



Neutral Citation: [2024] UKFTT 00567 (TC)

Case Number: TC09223

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

In Public by remote video hearing

Appeal reference: TC/2022/12137

*STRIKE OUT – late service of authorities bundle – breach of unless order? – yes – HMRC’s application for a DOTAS notification struck out*

**Heard on:** 19 June 2024

**Judgment date:** 26 June 2024

**Before**

**TRIBUNAL JUDGE NIGEL POPPLEWELL  
MRS SHAMEEM AKHTAR**

**Between**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Applicant**

**and**

**ELITE MANAGEMENT CONSULTANCY LIMITED  
(in administration)**

**Respondent**

**and**

**ADAM BALE**

**Second Respondent**

**Representation:**

For the Applicant: Rebecca Murray of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

For the Respondents: Howard Watkinson of counsel instructed by ASW Solicitors

## DECISION

### INTRODUCTION

1. This is a short but fully reasoned decision which follows our ex tempore decision given at an oral hearing which was scheduled to take place over two days, and which was to hear an application by HMRC (“**HMRC’s application**”) for an order against the first respondent that arrangements known as the “enhanced umbrella scheme”, are, or should be treated as “notifiable arrangements” within the meaning of section 306(1) Finance Act 2004. In colloquial terms, HMRC contend that the arrangements are notifiable as a tax avoidance scheme under the DOTAS regime.

2. However, on the day before the hearing, i.e. 18 June 2024, the second respondents’ representative made an application that the tribunal should automatically strike out HMRC’s application as they had failed to comply with the time limit set out in the relevant directions for serving the authorities bundle and was thus in breach of a “will” unless order.

3. Both Mr Murray and Mr Watkinson made oral submissions and at the hearing we gave an ex tempore decision that HMRC’s application had been automatically struck out at 5.01 pm on 17 June 2024.

### THE BACKGROUND FACTS

4. The relevant background facts can be simply stated and are not in dispute:

(1) Judge Sinfield issued directions (we understand that these had previously been negotiated and agreed between the parties) on 20 September 2023. Direction 12 which deals with the Authorities Bundle (“**Direction 12**”) directed that HMRC, not later than seven days before the hearing, should send or deliver to the Respondents and the Tribunal by email or electronic transfer, an electronic authorities bundle.

(2) Direction 17 of those directions (“**Direction 17**”) states “Both parties to take note that failure to comply with these Directions WILL result in the proceedings being STRUCK OUT (in the case of non-compliance by the Appellant) or the Respondents being BARRED from taking further part in the proceedings (in the case of non-compliance by the Respondents) SUBJECT TO prior permission not to comply and any subsequent application for reinstatement or lifting of the bar as the case may be”. (Emphasis in the original).

(3) On 8 May 2024, HMRC applied for an extension of time to comply with, inter alia, Direction 12. At that stage compliance was due not later than 12 June 2024. HMRC wanted it to be extended until 17 June 2024.

(4) That extension of time application was opposed by the respondents and the matter was heard by Judge Brown who, on 16 May 2024 allowed the application to extend time.

(5) In an email timed at 7.05 pm on 17 June 2024, from the Secure Data Exchange Service (i.e. HMRC) the respondent’s representatives were notified that the authorities bundle had been made available by way of a download in SDES.

(6) In an email timed at 7.19 p.m. on the same date, Namrah Kahn, a paralegal in the strategic litigation unit of HMRC’s solicitors office, confirmed that in accordance with Direction 12 (as amended), “the Authorities bundle has been uploaded onto HMRC’s Secure Data Exchange Service for both Respondents and on the HMCTS Document Upload Centre for the Tribunal to retrieve”.

### THE RULES

5. The relevant Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) (the “**Rules**”) are Rules 2, 8 and 12:

6. Rule 2(3) requires us to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

“The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly”.

7. Rule 8 deals with strike out. Under Rule 8(1):

“The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them”.

8. Rule 12 deals with calculating time. Under Rule 12 (1):

“An act required by these Rules, a practice direction or a direction to be done on or by a particular day must be done before 5pm on that day”.

## **DISCUSSION**

### *Submissions*

9. In summary, Miss Murray submitted that: it was in our gift to find that HMRC’s application had not been automatically struck out as it was not a substantive breach of Direction 12; the authorities bundle was uploaded onto the SDES shortly after 7pm on 17 June 2024; there was no prejudice to the second respondent as he had filed his skeleton argument well before the due time for compliance with Direction 12; the overriding objective in Rule 2 applies and it would be completely disproportionate to strike out HMRC’s application simply because it had missed a deadline by two hours.

10. In summary, Mr Watkinson submitted that: the facts clearly show, and Miss Murray accepts that the authorities bundle was served late and there was therefore a breach of Direction 12; Direction 17, which has survived the various date changes to the other directions, therefore applies; it is a mandatory unless order, and failure to comply with it engages the automatic strike out provisions of Rule 8 (1); the overriding objective is irrelevant (although it is clearly relevant to any application for reinstatement); we have no discretion; HMRC’s application was automatically struck out at 5pm on 17 June 2024 when HMRC failed to comply with Direction 12; unless and until there is a successful application for reinstatement, the Tribunal has no jurisdiction to consider HMRC’s application.

### *Our view*

11. The provisions of Rule 8 (1) provide (inter alia) that proceedings will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of those proceedings.

12. The relevant proceedings here are HMRC’s application.

13. It is clear to us (and there was no serious dispute about this) that the provisions of Direction 17, notwithstanding the applications which have been made since it was promulgated in September 2023 (including HMRC’s application to extend time of 8 May 2024) applied to the service of the authorities bundle. The date for that service, as sought by HMRC, was 17 June 2024.

14. Although Direction 12 itself (as amended) specified no specific time for service, Rule 12 applies. The consequence of this (as Miss Murray accepts) is that the authorities bundle should have been served by 5pm on 17 June 2024.

15. On the facts, it was not. It was not served until shortly after 7pm on that date.

16. Direction 17 is clear. It states that in the case of non-compliance by HMRC, any failure to comply with Direction 12 “WILL result in the proceedings being STRUCK OUT” (subject to any prior permission not to comply and any subsequent application for reinstatement).

17. It is clearly therefore a direction that stated that failure by a party to comply with the direction would lead to the striking out as per Rule 8 (1).

18. And so, as night follows day, the automatic strike out provisions of Rule 8(1) are engaged.

19. It is our view that this mandatory strike out leaves no room for the application of the overriding objective in Rule 2. Whilst the overriding objective is of crucial importance when exercising any form of judicial discretion and will be highly relevant in relation to any reinstatement application which HMRC might make, it does not impinge on the automatic strike out provisions in Rule 8(1). There is a clear distinction between the situation of an automatic strike out (where the tribunal then loses jurisdiction pending a successful application for reinstatement) and the situation where the tribunal has jurisdiction and is considering relief from sanctions.

**DECISION**

20. It is our decision that HMRC’s application was automatically struck out at 5.01 pm on 17 June 2024.

**REINSTATEMENT**

21. It is clear that HMRC intend to make an application for reinstatement. We would remind them (in light of the nature of the reasons for any such application) that Rule 8(6) provides that there is a 28 day limitation period, starting on the date on which this decision is released, for making their application

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

22. 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.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**Release date: 26<sup>th</sup> JUNE 2024**