



Neutral Citation: [2023] UKFTT 694 (TC)

Case Number: TC 08885

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/12561

PROCEDURE – Strike out application – previous strike out notice – appeal against personal liability notices

Heard on: 12 June 2023

Judgment date: 11 August 2023

Before

TRIBUNAL JUDGE MCGREGOR

Between

TRAN VAN PHO TSANG

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs Tsang

For the Respondents: Andrew Marshall, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) by Tribunal video hearing system. A face-to-face hearing was not held because a remote hearing was more expedient. The documents to which I was referred are a bundle of 356 pages and a skeleton argument of 10 pages.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. As English is not her first language, Mrs Tsang had the benefit of an interpreter throughout the hearing.
4. This was an application from HMRC to strike out Mrs Tsang's appeal.

BACKGROUND

5. The following factual background was not in dispute:
 - (1) Prosperity Restaurant limited ran a Chinese restaurant in North Wales. Mrs Tsang was its director.
 - (2) In 2018, three linked appeals were brought before the Tribunal.
 - (3) The first was against VAT assessments totalling £22, 916.00 raised by HMRC against Prosperity Restaurant Limited in respect of under declared output tax covering VAT periods 04/13 to 03/16. The reference for this appeal was TC/2018/02582.
 - (4) The second was against Corporation Tax (CT) assessments totalling £22, 916.00 in respect of underdeclared sales for periods 31/03/2014 to 31/03 2016. The reference for this appeal was TC/2018/03111.
 - (5) The third was against penalties charged under Schedule 24 of the Finance Act 2007 in the amount of £10, 827.00 for both the VAT (issued on 20 July 2017) and CT (issued on 28 November 2017) assessments.
 - (6) Personal Liability Notices (PLN) were issued under Paragraph 19 (1) of Schedule 24 to the Finance Act 2007 for both the VAT penalty and CT penalty. The reference for this appeal was TC/2018/03113.
 - (7) An unless order was issue on 9 July 2019. It was address to both Prosperity Restaurant and Mrs Tsang and all three appeal numbers were listed. It was worded as follows:

“The Appellant having failed to comply with the Directions issued on 30 November 2018 and having failed to reply to the letter from the Tribunal dated 28 June 2019 in respect of TC/2018/02582 within the times stipulated therein or at all the Tribunal DIRECTS that UNLESS the Appellant no later than 5pm on 23 August 2019 sends to the Tribunal details of the steps which have been taken to restore the appellant to the register of companies then these proceedings MAY be STRUCK OUT without further reference to the parties.”
 - (8) On 1 October 2019, the Tribunal issued directions. All three appeal numbers were set out at the top of the document, but the “Appellant” was listed only as Prosperity Restaurant Limited. Mrs Tsang is not referred to in the directions at all. The directions read as follows:

“IT IS DIRECTED that

1. The Appellant having failed to comply with the Directions issued on 9 July 2019 which stated that such failure could result in the proceedings being struck out without further reference to the parties,

and because it has been confirmed that there is no intention to make an application for the company, which has been dissolved with effect from 29 January 2019, to be restored to the Register of Companies

the Tribunal hereby DIRECTS that these proceedings are NOW STRUCK OUT.

2. The appellant has the right to apply for the proceedings to be reinstated but such an application must be (a) in writing, (b) supported by reasons and include an explanation for the non-compliance and (c) be received by the Tribunal within 28 days from the date of this letter. The appellant also has the right, if the appellant believes the decision striking out the appeal contains an error of law, to apply for permission to appeal, but such an application must be (a) in writing (b) identify the alleged error of law and (c) be received by the Tribunal no later than 56 days after the date this decision was sent. Neither application is granted automatically.”

(9) On 24 February 2022, HMRC’s Debt management unit contacted Mrs Tsang demanding payment of an overdue VAT debt of £10,827.

(10) On 7 March 2022, Mrs Tsang wrote a letter to HMRC (I will return to the detail of this letter in the discussion below).

(11) On 25 April 2022, HMRC’s Targeted Enforcement Recovery Unit (TERU) sent a letter seeking to recover £35,519.75 from Mrs Tsang in relation to Prosperity Restaurant’s tax affairs. It highlighted that if she did not take any action, HMRC could take further action, including seeking bankruptcy.

(12) HMRC in their skeleton argument stated that this was the incorrect sum and that the amount to be pursued should have been £21,655.60, being two amounts of £10,827, because the penalty amounts were reduced following an original review, which found that HMRC did not have enough evidence to support a penalty based on deliberate and concealed behaviour and therefore downgraded the penalties to deliberate only.

(13) A further exchange of correspondence ensued dated 30 April, 4 May and 10 May.

(14) On 18 May 2022, TERU sent a further letter warning bankruptcy, based again on the incorrect figure of £35, 519.75.

(15) On 25 May 2022, Mrs Tsang made a further appeal to the Tribunal.

(16) On 20 October 2022 HMRC made an application to strike out the appeal pursuant to Rule 8 of the Tribunal Procedure rules.

PARTIES ARGUMENTS

6. The Tribunal directed that the following four issues should be considered at the hearing:

(1) Whether the Tribunal direction dated 1 October 2019 in respect of the appeal against the personal liability notices, i.e. Mrs Tsang’s appeal, was correctly issued.

(2) If the appellant should be allowed to make a late application for reinstatement of the appeal against the personal liability notices, and, if so granted, determine the application for reinstatement.

(3) Determination of HMRC’s application for proceedings in TC/2022/12561 to be struck out.

- (4) If permission to make a late appeal in TC/2022/12561 should be granted or refused.
7. On the first issue, HMRC submits that:
- (1) the strike out directions were validly issued following an unless order and that the directions in the unless order were not complied with; and
 - (2) HMRC had, in correspondence in February 2019 explained the meaning of strike out “*Struck out simply means that the appeal is closed down in favour of the other party, in this case in favour of HM Revenue & Customs.*”
 - (3) The Tribunal and HMRC had made it clear to the Appellant the effect of the proceedings begin struck out on the 3 appeals before the Tribunal.
8. On the second issue about making a late application for reinstatement, HMRC submitted that:
- (1) Following the decision in *Revenue and Customs Commissioners v BMW Shipping Agents Ltd* [2021] UKUT 91, the Upper Tribunal confirmed that the approach in *William Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 0178 on late appeals applied equally to late applications for reinstatement.
 - (2) Since the issues are the same for both late reinstatement and late appeal, the legal tests can be applied to the facts together.
9. On the third issue (strike out), HMRC submits that the proceedings in the appeal reference TC/2022/12561 are a replica of one of the appeals that was struck out by the Tribunal, namely the appeal against the PLNs (TC/2018/03113). Since this appeal was correctly struck out due to the Appellant’s failure to comply with an “unless order”, HMRC submits that the Tribunal must, under Rule 8(2) strike out this appeal for lack of jurisdiction, being a matter that has already been litigated.
10. On the fourth issue, HMRC objects to the lateness of Mrs Tsang’s appeal under appeal under TC/2022/12561.
11. On lateness, HMRC submits that:
- (1) The length of the delay is serious and significant being 31 months after:
 - (a) The expiry of the statutory time limits for appealing against the CT and VAT assessments; and
 - (b) The expiry of the statutory time limit for applying for reinstatement of the proceedings after the strike out notice.
 - (2) The reasons for the delay appear to be that Mrs Tsang did not understand the consequences of a strike out, being under the misapprehension that striking out an appeal meant that they had been resolved in her favour. HMRC’s position is that both HMRC and the Tribunal had made it clear that this was not the case.
 - (3) At the third stage, evaluating all the circumstances, HMRC submit that:
 - (a) The enforcement of time limits is of particular importance;
 - (b) HMRC would be prejudiced because they will have to divert resources to defend an appeal which they were entitled to consider closed, especially given the significant length of the delay;
 - (c) other taxpayers will be prejudiced as the Respondents’ and this Tribunal’s resources, which would otherwise have been used in respect of those who have

made appeals in accordance with statutory time limits, will be diverted to consider the Appellant's appeal;

(d) the Appellant's prejudice in being unable to pursue the appeal is not sufficient to warrant granting permission for the appeal to be brought out of time when balanced against the factors above;

(e) the only reason that the Appellant has taken further action is because TERU has started to pursue the outstanding liability; and

(f) to the limited extent that merits of the case should be considered, the appellant's case is weak because 23-24% of all sales reviewed were voided off the system, which suggests a deliberate attempt to artificially reduce the sales recorded on the EPOS system, thereby reducing the Appellant's tax burden.

DISCUSSION

Meaning of strike out

12. Since it was apparent, including at the hearing, that Mrs Tsang did not fully understand the meaning of a case being struck out, I am seeking to explain it as clearly as possible in this decision.

13. When a taxpayer brings an appeal to the Tribunal, the taxpayer is usually bringing an appeal against a decision of HMRC that the taxpayer should pay an additional amount of tax or a penalty.

14. If a taxpayer does not bring an appeal, the decision of HMRC will stand and the tax (or penalty) will be due and HMRC can seek to recover the money.

15. If the taxpayer chooses to bring an appeal to the Tribunal, the Tribunal will then hear evidence and submissions from both the taxpayer and HMRC and make a decision. The Tribunal's powers are set out in statute and vary depending on the type of appeal.

16. The Tribunal can strike out an appeal in a number of different circumstances, either following an application from HMRC or of its own volition.

17. Where the appeal is struck out, this means that the taxpayer's challenge to HMRC's decision cannot proceed to be heard by the Tribunal. The consequence of the taxpayer's appeal being struck out is that HMRC's original decision stands and therefore the tax or penalty set out in it will be due.

18. For the sake of completeness and to avoid further confusion. A company "strike-off" is an entirely separate process relating to the company being removed from the Companies House register. Although a company being struck off may lead to its appeal being struck out (because a company that no longer exists cannot bring an appeal), the two processes are separate.

Validity of previous strike out

19. Having explained the general meaning of strike out, I turn to the specific strike out direction issued in November 2019.

20. The three appeals that were joined together are more complex than the general scenario I set out above because two of them were appeals brought by the company against assessments on the company, and the third was an appeal brought by Mrs Tsang personally against the personal liability notices.

21. For the purposes of considering this question, I find the following additional facts concerning the earlier conduct of proceedings:

- (1) 21 June 2018 – the three appeals were directed to be heard together;

(2) 8 August 2018 – an unsuccessful attempt was made at alternative dispute resolution;

(3) On 29 January 2019, Prosperity Restaurants Limited was dissolved at Companies House by compulsory strike-off;

(4) On 11 February 2019, the officer at HMRC emailed Mrs Tsang and that email must have referred to a strike out but I do not have evidence of this email;

(5) On 13 February 2019, Mrs Tsang asked the officer to explain what an application for strike out means for the company and “where do I personally stand”.

(6) On the same day, the officer replies with the following email:

““Struck out” simply means that the appeal is closed down in favour of the other party, in this case in favour of HM Revenue & Customs. Where a company is dissolved the “right” to progress the appeal ceases to be with the director of the company and transfers to the Treasury Solicitor. You can read more about this in the link below:

<https://www.gov.uk/government/organisations/bona-vacantia>

In these situations we must apply for the appeal to be closed as the company, in legal terms, no longer exists.

Unfortunately I am unable to give any advice as to how this may affect you personally. I would suggest that you seek professional advice in this regard, either by discussing matters with an accountant or by contacting the Citizens Advice Bureau (website: <https://www.citizensadvice.org.uk/>).”

(7) 8 April 2019 – HMRC applies to the Tribunal for the three appeals to be struck out;

(8) 28 June 2019 – the Tribunal sends an email to Mrs Tsang thanking her for her response and stating:

“We take this to be confirmation that you do not propose to apply for Prosperity Restaurant Ltd to be restored to the register of companies. If we do not hear to the contrary from you within the next 14 days, we will take steps to strike out appeal TC/2018/02582.

As set out in our earlier letter, this does not affect other appeals brought by you personally.”

(9) 2 July 2019 - Mrs Tsang emails the HMRC officer dealing with the case asking him for clarification. The text of the email is as follows:

“Tribunal has emailed me that the personal cases against me are still going ahead. If so, are you still responsible for the case as I have not had any communications from you lately. If you are no longer the representative, please advise who are the next representative officer from the HMRC dept. taking on this case.

If HMRC are not pursuing me for the Personal gains, then I do not need to appeal.

But I do need a letter from HMRC to say so, and closed the case.

Mr Callaghan, the Compliance Officer has already dropped the Employer Compliances case. I have already received a letter from Mr Callaghan clarifying that the case is closed.

If the Personal Gains cases are still going ahead, I will fight my case undoubtedly.”

(10) On 8 July 2019, another HMRC officer emails Mrs Tsang explaining that she is the litigator dealing with the appeal. She went on to say:

“In response to your email dated 2 July 2019 I can confirm that your appeal is still live with the Tribunal. However, my colleague made an application to the Tribunal Service on 8 April 2019 to request that the appeal be “struck out” as your company is now dissolved. The “strike out” application was made as the company, in legal terms, no longer exists.

The Value Added Tax and Corporation tax assessments were issued to the company.

The penalties in this appeal have been charged to you personally as an individual.”

(11) The Unless Order was issued on 9 August 2019, with a deadline of 23 August 2019 (as set out in full above).

(12) Mrs Tsang replied to that notice by email on 19 August 2019 objecting to the suggestion that she had not complied with the directions and setting out the email correspondence detailed above.

22. I also had a copy of the directions issued on 30 November 2018, which were a standard set of directions, setting out a timetable for exchanging lists of documents, witness statements, dates to avoid, bundles and skeleton arguments.

23. We had no evidence before us of what the apparent non-compliance with directions had been prior to the unless order, and given the effluxion of time, the file held by the Tribunal had been destroyed in accordance with document retention policies.

24. The question for me to consider is whether the strike out direction issued on 1 October 2019 was correctly issued such that all three appeals were struck out.

25. I find that the appeal against the personal liability notices was not validly struck out by the notice issued on 1 October 2019. I come to this conclusion based on the following factors:

(1) The email of 28 June 2019 gave Mrs Tsang a 14 day opportunity to counter the Tribunal’s conclusion that she did not intend to restore the company to the register. If the opportunity was not taken up, the Tribunal warned that it would take steps to strike out appeal 02582, which was the company’s appeal against the VAT assessment. The other two appeal numbers were not mentioned.

(2) It was clear from the email sent by Mrs Tsang on 2 July 2019 to HMRC that she was still under the impression that her personal appeal remained live.

(3) The unless order required Mrs Tsang to respond “to the Tribunal details of the steps which have been taken to restore the appellant to the register of companies”.

(4) Mrs Tsang did reply on 19 August 2019, in time for compliance with the Unless Order, explaining that she objected to the suggestion that she had not complied with previous directions or emails and reiterating that she did not intend to restore the company to the register.

(5) The strike out direction does not refer to Mrs Tsang personally at all, only to the company.

26. All of the correspondence leading up to the strike out direction being issued related to the status of the company and did not consider Mrs Tsang’s appeal at all. In addition she was

not named in the notice. The fact that the third appeal number was included on the notice is insufficient to counteract those factors.

27. There is no requirement for the company to be in existence for Mrs Tsang's appeals against the personal liability notices to be able to proceed.

28. My conclusion is that the strike out direction was not sufficiently clear as to have validly struck out the appeal brought by Mrs Tsang because her name was not mentioned and the non-compliance that apparently led to the unless order and referred to in the strike out direction related exclusively to the company.

29. As I have noted above, Mrs Tsang did not understand the consequences of a strike out and therefore she had not been under the misapprehension that her appeal had been proceeding in the intervening years. I do not consider that this misunderstanding alters the factual position that the strike out was not validly set out.

30. The appeal TC/2018/03113 against the personal liability notices has therefore never been validly struck out and continues to be a live appeal. Directions to ensure that the appeal can proceed to be heard will follow.

31. Since I have decided that the appeal was never struck out, the question on whether a late application for reinstatement should be allowed does not arise.

32. With regards to the second appeal, TC/2022/12561, for the sake of completeness, I confirm that this appeal should be struck because it is effectively a repeat of appeal TC/2018/03113, which, as a result of the above decision, is ongoing. The question of lateness of that appeal does not arise.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

Release date: 11 August 2023