[2021] UKFTT 0045 (TC)

TC08031

PROCEDURE – reinstatement application following withdrawal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08244

BETWEEN

JASON PHILLIPS **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

The Tribunal determined the appeal on the papers without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic. The documents to which I was referred are the Appellant's reinstatement application and his earlier notice of appeal, HMRC's objections and statement of case, and the further submissions, directions, correspondence, returns, witness statement and attachments in the bundle.

DECISION

INTRODUCTION

1. This application is for the reinstatement of an appeal. The appeal included an application for permission to appeal out of time. The appeal was withdrawn in September 2018 on the day before the First-tier Tribunal (FTT) was due to hear the application to make the late appeal. The application for the reinstatement was made some 5 months after the expiry of the 28-day time limit.

BACKGROUND FACTS

2. The Appellant owned a betting shop before the events relevant to this appeal. The Appellant continued to hold a valid betting operator's licence after this business ceased to trade in February 2013. The Appellant's father had operated betting shops since the 1960s.

3. In 2013 the Appellant's father incorporated Bet 0151 Limited and acquired three betting premises. As the Appellant still held a valid operator's licence, he agreed that his licence (Jason Phillips T/A Bet 0151) could be used for premises acquired by Bet 0151 Limited.

4. The Respondents (HMRC) conducted an enquiry into the business in 2015-2016. The enquiry involved a number of visits to the premises and correspondence between the parties. HMRC issued the assessments the subject of the appeal at the conclusion of their enquiry.

5. On 15 November 2017 the Appellant filed an appeal against assessments made by the HMRC in August 2015, February 2016 and March 2016 in respect of general betting duty and machine games duty. The appeal concerns the question of whether the assessments should be against the person that holds the operator's licence or the business or both jointly/severally.

6. The appeal included an application for permission to appeal out of time. The application to appeal out of time included a statement that the matter would not cause HMRC substantial work as it is not disputed that the duty is owed, and the Appellant simply wishes to dispute that he is liable for the debt. On 21 March 2018 HMRC filed their objection to the application to make a late appeal.

7. The Appellant's application to appeal out of time was supported by an unsigned witness statement dated 11 September 2018. The statement includes a number of statements under the heading 'Background'. The Appellant states that he worked on a consultancy basis for Bet 0151 Limited from 1 March 2013 and that the company was owned and operated by his father. The Appellant began training as a deep-sea diver in 2014 and worked only part-time for his father's business. The Appellant was aware of the personal assessments issued by HMRC but was not in a position to deal with them at the time because of a series of bereavements in 2015 and 2016, and the effect that these had on him and his father. The statement also claims that HMRC is pursuing Bet 0151 Limited in respect of the same debt and that those assessments have also been challenged.

8. The application to make the late appeal was listed for hearing on 14 September 2018. On 13 September 2018 HMRC emailed the Appellant's representative at CTM Tax Litigation Limited (CTM) at 11.11 to advise that HMRC's debt management team had notified them that they had received payments against some of the assessments the subject of the appeal in August 2016 and July 2017. At 12.30 on 13 September 2018 the Appellant's representative, CTM, wrote to the Tribunal in the following terms:

> "The Appellant has considered our advice and, for a number of reasons, withdraws its appeal.

> The Appellant has taken the decision to communicate with HMRC to settle the amount owed by way of further payments from his father and we will deal directly with the Respondents on this matter.
>
> We ask that the hearing for tomorrow is now cancelled and for you to confirm receipt."

9. The Tribunal wrote to HMRC on 13 September 2018 to advise that the Appellant had withdrawn his appeal and that the effect was that the appeal had failed. The letter stated that the Appellant had 28 days to make any further applications.

10. On 29 October 2018 HMRC served a statutory demand on the Appellant. He claims that it was at this point that he understood the effect of withdrawing the appeal.

REINSTATEMENT APPLICATION AND THE PARTIES' SUBMISSIONS

11. On 27 March 2019 the Appellant filed a new appeal. It was treated by the Tribunal as an application for reinstatement of the appeal made in 2017. The application was made by the Appellant's new representative, Brabners LLP.

12. The grounds for the application to reinstate the 2017 appeal are that the Appellant "was not fully advised as to the consequences of withdrawing the appeal". The Appellant claims that his understanding was that further negotiation could continue with HMRC without needing to involve the Tribunal, and that the debt would not be pursued in the meantime. The Appellant claims that the assessments made against him duplicate those made against Bet 0151 Limited. The Appellant states that he had understood that by withdrawing his appeal, it would be possible for Bet 0151 Limited to reach a settlement with HMRC such that the assessments against him would be cancelled. The grounds for appeal conclude that this is a "straight forward technical argument as to whether HMRC should raise an assessment against the person that held the Operator's Licence or whether the business that ran the betting shop should be liable."

13. The Appellant made a number of separate submissions in support of his application for reinstatement. These included submissions that the reason for delay in the application to reinstate was that CTM Law ceased to act at short notice following a deterioration in the relationship, that the Appellant's father, Joseph Phillips, made a number of attempts to negotiate with HMRC with the intention of finding a resolution to the matter after the withdrawal of the appeal, and that it took some time to appoint a new representative.

14. The Appellant also made a number of submissions setting out why he believes that the substantive merits of his appeal are strong. These focus on the claim that the Appellant had only been registered as a bookmaker and traded under the name Bet 0151 until February 2013. In February 2013, the Appellant was engaged to "act as a consultant to the company Bet 0151 Limited providing a service of helping to maintain the Gambling Commission's requirements and objectives". The Appellant claims that his father's company, Bet 0151 Limited was the principal bookmaker and that it was responsible for the premises where the machine was located. The Appellant states that he played no role in the taking or settling of the bets and was not a "bet-broker". The Appellant's draft witness statement for the hearing in September 2018 includes a statement that his only error was to allow the company to trade while using a licence in his name, and that he was simply helping out his father.

15. HMRC filed their Notice of Objection against the reinstatement on 25 June 2019.

16. On 8 July 2020 HMRC filed a statement of case on the Appellant's late application to reinstate his appeal. This sets out the legislation that HMRC rely upon as authority for the liability of the Appellant and the consequent assessments in respect of general betting duty and machine games duty, and the related penalties. The relevant provisions set out why the

Appellant, as holder of the betting operating licence and the person registered for machine games duty, is jointly and severally liable to pay duty with the bookmaker or person responsible for the management of the business.

17. HMRC's submissions set out the decisions made against the Appellant and those made against Bet 0151 Limited, and confirm that two of the five decisions overlap. HMRC state that this is because the Appellant held the operator's licence issued by the Gambling Commission and the premises licence issued by the local authority, and that he was registered for machine games duty in respect of four machines at 187/189 London Road, Liverpool.

18. HMRC cite *Denton v TH White* [2014] EWCA Civ 906 ("*Denton*"), *BPP Holdings Limited v HMRC* [2017] 1 WLR 2945, *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 ("*Romasave*") and *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") in support of their submission that the application to reinstate should be refused.

RELEVANT LAW

19. The FTT's jurisdiction in relation to the reinstatement of an appeal that has been withdrawn is set out in rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). The relevant provisions in rule 17 are as follows:

> "(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 –
> (a) by sending or delivering to the Tribunal a written notice of withdrawal; or
> (b) orally at a 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)."

20. Rule 5 of the Tribunal Rules states that the Tribunal may extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with the provision of another enactment setting down a time limit.

21. Rule 2 of the Tribunal Rules provides that the Tribunal should apply the overriding objective when considering an exercise of its powers and discretions under the Tribunal Rules. Rule 2 provides as follows:

> "Overriding objective and parties' obligation to co-operate with the Tribunal
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.
(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.
(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

22. As noted above, HMRC referred me to the decisions of the Court of Appeal in *Denton and others v TH White Limited and others* [2014] 1WLR 3926, the Supreme Court in *BPP Holdings Limited v HMRC* [2017] 1 WLR 2945 and the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 ("*Romasave*") and *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*").

23. In *Martland* the Upper Tribunal considered the approach to be taken by the FTT in relation to applications for relief from sanctions following the decisions in *Denton* and *BPP*. The Upper Tribunal concluded by providing the FTT with the following guidance [at paragraphs 44-47]:

> "[We consider that] 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 the 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 of "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.
>
> That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently **and** at proportionate cost, **and** for statutory time limits to be respected. … The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
>
> In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. "

24. The guidance in *Martland,* and the earlier guidance provided by Proudman J in *Pierhead Purchasing Ltd v Revenue and Customs Commrs* [2014] UKUT 321 ("*Pierhead*") in relation to reinstatement applications, was considered by Judge Herrington in *Dominic Chappell v The Pensions Regulator* [2019] UKUT 0209 ("*Chappell*"). Judge Herrington confirmed that the Tribunal should adopt the three-stage approach set out in *Martland,*

adapted to take account of the fact that the application concerns a reinstatement of an appeal (at [99]):

> " In the light of the analysis set out above, in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* as quoted above, adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order, taking account also of the previous breaches of the Rules that led to the making of the Unless Order. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders. I shall only consider the merits of [the case] to the extent that it appears that [the] case has any feature such as those that I have described at [93] above."

25. Both parties have made submissions relating to the merits of the Appellant's case. I note that this application was filed as an application to make a late appeal and that it was then treated as a reinstatement application by the Tribunal. It is therefore arguable that I should consider any obvious strengths or weaknesses of the appeal in accordance with the guidance in *Martland* in relation to an application to make a late appeal. The argument against is that Tribunal has determined that the appeal should be treated as an out of time application for reinstatement and that, in accordance with the reasoning in *Chappell* (at paras [85-86]), the Tribunal should generally take no account of the merits because of the binding authority provided by the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495 ("*Global Torch*"). The decision in *Chappell* follows the distinction made in *Martland* between cases "where the point in issue is whether it is appropriate for the [Tribunal] to assume jurisdiction over an appeal which has not been the subject of prior judicial consideration" and a case management (or reinstatement) application. In the latter, Judge Herrington concludes as follows (at para [86]):

> "In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch*, generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuburger said at [29] of the judgment in that case:
>
> > "In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment…."

DISCUSSION

26. I have considered the Appellant's late application for reinstatement in accordance with the powers and discretions in rules 17 and 5 of the Tribunal Rules, giving effect to the overriding objective in rule 2 of the Tribunal Rules and adopting the guidance in the caselaw summarised above. I have adopted the three-stage approach set out in *Martland*, as adapted and used in *Chappell* (set out in the passage cited in para 24 above).

Seriousness and significance of the breach

27. This matter concerns the withdrawal of an application to make a late appeal and a late application for reinstatement. The Appellant withdrew his appeal on 13 September 2018 and

his application for reinstatement was made some 5 months following expiry of the 28-day time limit for making an application for reinstatement.

28. Following the receipt of the statutory demand on 29 October 2018 (see paragraph 10 above), the Appellant was clearly made aware that HMRC would seek recovery of the unpaid debt from him as it had not been settled. It not stated when the Appellant was aware that the debt had not been settled by his father, but it must have been no later than receipt of the statutory demand. There was therefore a period of at least 5 months in which the Appellant failed to take any action in relation to his appeal, notwithstanding the 28-day time limit. Adopting the reasoning in *Romasave* (at para 96):

> "In the context of an appeal right which must be exercised within [30] days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

Reasons why the breach occurred

29. The Appellant claims that he was not aware that HMRC would pursue him for the liability if he withdrew his appeal and that he believed that he would be permitted to continue with his appeal. He claims that it took time to instruct a new representative once he understood his position.

30. The Appellant's claim that he believed that he would be permitted to continue his appeal after withdrawing do not sit comfortably with the statements and actions of the Appellant and his representatives in 2018. The withdrawal letter specifically refers to the Appellant considering advice and having taken the decision to settle the amount owed by way of further payments from his father. This narrative is supported by the Appellant's statement that he does not dispute that the duty is due, but rather who should be paying it. In this context, withdrawing from an appeal the day before he was due to put his case for the late appeal to the Tribunal, and then leaving his father to contact HMRC about settling the debt is consistent with the statement made by his representative at that time to the Tribunal. It is reasonable to assume that the Appellant and his representative at that time understood that the Appellant's father was settling the debt, and that payment would cancel the assessments.

31. The fact that the debt was not settled and that HMRC therefore sought recovery from the Appellant in October 2018 does not explain why it took the Appellant a further 5 months to apply to the Tribunal. The Appellant's explanation of events between the withdrawal and application to reinstate is summarised in paragraph 13 above. I do not consider that there is a good reason for the delay as the Appellant was aware in September 2018 that HMRC had been told that the debt would be settled by his father and in October 2018 that HMRC were seeking recovery from him as it had not been paid. The change of advisers does not justify the 5-month delay in approaching the Tribunal. It was incumbent on the Appellant to take urgent action.

Evaluation of all the circumstances

32. This reinstatement relates to an appeal that was still subject to an application for the Tribunal to admit the late appeal and assume jurisdiction when it was withdrawn. It is not a case in which the Tribunal had already assumed jurisdiction and the parties were preparing for a substantive hearing. The actions of the Appellant in withdrawing from a late appeal hearing the day before it was due to be heard and then making an out of time application to reinstate have not been in accordance with the need for litigation to be conducted efficiently and at proportionate cost.

33. Following on from this, the prejudice which would be caused to HMRC if the appeal were to be reinstated is considerable. HMRC were told that the matter was withdrawn, and

that the debt would be settled in 2018. Allowing the reinstatement would mean that HMRC would have to incur the time and costs of dealing with the application to make a late appeal that was due to be heard in September 2018 and, if that was successful, an appeal against assessments that were made in 2015 and 2016. This is a matter that HMRC were entitled to consider as closed when the appeal was withdrawn on the basis that the debt would be settled.

The prejudice which would be caused to the Appellant by refusing the application to restore is the financial cost and that he would not have an opportunity to put forward his case to make a late appeal and, if that application were to be successful, to make his case about who is liable to be assessed for the relevant duties. Adopting the narrower consideration of the merits of the late appeal in accordance with the guidance in *Chappell*, my conclusion is that the Appellant does not have as unanswerable case. Even if I consider the merits on the basis that this is an application to make a late appeal in accordance with *Martland*, an obvious weakness of the Appellant's substantive case is that he was the holder of the betting operating licence that he allowed to be used for the business, and he was registered for machine games duties and held a licence with the Gambling Commission. The prejudice which would be caused to the Appellant by refusing the opportunity to put forward his case is limited in this respect.

Conclusion

34. I have weighed the factors in this application in light of the overriding objective, taking account of the factor in favour of a reinstatement, the prejudice to the Appellant, and the factors that weigh against, including the length and reason for the Appellant's delay notwithstanding the need for litigation to be conducted efficiently and for compliance with time limits, as well as the prejudice to HMRC if I reinstate the appeal. My evaluation of all the circumstances of the case is that the prejudice to the Appellant is outweighed by the other factors considered above.

DECISION

35. For the reasons set out above, the application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2021