



Neutral Citation: [2022] UKFTT 372 (TC)

Case Number: TC08621

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal reference: TC/2021/11356

Appeal allocated as a Complex case – late request for the proceedings to be excluded from potential liability for costs – Martland applied – time for making request extended.

Heard on: 30 September 2022
Judgment date: 12 October 2022

Before

TRIBUNAL JUDGE BEDENHAM

Between

BETINDEX LIMITED (IN LIQUIDATION)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondent

The Tribunal determined the Appellant’s application on 30 September 2022 without a hearing.

DECISION

INTRODUCTION

1. This is the decision on the Appellant's application, dated 8 April 2022, to make a late request for the appeal to be excluded from potential liability for costs pursuant to Rule 10(1)(c)(ii) of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) Rules 2009 ("the FTT Rules"). In reaching this decision I have considered the papers included in the hearing bundle (running to 82 pages).
2. For the reasons set out below, I have decided that the Appellant should be permitted to make this late request and that the appeal should be excluded from potential liability for costs pursuant to Rule 10(1)(c)(ii) of the FTT Rules.

BACKGROUND

3. On 5 October 2021, HMRC issued a decision by which they refused to retrospectively amend the Appellant's general betting duty quarterly accounting periods (to non-standard accounting periods).
4. The Appellant appealed to the Tribunal by way of Notice of Appeal dated 4 November 2021.
5. On 12 November 2021 a notice was issued in the Jersey Gazette that the Appellant had gone into liquidation.
6. On 12 January 2022, the Tribunal wrote to the Appellant notifying it that the appeal had been categorised as complex. The same correspondence continued:

"In an appeal which has been categorised as "complex" the Tribunal has a general power to award costs and is likely to award costs against the unsuccessful party. If you wish to opt out of this costs regime, you must apply to the Tribunal within 28 days from the date of this letter."
7. On 12 January 2022, the Tribunal directed HMRC to provide their Statement of Case within 60 days.
8. On 10 March 2022, HMRC provided their Statement of Case. At paragraph 19, HMRC stated that the liquidators of the Appellant have confirmed that they wish to proceed with the appeal.
9. On 8 April 2022, solicitors for the Appellant wrote to the Tribunal (copying in HMRC) stating that the Appellant would like to opt-out of the costs regime. The Appellant's solicitors also stated:

"We are aware that this application is being made outside of the general 28-day time limit but it is still being made very early on in the proceedings (before exchange of list of documents) and as such will not cause any prejudice to either party."
10. On 21 April 2022, HMRC provided their list of documents
11. On 22 April 2022, the Appellant provided its list of documents.
12. On 17 May 2022, the Tribunal asked HMRC to provide their representations on the Appellant's application dated 8 April 2022 (to belatedly request that the appeal be excluded from the costs regime).

13. On 31 May 2022, HMRC filed an objection to the Appellant's application dated 8 April 2022.
14. On 4 July 2022, the Appellant replied to HMRC's objection.

THE SUBMISSION OF THE PARTIES

15. The parties agree that in considering this application, I should apply the 3-stage test referred to in *Denton v TH White Ltd* [2014] EWCA Civ 906 and *William Martland v HMRC* [2018] UKUT 178 (TCC).

16. In relation to the first stage of the test (identifying the breach and assessing its seriousness):

17. HMRC submit that in the context of a 28-day deadline, a delay of 8 weeks is significant and serious.

18. The Appellant submits that, when considered in context, the delay is not significant or serious because:

- (1) It has no effect on any litigation timetable;
- (2) There has been no impact on future hearing dates;
- (3) It has no impact on the efficient conduct of this litigation or any other litigation;
- (4) There will be no increase to costs; and
- (5) No prejudice has been caused to HMRC.

19. In relation to the second stage of the test (the reason why the default occurred):

20. HMRC submit there is no good reason for the delay.

21. The Appellant submits that the delay was due to "an oversight by the Appellant" and that a lack of a good reason does not prevent the Tribunal from deciding this application in the Appellant's favour.

22. In relation to the third stage of the test (consideration of all the circumstances of the case so as to ensure that the application is dealt with fairly and justly):

23. HMRC submit that the circumstances do not justify the Appellant being permitted to opt out of the costs regime after the deadline for doing so has passed. In particular, HMRC rely on the following:

- (1) The delay is significant and serious;
- (2) The Appellant has not provided a good reason for the delay; and
- (3) "HMRC may suffer prejudice if HMRC are found to be the successful party but are not able to recover their costs due to the Appellant being permitted to opt out of the costs regime out of time."

24. The Appellant submits that there is no prejudice to HMRC caused by the timing of the Appellant's application to opt out of the costs regime (rather, the claimed *potential* prejudice is the result of the operation of the FTT Rules – which permit appellants to opt out of the costs regime). The Appellant also repeats that there has been no delay or other disruption occasioned by the breach.

DISCUSSION AND DECISION

25. Rule 10(1) of the FTT Rules provides in relevant part:

“(1) The Tribunal may only make an order in respect of costs...

...

(c) if –

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer...has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs...”

26. The Appellant’s request that the proceedings be excluded from potential liability for costs was made outside of the 28 days provided for in Rule 10(1)(c). I agree with the parties that, when considering whether to permit the Appellant to make a late request, I should apply the 3-stage test in *Denton/Martland*.

27. The first stage of the *Denton/Martland* process requires me to identify the breach and assess its seriousness. The breach in question is the failure to file a request to opt out of the costs regime. That request should have been made by 10 February 2022. It was not made until 8 April 2022. That is a delay of 8 weeks. In the context of a 28-day period for compliance, I consider that a delay of that length is significant and serious.

28. The second stage of the *Denton/Martland* process requires me to consider the reasons why the default occurred. The Appellant candidly accepted that the delay occurred as a result of “oversight”. That is not a good reason.

29. The third stage of the *Denton/Martland* process requires me to consider all the circumstances of the case so as to ensure that the application is dealt with fairly and justly. I recognise, of course, that the FTT Rules and any deadlines imposed thereby must be complied with. However, on the facts of this case, I am satisfied that extending time to file the request to opt out of the costs regime is the fair and just result in circumstances where:

(1) The delay (whilst serious and significant by dint of its length and the fact that it was in breach of one of the FTT Rules) has had no material effect on the litigation timetable or otherwise on the efficient conduct of this appeal (or any other appeal).

(2) The (late) request was made at an early stage in the proceedings and before the exchange of evidence.

(3) No material prejudice has been caused to HMRC by the delay in making the application (HMRC’s inability to recover their costs is not the product of the delay but of the operation of the FTT Rules). There is no suggestion that HMRC have (or would have) conducted the litigation differently had the Appellant made the request within the 28 days provided for by the FTT Rules.

(4) The FTT Rules envisage the taxpayer being given a choice in relation to whether to be in or out of the cost regime if a case is allocated as Complex. Whilst that choice should be exercised within 28 days of the case being allocated as Complex, I do not consider it is proportionate, on the facts of this case, to remove that choice from the taxpayer for a breach that has not caused any material prejudice to HMRC or to the conduct of the litigation, and was made at an early stage in the proceedings.

30. Accordingly, I grant the Appellant’s application to make a late request pursuant to Rule 10(1)(c)(ii) and direct that the appeal should be excluded from potential liability for costs pursuant to that sub-section.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**DAVID BEDENHAM
TRIBUNAL JUDGE**

Release date: 12TH OCTOBER 2022