



TC06664

Appeal number: TC/2017/897 & 989

INCOME TAX – procedure – reinstatement following strike out application – persistent failure to comply with directions – failure to attend by applicant – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR JB AND MRS M PERT

Applicants

- and -

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

Respondents

TRIBUNAL: JUDGE AMANDA BROWN

Sitting in public at Norwich Magistrates Court, Norwich on 8 August 2018

No one attending for the Applicants

Miss G Truelove, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

The issue

1. The application for consideration by the Tribunal was one made by each of Mr
5 Jason Pert and Mrs Maxine Pert (together “the Applicants”) for the reinstatement of
appeals which had been struck out on the basis that the Applicants had failed to
comply with directions issued by the Tribunal.

The substantive appeals

2. The underlying appeals concern for discovery assessments and penalty
10 assessments issued to each of the Applicants by HM Revenue & Customs (“HMRC”) in respect of dividend income shown in the company’s accounts but not declared for income tax purposes by either Applicant.

Hearing

3. At the hearing, there was no appearance by or on behalf of the Applicants. It was
15 evident from the Tribunal file that a notice of hearing had been sent on 18 May 2018 to each of the Applicants at the address shown on the Notice of Appeal and to Mr R Frary of Eastern Accounting Associates, the Applicants’ nominated representative. The Notice of Appeal had provided no telephone or email contact details for the Applicant accordingly, the Tribunal asked the administrative office of the Tribunal to
20 telephone the Applicant’s representatives. The clerk informed the Tribunal that the Applicant had been called. A message was left as no one at the Applicant’s representative’s office answered the phone.

4. HMRC indicated that yesterday they had received a communication from the
Applicants requesting a postponement on the basis of “hospitalisation”.
25 Unfortunately, the Presenting Officer had only an electronic copy of the communication which she was unable access from the hearing venue. The Tribunal established that there was no record of any similar communication sent to the Tribunal office either by post or by email.

5. HMRC made an application pursuant to rule 33 Tribunal Procedure (First-tier
30 Tribunal) (Tax Chamber) Rules 2009 (“Tribunal Rules”) that the hearing proceed in the Applicant’s absence.

6. The Tribunal determined that as the notice of hearing had been properly sent by
post section 7 Interpretation Act 1978 provided that notice had effectively been given.
In light of the communication sent to HMRC it is apparent that the notice was
35 received. In light of the chronology of this case (as set out below) and applying the overriding objective under rule 2 Tribunal Rules the Tribunal considered that dealing with the matter justly and fairly and in particular to avoid delay the reinstatement application should be heard in the Applicant’s absence.

Chronology

7. On 15 March 2016 discovery assessments were issued to Mrs Pert in respect of under declared dividend income. Similar assessments were issued to Mr Pert on 18 April 2016. Penalty assessments were issued to Mrs Pert on 8 April 2016 and to Mr Pert on 14 September 2016.

8. Mrs Pert appealed the discovery assessments by letter dated 24 March 2016 within the statutory time limit of 30 days. From an incomplete file it appears that HMRC treated Mrs Pert as having appealed the penalty assessments. The basis of both appeals was that Mrs Pert disagreed with the figures and claimed property expenditure. HMRC, on several occasions requested information and documentation to support Mrs Pert's appeal but nothing was provided. The assessments which were upheld on 31 October 2016. Mrs Pert's representative sought an independent review which was carried out on 5 January 2017 HMRC upheld the discovery and penalty assessments. On 13 January 2017 Mrs Pert notified her appeal.

9. Mr Pert appealed the discovery assessments at some point prior to 31 October 2016 (the file was incomplete and the Tribunal does not have a copy of the appeal). HMRC gave a view of the matter on 2 December 2016 and a review. On 9 January 2017 HMRC upheld the discovery and penalty assessments.

10. It is important to note that up to the point of notifying their appeals the Applicants acted within the statutory time limits; however, in the case of both Applicants HMRC upheld the assessments as the Applicants had provided no substantive documentation or explanation as to why the dividends in the accounts were not reflected in their respective self-assessment tax returns.

11. On 28 March 2017 HMRC issued their statements of case in respect of each appeal following which, on 9 May 2017 the Tribunal issued directions setting the timetable for the appeals. These directions required:

- (1) Each party to serve their list of documents by 12 June 2017
- (2) Each party to deliver witness statements by 10 July 2017
- (3) Each party to provide listing information by 24 July 2017

12. On 30 May 2017 HMRC served their list of documents, confirmed they would not be relying on any witness evidence and provided listing information. Letters were also sent to the Applicants providing copies of the list of documents.

13. On 8 June 2017 on behalf of Mrs Pert the Applicants' representative wrote to HMRC providing a copy of the notice of appeal and a single sheet described as "details of the dividends received by our client".

14. By letter dated 17 June 2017 HMRC enquired of the Tribunal and the Applicants as to whether the Applicants had complied with the requirement to serve a list of documents by 12 June 2017. The Applicant's representative acknowledged the

enquiry by letter dated 29 June 2017 indicating the relevant documents would be provided within 7 days.

15. On 20 July 2017 a copy of the letter to HMRC dated 8 June 2017 in respect of Mrs Pert was provided to the Tribunal.

5 16. By letter dated 31 July 2017 HMRC wrote to the Applicants' representatives indicating that as no list of documents had been provided HMRC had prepared a bundle of documents based on their own list and that an outline of submissions would be provided once a listing date had been fixed. The Tribunal was also informed.

10 17. On 8 August 2017 the Tribunal wrote to each Applicant granting a 7 day extension for compliance with the directions as to list of documents, witness statements and listing particulars. The Applicants were warned that failure to comply would result in the case being referred to a judge to consider appropriate sanctions.

15 18. On the basis that there was no further correspondence from the Applicants or their representative, on 11 September 2017, Judge Richards directed that "UNLESS the appellants no later than 5pm on 10 October 2017 (a) confirm in writing to the tribunal that they intend to proceed with the appeal; and (b) comply with Directions 1 – 4 of the 09 May 2017 [sic] then the proceedings MAY BE STRUCK OUT without further reference to the parties".

20 19. By letter dated 24 October 2017 HMRC sought to enquire whether the Applicant had complied with the unless order.

20. On 4 November 2017 Judge Kempster struck out the appeal also notifying the Applicants of their right to apply for reinstatement within 28 days.

25 21. By letter dated 8 November 2017 the Applicants' representative applied for reinstatement on the basis that "The agent, Mr Frary was in hospital and unable to submit the confirmation".

30 22. On 29 November 2017 Judge Cannan directed that the Applicants should set out in writing and send to the Tribunal and HMRC within 14 days all facts and matters they rely on in support of the applications to reinstate, to include full details and supporting evidence as to what they failed to comply with or respond to the directions released on 9 May 2017, the Tribunal's letter of 8 August 2017 and the directions released on 11 September 2017.

23. The Applicants' representative responded by letter dated 7 December 2017 that "Our Mr Frary, who is dealing with this case, was hospitalised and undergoing surgery for osteoporosis. Mr & Mrs Pert were in Dubai purchasing property."

35 24. That correspondence was not copied to HMRC (as the directions required). It was received by the Tribunal on 12 December 2017 but was not immediately served on HMRC, with the consequence that on 18 December 2017 HMRC wrote to the Applicants enclosing their letter to the Tribunal formally opposing the reinstatement application.

25. The Tribunal served the letter of 7 December 2017 on HMRC on 28 December 2017. On 29 December 2017 HMRC wrote to the Tribunal indicating that they considered the contents of the letter to fall “well short” of that required to meet the terms of the direction of Judge Cannan.

5 26. Judge Mosdale reviewed the letter of 7 December 2017 and, by letter from the Tribunal dated 18 January, gave a preliminary view that the letter was non-compliant and failed to support the reinstatement application. The judge expressed the view that there was no need for a hearing but that the Applicants should be given one last opportunity to comply by giving a full reply to support their reinstatement application
10 within 14 days.

27. No response was forthcoming. Despite the indication from Judge Mosdale that no hearing was necessary Judge Raghavan decided that the Applicants should be given the opportunity for an oral hearing at which to make their case for reinstatement. A request was made for inconvenient dates on 31 May 2018 and the
15 notice of hearing was issued on 26 June 2018.

28. As indicated above, HMRC informed the Tribunal that the Applicants had contacted them with a view to postponing the hearing but no such request was made of the Tribunal.

Relevant legislation

20 29. The relevant statutory provision concerning strike out is contained in rule 8(3) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“Tribunal Rules”). This rule provides that the Tribunal may strike out and appeal where “the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings
25 or part of them”. Rule 8(5) and (6) provide for an appellant whose appeal has been struck out to apply for it to be reinstated.

30. Rule 5 of the Tribunal Rules provide for a wide discretion to extend time for compliance with directions.

30 31. The exercise of the Tribunal’s discretion in all matters is subject to the overriding objective set out in Rule 2 of the Tribunal Rules. This requires that the Tribunal deal justly and fairly whilst acting proportionately, to make the proceedings accessible, avoiding formality and avoiding delay.

The Applicants’ case for reinstatement

35 32. The Applicants’ case can be discerned only from the two one line letters received from the representative: that the Applicants’ apparently failed to comply with the directions of 9 May, 8 August, 11 September, and 18 January because the representative was unwell/hospitalised and the Applicants were out of the country.

HMRC's case against reinstatement

33. HMRC's case is that the Applicant has failed to provide adequate explanation for the failure to comply with the directions, they have persistently failed to produce explanation or documentation to support the substantive dispute and have otherwise failed to engage with the resolution of the dispute between the parties.

Approach to be adopted

34. HMRC referred to the First-Tier Tribunal judgments in *Decker and others v HMRC [2017] UKFTT 848* and *Tophayat Limited v HMRC [2017] UKFTT 187* as indicative of the approach to be adopted by this Tribunal in determining whether the Applicants' appeal should be reinstated.

35. In the *Tophayat* case the Tribunal notes at paragraph [34] that essentially the question of reinstatement is one akin to the granting of relief from sanctions under the Civil Procedure Rules ("CPR"). Here the failure was compliance with directions, the sanction was the strike out of the appeal and the relief sought is reinstatement.

36. So far as is relevant to the present appeal, Rule 3.9 CPR provides that on an application for relief from any sanction imposed for failure to comply with any direction the Tribunal will consider all the circumstances of the case so as to enable it to deal justly and fairly with the application. Including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules and directions. The Rule also requires an application for relief to be supported by evidence.

37. The Tribunal in *Tophayat* also notes at paragraph [37] that the Court of Appeal in *BPP Holdings Limited v HMRC [2016] EWCA Civ 121* confirmed that despite no equivalent rule to Rule 3.9 CPR in the Tribunal Rules, a similar approach was to be adopted. The approach of the Court of Appeal was subsequently endorsed by the Supreme Court ([2017] UKSC 55).

38. In *Decker* the Tribunal referenced the cases of *Jumbogate Ltd v HMRC [2015] UKFTT 64* and *Pierhead Purchasing Ltd v HMRC [2014] UKUT 321*. These cases require that the approach of the Tribunal in considering the Applicants' application should be to consider:

- (1) The reasons for the delay (is there a good reason for it?)
- (2) The reasons for the strike out
- (3) Whether there has been a material change since the appeals were struck out
- (4) Whether HMRC would be prejudiced by reinstatement
- (5) Loss to the Applicants if reinstatement were refused

(6) Whether extending time for compliance with the directions and thereby permitting reinstatement of the appeal would be in the interests of good administration

(7) Whether the appeal is arguable and has a reasonable prospect of success

5 (8) The conduct of the parties

Discussion

39. The tribunal will deal with each of these factors in turn:

(1) The reasons for the delay (is there a good reason for it?)

10 As indicated above the Applicants have provided very limited information as to the reason for the delay despite having been given the opportunity on now two occasions to do so. The reasons given (illness of the representative and absence of the taxpayers) indicate a lack of engagement with the appeal process as questions arise as to why alternative cover could not be found for the representative and the relative importance to the Applicants of purchasing
15 property v resolving their tax dispute.

(2) The reasons for the strike out

The appeals were struck out because of persistent failure to comply with directions despite repeated opportunity to comply.

20 (3) Whether there has been a material change since the appeals were struck out

There has been no material change since the appeals were struck out, in fact there has been perpetuation of the behaviour that led to the strike out.

(4) Whether the appeal is arguable and has a reasonable prospect of success

25 There is little for the Tribunal to determine the prospects of success of the appeal. The grounds of appeal are limited and the Applicants' have provided no further explanation or documentation to support their challenge that "the demand is not correct and that the Applicants received reimbursement of expenses relating to the property".

(5) Whether HMRC would be prejudiced by reinstatement

30 The years under appeal go back to tax year ended 5 April 2009. There have been no documents provided by the Applicants and no witness statements tendered. If the Applicants now sought to produce witness statements the lapse of time may prevent HMRC from effectively countering the evidence, documentation held by others is now outside the 6 year time frame in which it
35 must be retained.

(6) Loss to the Applicants if reinstatement were refused

5 Self-evidently if reinstatement is refused the Applicants' will be required to pay the assessed tax without HMRC, on whom the burden rests, having to satisfy the Tribunal that the conditions required to be met for enforcement of a discovery assessment are met. However, despite being professionally represented the Applicants have raised no direct or specific issue concerning the competence of the assessments.

10 (7) Whether extending time for compliance with the directions and thereby permitting reinstatement of the appeal would be in the interests of good administration.

15 Good administration requires that public money not be wasted in cajoling a taxpayer to pursue an appeal. Good administration requires that litigation be efficiently and fairly managed in the interests of both parties and the tax paying public at large. To reinstate the present appeal would not appear to be in the interests of good administration.

(8) The conduct of the parties

20 HMRC have diligently managed and sought to progress the present appeal as had the Tribunal service. The Applicants have ignored, stonewalled and otherwise acted without courtesy to the legal system on which they seek to rely. The delay in compliance with directions is now over 12 months, which is both significant and serious. They have been given 3 opportunities to comply and even when faced with a further opportunity to present their position orally to the Tribunal they again failed. Had the Applicants wanted to illustrate a commitment to the appeal they could have complied with the directions at any time prior to the reinstatement application as none of the directions breached are onerous and represent only a commitment to progress their appeal and achieve finality.

Decision

30 40. As Judge Scott states at [68] of her judgment in *Decker* "Every application depends on its own facts and circumstances ... At all stages in the consideration of this matter I have had Rule 2 of the Rules very much in mind. It is imperative that any decision should be fair and just to **all** of the parties. I have weighed every factor that was brought to my attention in the balance" (original emphasis). Balancing these factors the Tribunal determines that the Applicants have wholly failed to comply with their obligations as litigants and the Tribunal declines to exercise its discretion in favour of the Applicants. Permission to reinstate is refused.

41. Having been heard in the Applicants' absence pursuant to rule 33 of Tribunal Rules, rule 38 provides that the Applicants have a period of 28 days in which to apply to set aside the decision.

42. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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
5 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.

Amanda Brown

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TRIBUNAL JUDGE
RELEASE DATE: 17 August 2018