[2016] UKFTT 319 (TC)

TCO5088

Appeal number: TC/2014/02737

VALUE ADDED TAX – application for reinstatement of appeal after striking out - application denied – application for costs by the Respondents – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

INFOCOM IT (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 5 May 2016.

Mr Vijayanand Amaranathan appeared for the Appellant

Ms Natasha Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Infocom IT (UK) Limited for the re-instatement of its appeal dated 16 May 2014 in respect of the recovery of VAT input tax. The Respondents oppose the application to reinstate the appeal. The Respondents have also applied for an order pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 (the "TCEA 2007") and Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") in respect of the costs which they have incurred in responding to the application for reinstatement.

Background

2. The background to this appeal is that, on 5 February 2014, the Respondents issued letters denying the Appellant £509,691.90 claimed in VAT input tax for VAT periods 06/11/ to 09/12. After the decision underlying the letters was upheld on review on 17 April 2014, the Appellant appealed against the decision on 16 May 2014. Over the course of the next 15 months, the Appellant failed to comply with directions of the Tribunal on numerous occasions, the last of which was an order issued on 11 March 2015 to the Appellant's representative (which was re-served on the Appellant on 29 April 2015) to the effect that the Appellant's appeal might be struck out unless the Appellant notified the Tribunal in writing that it intended to continue with its appeal and provided a list of the documents upon which it intended to rely in connection with its appeal and witness statements from all witnesses on whose evidence it intended to rely at the hearing. In the absence of any response to this order, the Tribunal struck out the Appellant's appeal on 3 September 2015.

3. On 24 September 2015, the Appellant's representative, SBD Group Business Solutions Limited ("SBD"), applied for the Appellant's appeal to be re-instated and it is that application which is the main subject of this decision.

The law

4. In considering whether or not to reinstate the appeal, I am bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules. This requires the Tribunal to deal with cases fairly and justly. I am also bound by the recent Court of Appeal decision in *BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121 ("*BPP*"), where it was held that the strict approach to compliance with rules and directions taken in *Mitchell v News Group Newspapers Limited* [2014] 1 WLR 795 ("*Mitchell*") and *Denton v TH White Limited* [2014] 1 WLR 3926 ("*Denton*") should also be applied in the context of hearings before the Tribunal.

5. Each of the *Mitchell* case and the *Denton* case concerned the application of CPR 3.9 in the case of an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order. It follows from the decision

in the *BPP* case that the principles set out in the *Mitchell* case and the *Denton* case should be applied equally in a case such as this one.

6. CPR 3.9 requires that, on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, "the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

7. In giving the judgment of the court in *Mitchell*, the Master of the Rolls stated at paragraph 36 that the requirements set out in paragraphs (a) and (b) above "should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule". He went on to note that, whilst it was true that the reference to "all the circumstances of the case" meant that a broad approach should be adopted in such circumstances, "the other circumstances should be given less weight than the two considerations which are specifically mentioned".

8. In the *Denton* case, the Court of Appeal agreed with the principles set out in the *Mitchell* case and went on to say that an application for relief from sanctions should be addressed in three stages. "The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".

Discussion

9. Turning now to the facts which are relevant to this application and adopting the three-stage process suggested by the Court of Appeal in the *Denton* case, I would make the following observations.

The first stage – seriousness of breaches

10. In the period between lodging its appeal and the striking out of its appeal, the Appellant breached Tribunal directions on five occasions, including those set out in two unless orders issued on 26 November 2014 and 11 March 2015. It also failed to respond to numerous other letters from the Tribunal and the Respondents. Its breaches included the following:-

(a) Failing to serve its list of documents by 12 September 2014 in contravention of the Tribunal's direction dated 1 August 2014. The Appellant instead sought, on 12 September 2014, to provide the Tribunal with all its documents including a bag full of invoices but the Tribunal refused receipt;

(b) Failing to respond to the Tribunal's letter dated 25 September 2014 in which the Tribunal made clear the requirement to serve a list of documents, rather than to deliver the documents themselves;

(c) Failing to serve witness statements by 10 October 2014 in contravention of the Tribunal's direction dated 1 August 2014;

(d) Failing to respond to the Tribunal's letter dated 24 October 2014, in which the Tribunal reiterated the need to comply with its directions dated 1 August 2014. This was despite the fact that the letter warned the Appellant that the appeal could be struck out if the Appellant didn't comply with the directions within 14 days;

(e) Failing to provide listing information by 7 November 2014 in contravention of the Tribunal's direction dated 1 August 2014;

(f) Failing to comply with the Tribunal's first unless order issued on 26 November 2014;

(g) Failing to serve witness statements or a list of documents to the Tribunal by 15 February 2015, in contravention of the revised directions issued by the Tribunal on 30 January 2015. Those revised directions were issued after the Appellant had requested more time to serve witness statements on 15 January 2015. In that letter, the Appellant gave no reasons as to why it required more time; and

(h) Failing to respond to the Tribunal's second unless order issued on 11 March 2015 to the Appellant's representatives and re-served on the Appellant on 29 April 2015.

11. In this period, the Appellant's only engagement in the appeal was to attempt to serve all of its documents (as opposed to a list of documents) on the Tribunal in September 2014 and to request more time for the service of witness statements in January 2015 although it then failed to serve the witness statements within the extended deadline.

12. It is therefore clear that the Appellant repeatedly committed serious and significant breaches of directions.

13. At the hearing, Mr Amaranathan did not dispute any of the above.

<u>The second stage – reasons for default</u>

14. When invited by the Tribunal on 3 September 2015 to provide reasons for the Appellant's defaults, SBD (representing the Appellant) simply stated that:-

> "Our client has been abroad for a longer period due to important family commitments and was unable to furnish necessary witness and statements [*sic*] on time".

15. When invited at the hearing to expand on this and to provide further reasons for the Appellant's various defaults, Mr Amaranathan stated that:-

(a) he could not afford to pay for tax advice and that SBD had been helping him with his appeal only because the representative of SBD was a personal friend and therefore had agreed to help him without charge;

(b) he was working hard in his business throughout the relevant time and had insufficient time to deal with the paperwork involved in his appeal; and

(c) he had been abroad from the beginning of June 2015 until early September 2015 visiting his mother in India.

16. Mr Amaranathan also said that neither he nor his friend at SBD had understood the process involved in conducting the appeal. I would agree that, throughout the course of the appeal, Mr Amaranathan demonstrated a lack of understanding of the process involved in conducting the appeal. This is exemplified by the fact that he sought to provide the Tribunal with an array of documents (including a bag full of invoices) instead of a list of documents in September 2014 and that, shortly before this hearing, he provided the Tribunal with a document purporting to be a witness statement pertinent to this hearing but which was not in fact a witness statement and also dealt solely with the substantive merits of his original appeal and not with the issues arising in connection with the application to reinstate his appeal.

The third stage – all the circumstances

17. I have some sympathy with Mr Amaranathan's predicament. It is quite clear from both his conduct in the period since the appeal was first lodged and his demeanour at the hearing that he has had great difficulty in understanding the process.

18. On the other hand, I need to take into account the fact that a person conducting a business and engaging in litigation over the tax affairs of the business does have a responsibility to display at least a rudimentary grasp of the relevant processes. Perhaps more significantly, at any time in the period between the date when the appeal was lodged and the date when the appeal was struck out, Mr Amaranathan could have approached the Tribunal and the Respondents and asked for help with the process of progressing the litigation. Instead, he repeatedly ignored communications from both the Tribunal and the Respondents. In addition, his absence for 3 months in the middle of 2015 does not justify his failure to communicate with the Tribunal following the second unless order that was re-served on the Appellant on 29 April 2015. In the first place, more than a month elapsed from the service of that order on the Appellant and Mr Amaranathan's departure from the UK and, in the second place, he could easily have communicated with the Tribunal either himself or through SBD during the 3 months that he was away.

19. In short, even after taking into account the difficulties which Mr Amaranathan has clearly experienced in dealing with the litigation process, that falls some way short of justifying his behaviour. It would have been easy for Mr Amaranathan to have communicated with the Tribunal and the Respondents in relation to the various deadlines. Instead, he simply failed to engage with the process of the appeal in any meaningful sense.

20. It follows that, when considering all the circumstances of the present case, it would in my view be inappropriate for the present application to succeed. I am bound to give particular weight to the need for litigation to be conducted efficiently and the need for compliance with the rules of the Tribunal. The Appellant has failed to engage in the process and this has made it impossible to conduct and progress the litigation.

21. I accordingly hold that the appeal should not be reinstated.

Costs

22. Turning to the Respondents' application for costs, the Tribunal is entitled to make an order in respect of costs pursuant to section 29 of the TCEA 2007 and Rule 10 of the Tribunal Rules. Section 29 of the TCEA 2007 provides that, subject to the Tribunal Rules, the Tribunal has a discretion to award the costs of and incidental to all proceedings before it and has full power to determine by whom and to what extent the costs are to be paid. Rule 10(1)(b) of the Tribunal Rules provides that the Tribunal may make an order in respect of costs only if the Tribunal "considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings".

23. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TC), the Upper Tribunal stated that this test "requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done". In *Catanã v Revenue and Customs Commissioners* [2012] 2134 ("*Catanã*"), the Upper Tribunal said the following in relation to the phrase "bringing, defending or conducting the proceedings":

> "It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side."

24. At the hearing, both the Appellant and the Respondents effectively repeated their respective positions in relation to the application for restatement as representations on the costs position. In other words, the Respondents sought to rely on the Appellant's failure to comply with rules or directions prior to the striking out of the appeal as the grounds on which the Respondents should be awarded costs and the Appellant resisted that allegation by reference to the reasons given for justifying reinstatement of the appeal.

25. I think that neither party was focusing on the right question in making those submissions.

26. I would note that the application does not relate to costs incurred by the Respondents in the course of conducting the appeal which has been struck out. Instead, the costs relate to the work done by the Respondents in connection with preparing for the present application for the reinstatement of that appeal. Although it might fairly be said that the present application forms part of the same "proceedings"

as the "proceedings" involved in the original appeal – see, for example, the language used in Rule 8(5) of the Tribunal Rules, which refers to the "reinstatement" of the original proceedings – it seems to me that, in exercising my discretion as to whether or not to award costs to the Respondents, I need to focus solely on the conduct of the Appellant that led to the relevant costs and not to the conduct of the Appellant before that time. So it would be inappropriate for me to ask myself whether the Appellant or its representative acted unreasonably in the course of the original appeal. Instead, my sole consideration should be whether the Appellant or its representative has acted unreasonably in making the application for reinstatement – i.e. in making the application for reinstatement and putting the Respondents to the cost of resisting the application. This means that the reference at the end of the extract from the *Catanã* case set out above to a persistent failure to comply with the rules or directions to the prejudice of the other side is not relevant to the exercise of my discretion in this case.

27. Using only the criterion of whether or not the Appellant has acted unreasonably in making the application for reinstatement, I believe that the Appellant (through its representatives) has acted unreasonably. This is because the extent of the defaults made by the Appellant in the 15 months preceding the striking out of its appeal and the absence of compelling reasons for those defaults means that the Appellant's application for reinstatement was bound to fail.

28. Whilst I have some degree of sympathy for the circumstances in which the Appellant finds itself, I do not think that it can be said that a reasonable person in the position of Mr Amaranathan and SBD, as the Appellant's representatives, would have applied for the Appellant's appeal to be reinstated. It should have been perfectly clear to them that the application for reinstatement would not succeed, given the extent of the Appellant's defaults over the 15 months preceding the striking out of the appeal.

29. I therefore uphold the Respondents' application for costs in this case.

30. The amount of the costs sought by the Respondents is £6,333.80. I have examined the breakdown of the costs and, in my view, this amount is not unreasonable given the work which the Respondents have had to do in objecting to the application for reinstatement. I therefore award costs in the amount of £6,333.80 to the Respondents.

31. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2016