeal had been struck out by the tribunal following Mr Barakat's failure to comply with tribunal directions and subsequent failure to respond to an "unless order".

Legislation

3. Section 8(1) of the Finance Act 1994 provides that HMRC may issue penalties, equivalent to the amount of duty evaded, where a person has evaded excise duty by conduct involving dishonesty.
4. Section 25(1) of the Finance Act 2003 provides that HMRC may issue penalties, equivalent to the amount of duty evaded, where a person has evaded customs duty by conduct involving dishonesty.

Background

5. By a decision notified to Mr Barakat on 27 January 2015, HMRC imposed on him penalties amounting in aggregate to £1,257. The penalties related to the evasion of excise and customs duties by conduct involving dishonesty.
6. The evasion of duties arose in respect of cigarettes and shisha tobacco in the possession of Mr Barakat when he arrived at Manchester airport on 15 April 2014 having flown in from Dubai. Mr Barakat was stopped and searched by a border officer when he attempted to leave through the green "nothing to declare" channel.
7. In aggregate, the cigarettes and shisha tobacco found to be in Mr Barakat's possession was over 50 times the permitted allowance.
8. HMRC subsequently issued civil evasion penalties of £1,257 on 3 December 2014. Their decision to do so was upheld following an HMRC statutory review carried out at Mr Barakat's request.
9. Mr Barakat appealed to the tribunal against HMRC's decision on 14 April 2015. He appealed late and HMRC did not object to the late appeal.
10. Mr Barakat admitted that he had been in possession of the cigarettes and shisha tobacco when he was stopped in the green channel at Manchester airport. His grounds of appeal against the penalties included that: he did not know shisha contained tobacco; he contested the amounts stated to have been seized; he had not attempted to conceal the products, and it was a first offence.

Appeal Process

11. The appeal was assigned to the standard category on 7 May 2015. HMRC served their Statement of Case on 2 July 2015.
12. On 6 August 2015, the Tribunal issued Directions to the parties (“the **Directions**”). The Directions required, amongst other things, that the parties should provide their lists of documents and certain “listing information” to the Tribunal and each other by 4 September 2015.
13. HMRC complied fully with their obligations pursuant to the Directions by the due dates.
14. Mr Barakat did not comply with any of his obligations pursuant to the Directions, and did not otherwise contact the Tribunal, by the due dates.
15. On 10 September 2015, the Tribunal wrote to Mr Barakat, pointing out his failure to comply with his obligations pursuant to the Directions, and the potential consequences of such failure. The outstanding obligations included the requirements to produce a list of documents, provide details of any witnesses, and provide dates to avoid for the hearing. He was requested to advise the Tribunal of the position within seven days from the date of the letter.
16. Mr Barakat did not reply to the letter of 10 September 2015, and did not comply with his outstanding obligations. On 7 October 2015, the Tribunal issued what is commonly termed an “unless order” (the “**7 October Direction**”). This provided as follows:

“The Appellant having failed to comply with the directions issued on 6 August 2015 and having failed to reply to the letter from the Tribunal dated 10 September 2015 within the times stipulated therein or at all, the Tribunal DIRECTS that UNLESS the Appellant no later than 5.00pm on the date fourteen days after the date of issue of this Direction confirms in writing to the Tribunal (a) that he intends to proceed with the appeal; and (b) that he has complied with Directions 1 and 2 of the Directions issued on 6 April 2015; then these proceedings WILL BE STRUCK OUT without further reference to the parties.”
17. The letter to Mr Barakat from the Tribunal which accompanied the 7 October Direction explained it in simple terms and set out what was necessary if Mr Barakat wished to continue the appeal.
18. Mr Barakat did not respond to the 7 October Direction or otherwise contact the Tribunal by the 21 October deadline.
19. On 2 November 2015 the Tribunal wrote to Mr Barakat telling him that, accordingly, his appeal had been struck out (the “**Striking Out Order**”). The letter informed him of his right to apply for the appeal to be reinstated by a written application within 28 days, supported by reasons and an explanation of why the direction was not complied with.

20. On 6 November 2015, Mr Barakat sent an email to the Tribunal stating “I was waiting for the date of the Court, and I have no more evidence to produce.”
21. On 30 November 2015 the Tribunal wrote to the parties notifying them that the Tribunal was treating the email from Mr Barakat of 6 November 2015 as an application to reinstate the appeal.
22. HMRC opposed the application to reinstate. Their submissions were as follows:

“[1] The Tribunal set Directions for the timely conduct of the appeal. When the Appellant failed to comply with the Directions the Tribunal extended the time for compliance, by way of its letters of 10 September and 7 October 2015, but the Appellant’s non-compliance continued.

[2] By failing to comply with the Tribunal’s directions or to respond to correspondence in a timely manner (or at all) the Appellant caused delay in the progress of his appeal. When he did respond (on 6 November 2015) it was only after the appeal had already been struck out and then he addressed only one of the matters outstanding (the matter of documents). Whilst the Commissioners may be sympathetic to an Appellant’s genuine needs in respect of timescales and generally complying with Directions we submit that this Appellant has given no plausible explanation as to the reasons for his delays and inaction.

[3] Throughout the life of the appeal the Appellant failed to engage with the Tribunal in any meaningful way and consequently the Respondents submit that it would not be in the interests of justice for the appeal to be re-instated.”

Discussion and Decision

23. In considering the application to reinstate the appeal, I am guided by Rule 2 of the Tribunal Rules, titled “[O]verriding objective and the parties’ obligations to co-operate with the Tribunal”.
24. The overriding objective of the Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly. Rule 2 stipulates that this includes, amongst other things, ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings, and avoiding delay, so far as compatible with proper consideration of the issues.
25. Rule 2 also provides that the parties must help the Tribunal to further the overriding objective, and co-operate with the Tribunal generally.
26. In this case, reaching a decision chiefly entails balancing Mr Barakat’s right to participate in the proceedings against the need to avoid delay. That balancing act must take into account all relevant facts.
27. In this case, factors in favour of reinstating the appeal include Mr Barakat’s right to contest penalties involving dishonesty and his partial compliance with the directions in his email following the Striking Out Order. In relation to the need to avoid delay, and the importance of compliance with clear tribunal directions, relevant factors include the following:

- (a) Mr Barakat has not contested that he received all relevant correspondence from the Tribunal, including the Directions, the Tribunal letter of 10 September 2015, the 7 October Direction, and the Striking Out Order, on the relevant dates.
 - (b) There has been no indication that Mr Barakat did not understand the plain meaning of that correspondence.
 - (c) Mr Barakat did not respond at all to the 7 October Direction, or otherwise contact the Tribunal, notwithstanding its warning regarding striking out.
 - (d) The only explanation given by Mr Barakat for his ongoing failure to engage with the Tribunal was that, according to his email of 6 November 2015, he was waiting for a court date. It would have been evident from the Directions, which required the parties to give dates to avoid a hearing of the appeal within a certain timeframe, that fixing a hearing date was part of the process with which the Directions were concerned.
 - (e) Mr Barakat has yet to comply clearly with all the Directions.
 - (f) Mr Barakat has accepted that his application should be determined without a hearing. He was informed by the Tribunal that in that process he could send any written submission which might assist in that process. He has declined to do so.
28. Taking account of these and all other relevant factors, the application to reinstate the appeal is refused.
29. I would have reached this decision regardless of the recent decision by the Senior President of Tribunals in *BPP Holdings v HMRC* [2016] EWCA Civ 121. That decision makes it clear that in applying the overriding objective in the Tribunal rules, the stricter approach to compliance with tribunal rules and directions laid out in the Civil Procedure Rules applies to cases in the tax tribunals. See in particular [16] of the decision, and the statement (at [38]) that:
- “Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.”

Right to Apply for Permission to Appeal

30. 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.

**THOMAS SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 5 APRIL 2016