[2019] UKFTT 261 (TC)

TC07101

Appeal number: TC/2018/07155

INCOME TAX – application to set aside decision – refused – whether to treat application as one to correct, review or for permission to appeal – held no – HMRC asked to consider special reduction in light of new information Tribunal unable to act on.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SABIRA GULAMHUSSEIN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Decision on application under rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") to set aside decision disposing of proceedings and on whether to exercise power in rule 42.

DECISION

1. This was an application made by Smartax, Chartered Tax Advisers and Chartered Certified Accountants, on behalf of their client Mrs Samira Gulamhussein ("the appellant") to set aside a decision made by me on a Default Paper case, ie one made without a hearing of the appeal. That decision was released on 25 January 2019 and is reported as *Sabira Gulamhussein v HMRC* [2019] UKFTT 57 (TC) ("the appeal decision").

2. The appeal considered in the appeal decision was against two penalties imposed on the appellant under Schedule 56 Finance Act 2009 for her failure to pay an amount of income tax before the penalty date. In that decision I dismissed the appeal because, although I held that the appellant had a reasonable excuse for her failure to pay the tax by the penalty date, she did not remedy the failure within a reasonable time after the excuse had ceased.

3. The application was made on 22 February 2019 and so was within the 28 day time limit for making the application set out in rule 38(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the Rules"). It was copied to HMRC who made submissions on the application on 7 March 2019. The appellant responded to those comments on 1 April 2019.

The requirements of Rule 38

4. Rule 38 provides as follows:

> "**Setting aside a decision which disposes of proceedings**
>
> (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.
>
> (4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable.

5. Thus before the Tribunal can decide whether to set aside a decision because it is in the interests of justice to do so, it must be satisfied that one of the conditions in rule 38(1) is met.

Submissions

6. Smartax refer to that part of the appeal decision in which I held that the appellant had a reasonable excuse, but once it had ceased she did not remedy it within a reasonable time. They say that I was incorrect to find as a fact that there were more than three months between the ending of the excuse and the remedying of the failure.

7. They also refer to the appellant's "turbulent" pregnancy at the time when the excuse ceased. They say that the reason the appellant was unable to remedy the failure within an "alleged unreasonable timeframe" was because on 23 November 2017 she gave birth to a child with Ventricular Septal Defect, ie a "hole in the heart". They provided as evidence a discharge letter from a neonatal unit to the appellant's GP which shows that the appellant was discharged on 28 November.

8. They also complain that it is "grossly unfair" to penalise the appellant for a 6 month late payment (the second of the two penalties) when in their view the time lapse from the payment due date to the triggering of penalties was caused by HMRC as they took from 24 January 2017 to 2 November 2017 (over 9 months) to resolve the issues whereas their client took far less, an alleged unreasonable delay of less than three months, despite her circumstances.

9. The appellant characterises each of these points as an "irregularity in the decision".

10. In response HMRC say that:

> (1) They do not believe it is in the interests of justice to set aside the decision as all the papers were properly presented and an opportunity was afforded to the appellant to respond to HMRC's statement of case ("SoC") before the appeal was considered.
>
> (2) In any case none of the conditions is met. In particular the condition in paragraph (d) of rule 38(2) of the Rules cannot be relevant because this was a paper case.

Discussion

11. In my judgment HMRC are correct about the conditions.

12. Paragraph (a) of rule 38(2) requires that a document relating to the proceedings was not sent to or not received at an appropriate time by the applicant party, here the appellant and Smartax. Smartax have not suggested that this paragraph applies, and I can see nothing in the bundle of papers I received that this happened. It is clear that the appellant was given an opportunity to comment on the SoC because Smartax did so.

13. The same applies in relation to the condition in paragraph (b). The only relevant documents in a paper case the absence of which might cause injustice to an appellant are the SoC and the appellant's reply. The SoC was sent to the Tribunal at the appropriate time and copied to the appellant, and the appellant's reply was received by the Tribunal because it was in the papers sent to me.

14. Nor do I think there was any other procedural irregularity. The appellant says there were irregularities in the decision. But what Smartax complain of as irregularities are not procedural. If they are irregularities they are substantive, ie they are saying that decision was wrong.

15. Finally I agree with HMRC that paragraph (d) cannot apply. The Tribunal characterised this case as a Default Paper case in a direction made on 24 November 2018 under rule 23(1) of the Rules and which was sent to both parties. Neither party sought to re-allocate the case to a different category as they were entitled to do under rule 23(3), nor did the Tribunal do so of its own motion. Nor did any party apply to the Tribunal for an oral hearing as they were also entitled to do under rule 26(7) of the Rules.

16. All the remaining steps set out in rule 26 as to the procedure in a Default Paper case were properly carried out, and so by rule 26(6) the Tribunal must proceed to determine the case without a hearing. Thus there was no hearing at which the appellant was not present, because there was none at which she, or Smartax, could have been present.

17. In the light of my finding that none of the conditions in rule 38(2) was present the application must be dismissed. It is not necessary for me to consider whether it would have been in the interest of justice to set aside the decision.

18. Such a decision, which was inevitable on the basis of rule 38, leaves me with a feeling of unease. This arises for two reasons:

(1) I have reread all the papers sent to me and it is now clear that I was wrong to characterise the delay as one of over three months. It was at most two months and three weeks.

(2) In their response to HMRC's submissions on the application, Smartax say that HMRC's arguments were that there was no reasonable excuse and that they had not argued that there was unreasonable delay in remedying the cessation of a reasonable excuse. Had they done so additional details and evidence would have been provided, but they never had the opportunity to do so. I assume this would have included the details of the pregnancy problems that have now been provided. I should say that although Smartax said their notice of appeal to HMRC that in

the months that followed the original attempt to get a UTR on January 2017 the appellant tried to resolve problems with HMRC "but was also going through a troublesome pregnancy with her fourth child", no further details about the nature of the problems or the date of birth were given.

19. Had I realised my error about the length of the delay *and* [my emphasis] had I been told about the date of giving birth and the complications involved I would have held that there was not an unreasonable delay in remedying the default. I have therefore given anxious consideration to ways in which this unfortunate state of affairs might be remedied.

20. Under rule 42 of the Rules I may treat an application for a decision to be set aside as an application for a correction, review or permission to appeal a decision. In my view I should consider doing that if the application to set aside was bound to fail and was essentially misguided.

21. Rule 37 of the Rules allows me to correct the decision, but only for clerical mistakes or accidental slips or omissions in it. It does not allow me to reverse my decision. I decline therefore to treat the actual set aside application as one to correct under rule 37.

22. Rule 41 of the Rules allows me to review my decision. Although Rule 41 provides that the Tribunal may only review a decision of there is a permission to appeal ("PTA") application, I have held, as have other Tribunals, that I have a power to review independently of a PTA application (see *Couldwell Concrete Flooring Ltd (No 2) v HMRC* [2017] UKFTT 85 (TC) at [31] to [40]).

23. The limitation on my power of review is in rule 41(1)(b) and is that I must be satisfied that there was an error of law in the decision (not that it is arguable that there was).

24. I have reconsidered the appeal decision. In my view there was an error of law in it, and it was this. In coming to the view that the delay in remedying the cessation of the reasonable excuse was unreasonably long, I took as my starting point the body of binding case law on the subject of giving permission to appeal out of time and applications for relief from sanctions, such as in particular *Martland v HMRC* [2018] UKUT 178 (TCC). In particular I took into account the decision of the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) that a delay of three months was serious and significant. I consider on reflection that I was wrong to do so, and was over influenced by the reference to three months in *Romasave*. I think that the question whether a delay in remedying the cessation of an excuse requires different considerations which depend very much on the facts of an individual case. (I add that I was also arguably in error of law by not setting this out in my decision, but an arguable error of law is not enough to justify a review).

25. But I then need to decide whether in reviewing the decision I could take into account the further information now provided by the appellant, the information which I have already said would have persuaded me to change my mind. I do not think I can. I was aware from my scrutiny of the papers before coming to the appeal decision that

the appellant had had pregnancy problems. But I did not think I could take them into account because they were unspecified both as to their nature and to the time when they occurred. Without that information I would still have held that the delay was unreasonable, because it was actually only just short of three months and I would take into account that the payment of tax is a far simpler operation than say the filing of a tax return. No doubt a little time may have been needed for the appellant, assuming she was in good health and not just about to give birth under very difficult circumstances, to react to the receipt of the UTR, but it would have been a few days at the very most.

26. The appellant's representative says that they were deprived of the opportunity to put the details now presented forward for the purposes of the appeal decision because HMRC had not raised the issue. HMRC did refer to remedying on page 2 of the SoC under the heading "reasonable excuse", and to the proposition that for there to be a reasonable excuse it must exist throughout the period (page 3 SoC). But they also rightly said that the burden of proof is on the appellant to demonstrate a reasonable excuse. I do not think HMRC can be criticised for not explicitly suggesting that the appellant should provide evidence of a reasonable delay in not remedying the cessation of an excuse otherwise reasonable.

27. I therefore reluctantly decide not to treat the set aside application as one to review the decision.

28. I have also considered whether I should treat the application to set aside as a PTA application. I can do this even though I have reviewed the decision, as it is a condition of a PTA application that it requires a consideration whether to review.

29. Having decided that I did make an error of law in the appeal decision, I would obviously have met the threshold for giving permission to appeal. But I cannot see how the Upper Tribunal could come to the view that my error of law would either justify their remaking the decision in the appellant's favour or remitting it to the First-tier Tribunal to remake it.

30. I therefore reluctantly decide not to treat the appeal application as a PTA application.

Special reduction

31. In the appeal decision I said that

> "HMRC have addressed the question whether there were special circumstances, but have found none. I cannot say that this decision was flawed."

32. I do not and cannot change that finding. But I do point out that paragraph 9 Schedule 56 FA 2009 allows HMRC to reduce a penalty because of special circumstances, but is not limited to making that reduction before the determination of an appeal against it. Paragraph 9 Schedule 56 is the successor to s 102 Taxes Management Act 1970 which gives the Commissioners a power to mitigate a penalty and they could do it even after judgment.

33. It would in my view be wholly correct for HMRC to take into account that had I had the detailed information that Smartax have provided about the appellant's pregnancy I would have allowed her appeal and for them to reduce the penalty accordingly.

34. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 17 APRIL 2019