[2018] UKFTT 646 (TC)

TC06794

Appeal number: TC/2017/01122

Income tax, national insurance and VAT – application to reinstate appeals - dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANCK CHOBLET **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S **Respondents**

TRIBUNAL: JUDGE IAN HYDE

Sitting in public in Birmingham on 23 October 2018

Mr Choblet appeared in person

Ms McIntyre and Mr Mason, officers, for the Respondents

DECISION

1. This appeal concerns whether the appellant is entitled to reinstate appeals previously either struck out by this Tribunal or withdrawn.

The facts

2. The history of this matter is complex but it is sufficient to note for present purposes that the appellant, his former wife Mrs Choblet and associated companies have previously appealed a number of assessment and determinations by HMRC in respect of income tax, national insurance contributions, value added tax and related penalties and have issued related proceedings ("the Original Appeals").

3. On 11 February 2016 appeals relating to assessments to PAYE, National insurance and associated penalties on the appellant and Mrs Choblet (previously conducted under references TC/2015/3358, 3359 and 3295, "the Income Tax Appeals") which were part of the Original Appeals, were withdrawn by the appellant's accountants, Crowe Clarke Whitehill, on behalf of the appellant to allow for negotiations with HMRC both as to the amount of tax due and whether Mr Choblet should be the subject of a Individual Voluntary Arrangement.

4. On 24 August 2016 and 5 September 2016, following discussions between the appellant's accountants and HMRC the assessments which were previously the subject of the Income Tax Appeals were reduced by HMRC. The Individual Voluntary Arrangement was never entered into.

5. On 26 January 2017 the appellant file this appeal ("the 2017 Appeal")

6. The 2017 Appeal and related matters were the subject of a case management hearing on 18 December 2017 before Judge Kempster in this Tribunal and directions issued on 22 December 2017 ("the 2017 Directions"). The appellant did not attend the hearing nor was he represented.

7. In the 2017 Directions the Tribunal struck out most of the 2017 Appeal including matters relating to a VAT appeal brought by the appellant and which was part of the Original Appeals ("the VAT Appeal").

8. The 2017 Directions provided that the parts that remained of the 2017 Appeal were those concerned with the Income Tax Appeals and directed that;

> "18 The remaining parts of the 2017 Appeal shall be taken to be an out of time application for reinstatement…. pursuant to Tribunal Procedure Rule 17. No later than 16 March 2018 the Appellant shall send or deliver to the Tribunal and the Respondent his submissions on why it would be fair and just for the Tribunal to allow a reinstatement"

9. For the sake of clarity in the event it is necessary I find that the 2017 Directions struck out all aspects of this appeal save for the application for reinstatement of the Income Tax Appeals as described above and provided for in the 2017 Directions.

10. On 27 March 2018 HMRC, having received no representation from the appellant, applied for the Tribunal to determine the application for reinstatement based on HMRC's previous representations.

11. On 28 March 2018 the appellant asked for an extension of time on the basis that he had never been sent to the 2017 Directions.

12. On 19 April 2018 the Tribunal extended the time for submissions on reistatement to 18 May 2018.

13. On 20 April 2018 the appellant made written submissions respect of the reinstatement of the Income Tax Appeals and the VAT Appeal.

14. In summary therefore under the 2017 Directions this appeal has been struck out save that the appellant is treated as having made an application on 26 January 2017 to reinstate the Income Tax Appeals previously withdrawn on 11 February 2016. This application concerns the appellant's application for reinstatement. Further, by this application the appellant is also seeking to reinstate the VAT Appeal in so far as it relates to the appellant's personal position rather than associated companies struck out by the 2017 Directions.

Tribunal Rules

15. An application for reinstatement must be made under rule 17 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules");

> "(1) subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case-
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> (a) by sending or delivering to the Tribunal written notice of withdrawal; or
>
> (b) orally at hearing
>
> (2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after –

(a) the date that the Tribunal received the notice under paragraph 1(a);or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)"

16. Under Rule 7(2);

"(2) if a party has failed to comply with a requirement in these Rules… the tribunal may make such action as it considers just, which may include-

(a) waiving the requirement…"

17. The effect of Rule 7(2) in the context of Rule 17 is that the Tribunal has the power to allow a party to reinstate their case notwithstanding that the application is made outside of the 28 day period required by Rule 17(4).

The Parties' Arguments

18. The appellant argues that he was advised by his accountants in 2016 that he should withdraw the Income Tax Appeals to allow then to negotiate with HMRC and discuss a potential IVA. Further, he was advised that if the negotiations did not succeed he could restart his appeals.

19. The appellant further argues that he did not receive notice of the 18 December 2017 case management hearing that led to the 2017 Directions until 7 days beforehand. He was not able to attend the hearing because he was looking after his dying mother and his application to postpone was rejected.

20. The associated companies that were also appellants in the Original Appeals have been dissolved and so are not now relevant. However, the appellant wants the opportunity to challenge the appeals that affect him personally. If he cannot fight them he will be made bankrupt.

21. As regards his representations being late, the appellant argued that he did not get the 2017 Directions until they were sent on 19 April 2018.

22. HMRC oppose the reinstatement of the appeals. HMRC argue that the Income Tax Appeals were withdrawn on 11 February 2016 and the appellant has not produced any good reason why he did not apply to reinstate within the 28 days of the withdrawal as provided for in Rule 17(4). Based on the observation of the Upper Tribunal in *Romaserve (Property Services) Ltd v HMRC* [2015] UKUT 254 that a delay of more than three months cannot be described as anything but serious and significant" the 10 month delay in this case was very serious and significant.

23. The appellant should have applied to reinstate after the conclusion of negotiations in 2016 but waited until the conclusion of the IVA discussions in December 2016. The fact that the IVA discussions did not go the way the appellant wished is not a good reason. The appellant acted on advice, withdrew the appeals and the withdrawal of the appeals were given legal effect. The withdrawn appeals were

settled in accordance with section 54 Taxes Management Act 1970 and HMRC were entitled to consider the case as settled.

Decision on the Income Tax Appeals

24. The position in respect of the Income Tax Appeals and the VAT Appeal are entirely separate.

25. As regards the Income Tax Appeals, as I have set out above, the appellant is treated under the 2017 Directions as having made an application on 26 January 2017 to reinstate the Income Tax Appeals withdrawn on 11 February 2016.

26. The approach to take in deciding issues as to non compliance with time limits as set out by Morgan J in the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187;

> "[34] Applications for extension of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) Is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes his decision in the light of the answers to these questions."

27. This approach was endorsed in the Court of Appeal in *BPP Holdings Ltd v HMRC* [2016] STC 841;

> " [37] While I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> [38] A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non- compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party….
>
> [42] In my view the new CPR 3.9 and comments by the Court of Appeal in *Mitchell* and *Durrant v Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624…. clearly show that courts must be tougher and more

robust than they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order. [Counsel for HMRC's] answer to this point was that the Jackson reforms and CPR 3.9 do not apply to tribunals. He pointed out that the overriding objective in CPR1 is in different terms to the overriding objective in r 2(3) of the UT rules. From April 2013, CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly and proportionate cost. CPR 1 also provides that dealing with the cases justly includes ensuring that it is dealt with expeditiously. [Counsel for the taxpayer] submitted that the courts and tribunals should not apply different standards to matters such as their attitude to the grant of an extension of time.

[43] I agree that the CPR does not apply to tribunals. I do not however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that subject to the CPR…

[44]… Morgan J applied CPR 3.9 by analogy...in just the manner I have suggested is appropriate….

[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the court should apply the new approach to CPR3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules"

28. More recently the Upper Tribunal in *William Martland v Commissioners for Revenue & Customs* [2018] UKUT 178 (TCC) reviewed these decisions and provided fresh guidance;

"44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation all "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account that particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent that they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking into account all relevant factors, is It not to follow the checklist."

29. These differently phrased tests consider the same issues and for convenience I will adopt the tests as set out in *Martland*.

30. On the first of the factors in *Martland* to the Income Tax Appeals, the length of the delay, the appellant discontinued the appeal on 11 February 2016 and under Rule 17 should have made the application to reinstate within 28 days of receipt by the Tribunal of the notice of withdrawal. In accordance with the 2017 Directions the appellant is treated as having made the application on 26 January 2017. The delay is therefore some 10 months, which, applying the three month test in *Romaserve*, must be treated as serious and significant.

31. On the second factor, whether there are reasons for the delay, the appellant has made several points.

32. The appellant makes reference to the fact that he did not receive relevant papers in time and was unable to attend the 18 December 2017 case management hearing. However, Judge Kempster at the time considered these matters and felt able to proceed. I see no reason to disagree with that decision and so reject those factors as having any bearing on this application.

33. The appellant has complained about not receiving the 2017 Directions until 19 April 2018. However, I do not think that has any bearing on this matter as the issue is the delay between March 2016 and January 2017. There has undoubtedly been delay in the appellant submitting his reasons for reinstatement on 20 April 2018, being later than 28 March 2018 as required by the 2017 Directions. However, that matter is covered by the direction of the Tribunal of 19 April 2018 granting an extension of time to 18 May 2018.

34. As to the delay in the period from March 2016 to January 2017 the appellant's argument is that he was advised to discontinue by his accountants whilst negotiations

continued with HMRC and an IVA was discussed and reassured that he could restart his appeals.

35. Looking at all the circumstances, the appellant argues that if he is not able to reinstate the Income Tax Appeals then he will be made bankrupt. HMRC seek finality. There has been no substantive debate as to the substantive merits of the Income Tax Appeals and I take it that the appellant's case has some merit.

36. It is for the appellant to show why the Tribunal should grant permission out of time. The appellant discontinued the Income Tax Appeals on the advice of his accountants and tried to resolve matters by negotiation. Only after those discussions failed did he apply to reinstate the appeals. The reinstatement is a serious matter for the appellant but he took the decision to withdraw based on advice. He could have applied for the appeals to be stayed pending negotiations but on advice he did not. In all the circumstances, notwithstanding the seriousness of the matter, given the length of the delay and the lack of good reasons I dismiss the appellant's application to reinstate the Income Tax Appeals.

Decision on the VAT appeal

37. The VAT Appeal was struck out by the Tribunal in the 2017 Directions and was not, unlike the Income Tax Appeals, treated as having been subject to an application to reinstate.

38. The proper remedy to object to the VAT Appeal being struck out would have been to seek to appeal Judge Kempster's decision to strike out the VAT Appeal in the 2017 Directions. Rule 17 provides me with the power to reinstate an appeal that has been withdrawn, not one that has been struck out. Accordingly I do not have jurisdiction to grant the appellant's application. In any event I would add that, even if I had power to do so, I have not been given any reason why that decision in respect of the VAT Appeal was defective and see no reason to overturn Judge Kempster's decision.

Conclusion

39. Accordingly the appellant's application in respect of both the Income Tax Appeals and the VAT Appeal is dismissed.

40. However, given the complex history of this matter, it is worth stating the effect of this decision.

41. The effect of the 2017 Directions was to strike out the 2017 Appeal save and to the extent that the appellant was treated as making an application to reinstate the Income Tax Appeals. As I have rejected the appellant's application to reinstate the Income Tax Appeals and the further his application in respect of VAT Appeal, the practical effect of my decision is therefore to dismiss the 2017 Appeal.

42. 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.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 05 November 2018