[2020] UKFTT 0297 (TC)

TC07781

PROCEDURE - Application to set aside - Application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/08973

DECISION
ON AN APPLICATION FOR SET ASIDE
IN THE CASE OF

DR THOMAS ANTHONY ROGERS **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in private on 15 July 2020 and considering the Appellant's application dated 9 March 2020, and his emails of 21 April 2020, 22 April 2020, and 18 May 2020, and HMRC's submissions dated 21 April 2020 (as amended in relation to Paragraph 21).

DECISION

1. This decision concerns an appeal against a High Income Child Benefit Charge penalty of £178.80.

2. On 24 February 2020, I heard this appeal in Manchester. There was no attendance by or behalf of the Appellant, Dr Rogers, but I decided to proceed with the hearing in his absence. I was satisfied that he had been notified of the hearing, and I was satisfied that going ahead, despite his absence, was in the interests of justice: see Rule 33 of the Tribunal's Rules.

3. Given the passage of time, I have not retained the Notice of Hearing for this appeal, but the Tribunal's standard listing letter remarks that, if a party does not attend (that goes both for Appellants and HMRC), the Tribunal may decide the case in their absence.

4. Importantly, on 24 February 2020 I was satisfied that I could deal with the Appellant's arguments fairly on the basis of the information which was in the bundle (and the Appellant's letters to HMRC and the Tribunal), together with the transcripts of two calls made by Dr Rogers to HMRC on 14 December 2017 and 25 January 2018, which Dr Rogers had required HMRC to produce, and which he had seen.

5. In my decision, released to the parties on 27 February 2020, I dealt with, and dismissed the Appellant's arguments including as to (1) receipt of correspondence; (2) awareness of the charge scheme; (3) non-receipt of letters; (4) severe anxiety; (5) the 2 phone calls to HMRC; (6) fairness of the scheme. As to (5), I dealt with the allegation in detail: see Paragraphs 20 and 21 of the Decision.

6. On 9 March 2020, Dr Rogers applied to the Tribunal to set aside the Decision.

7. I should add that his letter was date-stamped in as received by the Tribunal on 16 March 2020 - i.e., just as Covid-19 restrictions were beginning, or about to begin - but unfortunately was not received by me until 14 July 2020. Directions were given on 7 April for HMRC to respond, which it did on 21 April. Thereafter, there has been delay in dealing with his application. Dr Rogers chased the Tribunal for news of progress on 18 May 2020. I apologise that he had to do so and has had to wait for longer for this decision than might otherwise have been the case. Nonetheless, the papers have now come to me and have been prioritised.

8. In his letter asking to set aside the Decision, Dr Rogers apologises for his absence from the hearing but says "I was not aware that my presence would have made a significant difference to any decision made having never experienced tribunal proceedings or similar in the past." He goes on to say, in summary:

(1) He could not get time off work at short notice;

(2) The phone transcripts should be read in context, and, if they are, they will settle the matter once and for all;

(3) He does not accept the Tribunal's findings that the phone calls did not give rise to a reasonable excuse;

(4) Letters from HMRC were not delivered to him;

(5) He was not aware of the HICBC, and was not obliged, legally or otherwise, to have social media or read BBC News;

(6) He suffers from a debilitating medical condition which has impacted on his ability to be a 'prudent' taxpayer.

9. Rule 38 of the FTT Rules provides as follows:

"Setting aside a decision which disposes of proceedings

38(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it if

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party's representative, was not present at a hearing related to the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a 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."

10. Therefore, before the FTT will set aside an earlier decision and re-consider a case, it must be satisfied (i) that it would be in the interests of justice for it to do so; (ii) that one of the conditions in Rule 38(2) is satisfied; and (iii) that the application was received within the 28 day time limit set out in rule 38(3).

11. Dealing with the time limit first: the application was sent to the FTT on 9 March 2020, and so is comfortably in time.

12. Dr Rogers was not at the hearing of the appeal so the condition in rule 38(2)(d) is met.

13. That means that the only issue for consideration is whether it is in the interests of justice to set aside the decision.

14. I am invited to consider and apply the guidance articulated by other compositions of this Tribunal in *James Quinn v HMRC* [2019] UKFTT 618 (TC) (Judge Anne Scott) and *Priti Lee v HMRC* [2012] UKFTT 434 (TC) (Judge Greg Sinfield). Those cases do not bind me, but in my view do contain useful guidance as to the right approach which I should depart from only if there is good reason to do so.

15. I remind myself - as I must - that each case of set aside has to be dealt with on its own merits, and that I must evaluate all the circumstances of the case, including balancing the merits of the arguments advanced and considering the prejudice that would be caused to both parties by setting aside or not setting aside. In this regard, I adopt the analogous approach in relation to applications for late appeals set out by the Upper Tribunal (Judges Berner and Poole) in *William Martland v HMRC* [2018] UKUT 178 (TCC).

16. In my view, the following features are also relevant:

(1) The 'interests of justice' (a broadly worded phrase which appears both in Rule 33 and Rule 38) includes the public interest of allocating an appropriate share of the Tribunal's resources to cases - not just to this one, but to all of them. Time and resources taken to re-hear this appeal would be time and resources which would not be available to hear another appeal;

(2) This is an appeal for a relatively modest sum - less than £180. It has already occupied half a day of Tribunal hearing time, and half a day of judicial writing time;

(3) This is not a case of a kind where the taxpayer's honesty or integrity are in jeopardy, or where findings have been made as to honesty or integrity;

(4) Strength of feeling as to the injustice of the result is not a relevant consideration unless something can be shown which realistically suggests that the outcome at a re-hearing might be different;

(5) This appeal was able to consider all the extant information and documents. Documents such as the transcripts stand alone, and their meaning is clear on the face of them. They do not call for interpretation;

(6) There is a general reluctance to admit evidence which was not before the Tribunal at the original hearing. But, in any event, no new evidence is advanced here. The submissions made by Dr Rogers are in essence an amplification of the reasons already put forward by him;

17. I cannot ignore the fact that Dr Rogers, on what he himself says, decided not to come to the hearing. He made that decision because he was under the misapprehension that his attendance would not have made a difference. I regret his misapprehension, since it was not well-founded. This Tribunal has extensive experience of dealing with persons who represent themselves, consistently with our overriding objective of dealing with cases - especially those (as this one was) in the 'basic' category - with flexibility and without undue formality: see the overriding objective in Rule 2. A person who decides not to come to the hearing risks the hearing going ahead in their absence.

18. He says that he was unable to get time off work at such short notice, but the hearing notice (which, as I have already said, I have not been able to locate) would not ordinarily have given unduly short notice (i.e., say, less than a fortnight). But, and even if I am wrong in fact about the length of notice, nothing stood in the way of Dr Rogers contacting the Tribunal to ask for another date if he could not get time off. He did not contact the Tribunal. I add that there is no evidence of Dr Rogers asking for time off. I am not persuaded that there was any good reason why Dr Rogers did not come to the hearing.

19. I am asked to reconsider the transcripts, as a key piece of evidence. They were already considered, and are verbatim transcripts. That is to say, there is nothing which Dr Rogers could add, by way of admissible evidence, to what is recorded in those transcripts. He has not said that the transcripts are incomplete or inaccurate. In the decision, I have already taken his position, even in his absence, at its highest and assessed whether what was said in four lines of a long conversation could even arguably amount to a reasonable excuse. I have decided that it did not. Dr Rogers makes various points about being a relatively new taxpayer ringing up the right people and trying to the right thing. That might well be right - no-one has said that it isn't. But, in my view, that is as far as the argument can realistically go. I am not persuaded that Dr Rogers coming to the Tribunal to tell a judge about his state of mind and belief arising from the calls enjoys any realistic prospect of leading to a different conclusion than that already reached.

20. Dr Rogers made submissions about what he has described as a debilitating medical condition from which he suffers. I did not consider it appropriate, in a judgment which would be made public, to say more about that than I did. Dr Rogers makes further submissions about the effect of this condition on his ability to deal with his tax affairs. I have read them. For the same reasons already set out, and because this will also be a public judgment, I say no more about them here. No medical evidence, even now, has been placed before me (although some is offered if I set aside the decision). That approach is, with respect, the wrong way round. Dr Rogers is a medical doctor - even though I do not hold him, by virtue of his profession, to some different, or higher, standard of proof than other litigants, I cannot extend a lower one to him either. Any appeal or application which seeks to rely on medical evidence as relevant should attach such evidence, or (at the very least) should set out in sufficient detail what it is. That has not happened here.

21. The position which faced me at the hearing, and which still faces me, is that there is no evidence before me which would permit me, even on the balance of probabilities, to say that this medical condition and what Dr Rogers says has been its impact on his ability 'to be a 'prudent' taxpayer' is, as a matter of law, capable of amounting to a reasonable excuse. I am not persuaded that anything said latterly would lead to a different conclusion than that already reached.

22. I was persuaded that it was in the interests of justice to proceed on 24 February 2020, for the reasons set out at the time.

23. The overall balancing exercise must take all of the above into account, and I do so. If the decision is set-aside, then it will take up further time and resources (both those of HMRC and HMCTS) at some point (perhaps many months down the line), but I am not persuaded that it would lead to any different outcome. If the decision stands, then the prejudice to Dr Rogers is that the decision stands and he is liable to pay £178.80. In my view, the balance comes down very firmly in favour of not setting the decision aside.

24. I have considered everything which Dr Rogers has said with care. Nothing which Dr Rogers has said since then persuades me that it would be in the interests of justice now to set that decision aside and for this appeal to be heard (whether by me, or by another judge) afresh.

25. For those reasons, I dismiss the application. The decision is not set aside.

26. 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.

DR CHRISTOPHER MCNALL

TRIBUNAL JUDGE

RELEASE DATE: 20 JULY 2020