



TC06397

Appeal number: TC/2013/02689

PROCEDURE – application to reinstate a struck out appeal – refused – costs application – awarded

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NM CONSULTANTS (LOGISTICS) LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Colchester on 12 February 2018

The Appellant did not appear and was not represented

Mr Adamson, presenting officer for the Respondents

DECISION

1. The appellant did not attend. At the request of the Tribunal the Clerk
5 telephoned the telephone number in the papers and was advised that the director of the
appellant dealing with the matter, Neil Alpine, was on holiday for the week.

2. It was noted from the file that the appellant had been asked by the Tribunal on 9
November 2017 for 'dates to avoid' when listing in the period 8 January to 30 March
2018. The appellant had advised that the period 20 January 2018 to 8 February 2018
10 should be avoided as the directors would be out of the country.

3. It was clear from the file that the appellant had been notified of this hearing,
which was not in the period requested by the appellant to be avoided, by letter and on
email on 12 January 2018 and had not objected to the hearing date set down by the
tribunal.

4. The respondents (HMRC) argued that the hearing should take place in the
15 absence of the appellant on the basis that it was obvious that the appellant had been
notified of the hearing and had made no objection to its proceeding, having been
warned of the consequences of not appearing.

5. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax
20 Chamber) Rules 2009 ("the Rules"). We decided that it was in the interests of justice
to proceed with the hearing in the absence of the appellant in accordance with Rule 33
of the Rules since there was no explanation as to the non-appearance by or for the
appellant. The appellant's attention is drawn to Rule 38 of the Rules in the event that
there was good cause for the non-attendance at this hearing.

25 **Background**

6. This is an application to reinstate an appeal which was struck out on 17 April
2014 for failure to comply with an Unless Order dated 1 April 2014.

7. The appeal was filed on 4 April 2013, against a decision by HMRC to issue a
Post Clearance Demand Note in respect of unpaid import VAT in the sum of
30 £97,382.10.

8. In course of the proceedings, the Tribunal issued directions requiring the parties
(amongst other things) to provide Lists of Documents and Listing Information by 17
January 2014, and that HMRC provide a paginated and bound bundle to the appellant
by 14 February 2014.

9. HMRC filed its List of Documents on 9 January 2014 and provided its Listing
35 Information on 23 January 2014.

10. The Tribunal wrote to the appellant on 21 January 2014 to inform it that its
Listing Information had not been received.

11. On 11 February 2014 HMRC advised the Tribunal and the appellant by email at neil@nmclogistics.com that it was unable to comply with the direction to produce a bundle because the appellant had not provided a List of Documents as directed.

5 12. On 13 February 2014 the Tribunal wrote to the appellant informing it that, unless it responded to the tribunal within 14 days, the appeal would be likely to be struck out.

13. On 4 March 2014 the Tribunal wrote again to the appellant asking for a response within 14 days, advising that the appeal would likely be struck out if there was no response.

10 14. On 1 April 2014 the Tribunal issued a direction that unless the appellant had notified the Tribunal by 16 April 2014 that it intended to pursue the appeal, then the appeal would be struck out without further notice.

15 15. On 24 April 2014 the Tribunal wrote to the appellant by post and email to neil@nmclogistics.com advising the appellant that the appeal had been struck out on 17 April 2014 and further advising the appellant that it had the right to apply for the proceedings to be reinstated but that such an application must be made within 28 days from 24 April 2014. The Tribunal did not receive a response to that letter.

16. On 1 June 2017, the appellant applied by email to the Tribunal, from the email address neil@nmclogistics.com, to have the appeal reinstated.

20 **Appellant's evidence and submissions**

17. As the appellant did not appear, the appellant's email requesting reinstatement was taken to be their submissions.

25 18. The appellant stated that they had received notice that the case was still outstanding and that their application was struck out because they had not responded to the Tribunal.

19. The appellant explained that they had moved address in late 2014 and had never received any further correspondence from the Tribunal on the matter.

30 20. The appellant submitted that it could "only assume" that their failure to respond was because their "address was never changed on your system" and requested that the appeal be reinstated.

HMRC evidence and submissions

35 21. HMC submitted that the three stage analysis set out by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 applied, as did the considerations set out in *Data Select Limited* [2012] UKUT 187, together forming the correct approach for the Tribunal in deciding whether to reinstate the appeal.

22. “Seriousness and significance of the failure to comply”: it was submitted that a failure to comply with an Unless Direction, after repeated reminders, must be regarded as a serious and significant failure. Similarly, the failure to comply with the 28 day deadline for application to reinstate the appeal, with a delay of over three years in making such application, is also a serious and significant failure.

23. “Why the default happened”: HMRC submitted that no good reason had been given for the failure to comply. The appellant’s justification that it must have failed to receive correspondence because it moved address was not a good reason for failure to comply. It was not clear how an address change in “late 2014” was relevant when the appeal was struck out in April 2014. It was, in any case, incumbent on the appellant to have notified the Tribunal of any change in address. Further, the appellant was copied by email via the email address neil@nmclogistics.com into various items of correspondence, including the letter informing the appeal that its appeal had been struck out.

24. It was submitted that the purpose of time limits is to provide certainty to the other party by allowing them to consider the matters under appeal settled (*North Berwick Golf Club* [2015] UKFTT 0082).

25. It was submitted that the length of the delay is substantial. In *Romasave* [2015] UKUT 0254 it was said that a delay of more three months “cannot be described as anything but serious and significant”. The application to reinstate was submitted on 1 June 2017, over three years after the appeal had been struck out.

26. It was submitted that the consequences of an extension of time would be that HMRC would be forced to expend time and resources on an appeal it was entitled to consider long settled. Further, the appellants would have escaped sanction for a failure to comply with Tribunal directions and for failing to meet a 28 day deadline by over three years without any good reason.

27. It was submitted that the consequences of a refusal to extent time would be that the appellant would not be able to have its appeal heard. Although this is a serious consequence, it was submitted that this will always be the case with an out of time application and cannot be given such weight that an appellant is effectively immune from having to comply with Tribunal rules and directions.

28. It was submitted that, applying the *Data Select* considerations, the factors against allowing the application outweigh the factors in favour.

29. It was further submitted that the fact that the appellant is unrepresented is not a good reason for repeated failure to comply with Tribunal directions and respond to correspondence, nor is it a good reason for failing to apply for this appeal to be reinstated for over three years after it was struck out. It was submitted that, as set out by the Court of Appeal in *Tinkler v Elliot* [2012] EWCA Civ 1289, “there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but ... they will only operate close to the margins. An

opponent of a litigation in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person”.

30. Finally, it was submitted that, as set out in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, “the court should decline to embark on an investigation of the merits” of the substantive appeal when considering an application to extend a deadline.

31. HMRC therefore submitted that the application should be dismissed.

Discussion

32. I have considered the factors which need to be balanced in coming to a decision in accordance with the overriding objective of dealing with cases fairly and justly.

33. There is a clear purpose to the time limit for making appeals against HMRC's decisions. It is not in the interests of fairness and justice (in its widest sense and not just looking at the position of one particular taxpayer) to allow appeals to be made outside the statutory time limit unless there is some good reason for doing so.

34. The delay in this case was substantially over two years, rather than days or weeks. It was a serious and significant delay.

35. I agree with HMRC there was no good reason for the delay. The appellant has offered no explanation for the delay other than that they moved address in “late 2014”, but have not offered any further explanation as to how this accounts for a failure to respond to correspondence in late 2013 and early 2014, nor how it accounts for a failure to respond to an Unless Direction in April 2014 or a letter advising of the strike out on 24 April 2014 which was also sent to the email address used by the appellant when making their application to reinstate the appeal.

Costs

36. At the end of the hearing, HMRC requested leave to make written submissions for costs, which was granted. After the hearing HMRC provided to the Tribunal and the appellant a written application for costs and a costs schedule detailing the costs incurred by HMRC in resisting this application in the amount of £4,276.00 which, it was submitted, fell substantially short of reflecting HMRC's true costs of the proceedings. HMRC requested that the costs be summarily assessed.

37. HMRC application for costs was made pursuant to Rule 10(1)(b) of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009, on the ground that the appellants had "acted unreasonably in ... defending or conducting the proceedings". Having made the application seeking reinstatement of its appeal on an out of time basis, it was incumbent on the appellants to satisfy the Tribunal it had reasonable grounds for making the application. HMRC submitted that, in failing to provide any substantial grounds for the application and failing to attend the hearing on 12 February 2018

without good reason, the appellant's conduct should be considered unreasonable for the purposes of Rule 10(1)(b) of the Tribunal Rules.

38. HMRC submitted that it is strongly in the interests of justice that litigants should not make applications where they do not attempt to make any reasonable arguments supporting the relief from sanctions being sought. Costs incurred in legal proceedings involving HMRC are paid using finite public funds and there appeared to be no justification for public funds being expended in these circumstances.

39. The appellant's response to the application for costs was to advise that the appellant was in liquidation, and that Parker Andrews Limited had been appointed as the liquidators. The appellant offered no other comment on the application for costs, nor provided any information as to the failure to appear at the hearing.

40. This application was not allocated to the Complex Case Category and therefore rule 10 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009 permits this Tribunal to make a costs order only in certain circumstances. Rule 10 provides, so far as relevant:

- (1) The Tribunal may only make an order in respect of costs...
- (b) if the Tribunal considers that a party or their representative has acted unreasonably bringing, defending or conducting the proceedings;
- (3) A person making an application for an order under paragraph (1) must –
 - (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
 - (b) send or deliver with the application a schedule of the costs...claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs... if it decides to do so.
- (4) an application for an order under paragraph (1) may be made at any time during the proceedings ...

41. The appellant has consistently failed to engage with the Tribunal in this matter, and the director dealing with the matter chose to go on holiday during the week in which the hearing was listed despite having advised the Tribunal that he would be available and having had notice of the hearing by post and email. The appellants also failed to provide any credible grounds for the application, referring only to a change of address in "late 2014" which must have been several months after the strike out in April 2014.

42. I took into consideration that the appellant had gone into liquidation at some point during the ten days following the hearing, which might have indicated a reason for failure to attend, but weighed this against the fact that the appellant's director had chosen to go on holiday during the week of the hearing rather than deal with this Tribunal hearing concerning the appellant.

43. In these circumstances, I consider that the appellant has acted unreasonably in conducting the proceedings and I am satisfied that I should exercise my discretion, in accordance with rule 10(1)(b), to make a direction that the appellant is to pay HMRC's costs of and incidental to these proceedings.

5 **Decision**

44. The application is refused and the appellant is ordered to pay HMRC's costs of and incidental to these proceedings as set out in HMRC's schedule of costs dated 16 February 2018.

45. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

20

RELEASE DATE: 19 MARCH 2018