



TC06499

Appeal number: TC/2017/04280

REINSTATEMENT APPLICATION – appellant failed to comply with Unless Order – automatically struck out – no adequate explanation or failure to comply – no real prospect of success – reinstatement refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAULINE McINNES

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday
9 May 2018**

No appearance by or for either party

Preliminary issue

1. On 4 May 2018, for security reasons, the administration in George House emailed the appellant seeking details of those attending the hearing. On 8 May 2018 the response was to the effect that “... unfortunately there won’t be anyone coming to the hearing on 9 May 2018”.

2. I had noted that on 21 November 2017, Mrs McIntyre for the respondents (“HMRC”) had intimated that HMRC had no objection to the reinstatement application being determined on the papers. Accordingly, the administration in

3. George House contacted her and she requested that the hearing proceed in the appellant's absence and in that event she would not attend either but relied on her Skeleton Argument. I had due regard to Rules 2 and 33 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") and decided that as the appellant had had proper notice of the hearing, the hearing should proceed in her absence.

The issue

4. On 26 September 2017, Judge Poole struck out the proceedings on the basis that the appellant had failed to comply with the Directions issued on 11 August 2017. On 12 October 2017, the appellant sought reinstatement of the appeal. On 17 November 2017, HMRC responded objecting to the reinstatement.

The history

5. The Notice of Appeal received by the Tribunal on 13 April 2017 lacked specification of the decisions to be appealed and the grounds of appeal, as required in terms of Rule 20 of the Rules. On 7 June 2017, HMRC lodged an application with the Tribunal, copied to the appellant and her representative requesting details of which specific default surcharges were being appealed, the specific reason for each default and the reason why the default was not appealed within the statutory timescale.

6. On 9 June 2017, HMRC applied for postponement of the hearing that had been set down for 17 July 2017 enclosing a copy of the said application. That was copied to the appellant and her representative.

7. On 19 June 2017, HMRC received a letter from the appellant's representative which detailed the default surcharge periods but neither provided a reason for the defaults nor a reason why the appeals were not made on time.

8. On 20 June 2017, the Tribunal issued Directions postponing the hearing and directing again that the appellant was required to inform the Tribunal and HMRC within 21 days:-

“(a) which specific default surcharge(s) she seeks to appeal, identifying it/them by reference to the amount and VAT accounting period in each case;

(b) the basis of the Appellant's argument in relation to each disputed surcharge as to why she should be relieved of it; and

(c) her representations on why the Tribunal should permit her appeal in relation to any one or more of the disputed surcharges to be considered, in spite of her notice of appeal being sent to the Tribunal outside the statutory time limit (of 30 days from each disputed decision).”

9. On 21 June 2017, HMRC wrote to the appellant's representative setting out the VAT periods which HMRC believed to be disputed and the dates by which appeals should have been lodged and asked for further information. Nothing was forthcoming.

10. On 11 August 2017, Directions were issued stipulating that UNLESS the appellant complied with Direction 2 of the previous Directions, the appeal might be struck out without further reference.

11. On 17 August 2017, HMRC received a letter from the appellant's representative setting out the reasons for each default but no explanation was given for the delay in submitting the appeals.

12. On 22 September 2017, HMRC wrote to the appellant's representative pointing out that there had not been compliance with Direction 2(c) of the Directions issued by the Tribunal on 20 June 2017.

13. On 26 September 2017, the Tribunal issued a Direction that the appeal had been struck out.

14. On 12 October 2017, as indicated above, the appellant applied for reinstatement. The reason given was that the appellant had attempted to pay VAT on time or as quickly thereafter as possible and they did not understand why leniency had not been shown to them. No explanation was offered for the late appeals other than they were business people not HMRC who understand every rule fully.

HMRC's arguments

15. HMRC argue that the appellant and her representative were well aware and had utilised the procedures for requesting review of a surcharge or requesting an appeal as evidenced by:

(a) They had requested a review of default surcharges on 13 June 2014 appealing surcharges imposed during the period 02/11 to 02/14.

(b) On 7 August 2014, HMRC had written to the appellant advising which surcharges had been amended or withdrawn following the request for a review and which surcharges were upheld. That letter also detailed the time limits and procedures for submitting an appeal to the Tribunal.

(c) It was only on 31 October 2014 that the appellant requested a review of the default surcharge issued in relation to period 08/14.

(d) On 4 November 2014, the appellant's representative wrote to HMRC recording receipt of the letter of 7 August 2014 stating that it was a small business and the business would be put under severe pressure if they had to pay the default surcharges. In fact on 5 December 2014, HMRC withdrew the default surcharge for period 08/14.

(e) On 6 October 2015, the appellant's representative wrote to HMRC stating that they had noted that there had been default surcharges issued for 11/14 and 02/15 and requesting a review. On 12 November 2015, HMRC withdrew those surcharges.

16. HMRC and the Tribunal have frequently requested reasons to be provided for the delay in submitting the appeals and there has been no explanation whatsoever provided.

Discussion

17. In considering whether or not to reinstate this appeal, in the first instance, I am bound to apply the overriding objective set out in Rule 2 of the Rules, a copy of which is annexed at Appendix 1.

18. As can be seen this requires the Tribunal to deal with cases fairly and justly but also pertinently that the parties must help the Tribunal to further the overriding objective and cooperate with the Tribunal. In this case the appeal was struck out because of the appellant's failure to cooperate with the Tribunal by complying with Direction 2(c) of the said Direction notwithstanding exhortations from both the Tribunal and HMRC.

19. The Tribunal has no actual evidence as to why the appellant has failed to comply with the UNLESS Order. The appellant has simply stated that she wishes the Tribunal to hear the late appeal and that they had an insufficiency of funds. That simply does not address the issue.

20. I agree with Judge Mosedale in *Maltavini Limited v HMRC*¹ (TC) where at paragraph 18 she took the view that where an appellant chooses not to comply with an UNLESS order, the appellant was effectively withdrawing from the appeal. At paragraph 19 she relied on Proudman J in *Pierhead Purchasing Limited v HMRC*² which stated that when considering reinstatement the Tribunal should take into account:-

“The reasons for the delay, that is to say, whether there is a good reason for it.

Whether HMRC would be prejudiced by reinstatement

Loss to the appellant if reinstatement were refused.

The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.

Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.”

21. In relation to each of these factors I find as follows:-

(1) No good reason has been provided for the non-compliance with Direction 2(c). A wish to pursue the late appeal does not suffice and nor does a lack of finance.

(2) There is clear prejudice to HMRC in that the appeal has been struck out and reinstatement would put HMRC to the cost of defending it.

(3) It is difficult to see that there is loss to the appellant in that effectively in failing to comply with Direction 2(c) the appellant has also not complied with Rule 20 of the Tribunal Rules, a copy of which is annexed at Appendix 2. That Rule stipulates at 20(4)(a) that a notice of appeal must include the reason why the notice of appeal was not lodged on time. That is precisely what was required in terms of Direction 2(c) and that has not been provided. In those circumstances there is not a valid appeal. Therefore there can be no loss arising from the appeal.

(4) I find that reinstating the appeal is against the public interest in finality in litigation.

¹ 2016 UKFTT 267 (TC)

² 2014 UKUT 321 (TCC)

(5) Lastly, as far as the merits of the proposed appeal are concerned, as I indicate above, it is very difficult to see what the merits of any appeal might be in that the first issue for decision would be whether or not the time limit for appealing is extended and if it is not then there is no appeal. The legislation is very specific as to the time limit imposed for the submission of an appeal. It is 30 days. Any Tribunal considering that appeal would be bound by *Romasave (Property Services) Limited v HMRC*³ which makes it absolutely explicit at paragraph 96 that a delay of more than three months where a time limit is 30 days cannot be described as anything but serious and significant. In this case the oldest appeal should have been lodged by 16 August 2010 and the most recent by 16 May 2014. The delay, without explanation, to June 2017 in lodging an appeal means that the prospects of success for the appellant, were the appeal to be reinstated, are negligible.

22. The application for reinstatement is refused.

23. 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 SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 15 MAY 2018

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³ 2015 UKUT 0254 (TCC)

2.—Overriding objective and parties’ obligations to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly 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.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

20.—Starting appeal proceedings

[(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.]⁴

- (2) The notice of appeal must include—
- (a) the name and address of the appellant;
 - (b) the name and address of the appellant’s representative (if any);
 - (c) an address where documents for the appellant may be sent or delivered;
 - (d) details of the decision appealed against;
 - (e) the result the appellant is seeking; and
 - (f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

[(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal must be made or notified after that period with the permission of the Tribunal—

- (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
- (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.]⁵

⁴ Substituted by Tribunal Procedure (Amendment No.3) Rules 2010/253 rule 6(5)(a) (November 29, 2010)

⁵ Substituted by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(5)(b) (November 29, 1010)