[2018] UKFTT 302 (TC)

TC06532

Appeal number: TC/2017/02011

PROCEDURE – power to review decision of Tribunal's own motion where no application for permission to appeal made – review finding error of law in original decision – decision remade and original decision reversed – application for permission to appeal to HMRC out of time granted.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PARVI REZAEE **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Civil & Family Court, Vernon St, Liverpool on 23 May 2018

Mr Farry Naderi, Sterling Accounting Services, for the Appellant

Ms Pavallika Patel, Solicitor Office and Legal Services, HM Revenue and Customs, for the Respondents

DECISION

1. This decision deals with an application by Mr Parvi Rezaee ("the appellant") for permission to make an appeal to the respondents ("HMRC") after the time permitted by law, HMRC having refused to accept the appeal. After hearing the submissions of the parties and the evidence of the appellant and Mr Naderi, I reserved my decision. I then prepared a summary decision which was released to the parties in which I decided that permission to make a late appeal to HMRC was refused.

2. But of my own motion I decided to review the decision. Having done so, I considered that the decision should be set aside and remade. I have now given the appellant permission to make his late appeal.

3. This is my remade decision. It includes a discussion of my power to review my own decision of my own motion, which is what I have done.

Facts

4. From the bundle of papers prepared by HMRC, and from the oral evidence of the appellant and Mr Naderi (whose evidence the appellant acknowledged as correct) I find the following facts.

5. Zara Cash and Carry (Liverpool) Ltd ("the company") was incorporated on 24 September 2009. From that date until 15 July 2013 the appellant was the sole shareholder, and from that latter date until the company's dissolution in August 2016 he held 67 out of 100 shares. He was also the sole director apart from the period from 22 October 2013 to 14 May 2014 when there was another director, Mr Kadir.

6. In 2015 the appellant's father became terminally ill in Iran, and the appellant moved to Iran to care for him, leaving behind his wife and children at their house in Liverpool.

7. On 14 September 2015 HMRC issued a notice of assessment to penalties for incorrect returns to Zara Cash & Carry (Liverpool) Ltd ("the company") for its accounting periods covering the years ended 30 September 2010, 2011 and 2012. The penalties assessed under Schedule 24 Finance Act 2007 totalled £28,963.95. The notices of penalty assessment were sent to the registered office of the appellant, which was not the appellant's then home address.

8. On 23 September 2015 HMRC notified the company "c/o Mr P Rezaee" at his home address saying that they were, on the same day, issuing a notice to the appellant as a company officer making him personally liable for the penalty.

9. On 23 September 2015 HMRC did indeed issue a notice to that effect ("PLN") to the appellant at the private address for him on record.

10. The PLN carried on its face a statement that if the appellant disagreed with the decision (I assume to make him personally liable) he could appeal within 30 days after the date the notice was received, explaining why the decision was wrong."

11. The appellant returned from Iran in December 2015 but did not return to the marital home. He returned to Iran in March 2016.

12. No appeal was made by the company, or its accountant, Mr Khan, against the penalties and the company was dissolved and struck off the register at Companies House on 23 August 2016, HMRC having previously objected to striking off action on two occasions.

13. On 10 October 2016 the appellant wrote to HMRC referring to a telephone conversation with the officer with conduct of the investigation into the company and requesting HMRC to accept a late appeal against "the decision for penalty charges enforced against company officer".

14. On 3 November 2016 HMRC rejected the appeal, as the excuse given by the appellant for lateness had, they said, ceased to a reasonable one on 25 December 2015 when the appellant returned to the UK. He had not acted within a reasonable time after the excuse ceased, but had only appealed nearly 10 months later.

15. On 1 March 2017 the appellant, who had engaged Mr Naderi to assist him, notified his application for permission to the Tribunal.

Law

16. Section 49 Taxes Management Act 1970 ("TMA") deals with late appeals thus:

> "(1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
>
> (b) where HMRC do not agree, the tribunal gives permission.
>
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
>
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
>
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
>
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
>
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
>
> (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

17. Appeals against penalties for inaccuracies in accounts of companies are governed by paragraph 15 Schedule 24 Finance Act ("FA") 2007 which provides relevantly:

> "15—(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.
>
> (2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person."

18. PLNs are authorised by paragraph 19 Schedule 24 FA 2007 which provides relevantly :

> "*Companies: officers' liability*
>
> 19—(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.
>
> (2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.
>
> (3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership "officer" means—
>
> (a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c 46)),
>
> (aa) a manager, and
>
> (b) a secretary.
>
> …
>
> (4) In the application of sub-paragraph (1) in any other case "officer" means—
>
> (a) a director,
>
> (b) a manager,
>
> (c) a secretary, and
>
> (d) any other person managing or purporting to manage any of the company's affairs.
>
> (5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)—
>
> (a) paragraph 11 applies to the specified portion as to a penalty,
>
> (b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,
>
> (c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,

(d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),

(e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and

(f) paragraph 21 applies as if the officer were liable to a penalty.

(6) In this paragraph "company" means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association."

19. The provision of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), about reviews by the First-tier Tribunal is section 9:

"(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).

(2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable—

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure Rules may—

(a) provide that the First-tier Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;

(b) provide that the First-tier Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;

(c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;

(d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the First-tier Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules.

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—

(a) re-decide the matter concerned, or

(b) refer that matter to the Upper Tribunal.

(6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.

(7) Where the Upper Tribunal is under subsection (6) re-deciding a matter, it may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter.

(8) Where a tribunal is acting under subsection (5)(a) or (6), it may make such findings of fact as it considers appropriate.

(9) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 11(1), but the First-tier Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).

(10) A decision of the First-tier Tribunal may not be reviewed under subsection (1) more than once, and once the First-tier Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.

(11) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (10) to be taken to be different decisions."

20. As to reviews of decisions on appeals and applications, the relevant rule of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules"), Rule 41 is:

"*Review of a decision*

(1) The Tribunal may only undertake a review of a decision—

(a) pursuant to rule 40(1) (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision.

(2) The Tribunal must notify the parties in writing of the outcome of any review, unless the Tribunal decides to take no action following the review.

(3) The Tribunal may not take any action in relation to a decision following a review without first giving every party an opportunity to make representations in relation to the proposed action."

21. HMRC's Compliance Manual says this about rights of appeal against a PLN:

"When assessing a penalty on the company for a deliberate inaccuracy, you must notify each liable officer about their individual liability to pay all or part of the penalty, following the guidance at CH406300.

The penalties for inaccuracies provisions apply to a liable officer in the same way as they apply to the company. This means that the same procedures and safeguards apply.

A liable officer can therefore appeal against

- your decision to pursue them for all or part of the penalty assessed on the company, as set out in the above notice, and
- the amount of the penalty you have allocated to them.

They cannot however specifically appeal against your decision that they have gained or attempted to gain personally from the deliberate inaccuracy.

The liable officers do not individually have the right to appeal against the amount of the penalty assessed on the company. This can only be appealed by the company or the administrator/insolvency practitioner, if they are being wound up."

Discussion

Power to review of my own motion

22. I deal first with my power to review. On the face of it Rule 41 of the FTT Rules limits the Tribunal's ability to review a decision to the case where a permission to appeal has been made. In considering an application by an appellant for a decision of the Tribunal in which I was the judge (sitting with Mrs Gay Webb) to be set aside, reviewed and appealed against (*Couldwell Concrete Flooring Ltd (No. 2) v HMRC* [2017] UKFTT 85 (TC)) I said this:

"**Application for a review of the decision**

Can a party apply for a review?

31. Section 9 TCEA covers reviews of decisions of the First-tier Tribunal. Omitting irrelevant parts, it says:

[s 9 TCEA is set out here]

32. The only substantive F-tT(Tax) Rule relating to reviews is rule 41 which in paragraph (1) says:

[Rule 41 is set out here]

33. It seems then that rule 41 is made under s 9(3)(d) TCEA in that it limits the grounds on which the Tribunal may review its decision to a question of law. But the rule's opening words purport to deny the right to a review on an application by a party as it says the Tribunal may only review pursuant to rule 40(1) (PTAs), which provides:

'(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 41 (review of a decision).'

34. Thus the combined effect of rule 40(1) and rule 41 is that a request or application for a review independent of a PTA application is not permitted, and that the tribunal must of its own motion review a decision when it receives a PTA application, but may only review a decision if it is satisfied there is an error of law in the decision.

35. But a statutory instrument such as the F-tT(Tax) Rules cannot simply oust a right given by primary legislation such as that in s 9(1) and (2)(b) TCEA unless the primary legislation provides for it to (see *Bennion on Statutory Interpretation* Code section 58). Section 9(3)(d) TCEA does not do that – it limits the grounds on which the review may be undertaken (in the F-tT(Tax) Rules an error of law). In relation to an application to review, s 9(3)(a) TCEA allows the procedure rules to set out a category of decision which may not be reviewed at all, but the F-tT(Tax) Rules do not do that. Section 9(3)(c) TCEA limits the grounds on which an application by a party for a review may be made but the F-tT(Tax) Rules do not do that either.

36. The paragraph most pertinent to this question is paragraph (b) of s 9(3). It provides that procedure rules can determine what description (type) of decision can only be reviewed on the Tribunal's own initiative. Rule 41 says that any decision at all may be considered for a review but only if there is a PTA. That does not seem to me to be setting out a description of a decision, but a precondition to a review being considered.

Conclusion on right of party to apply

37. I conclude then that it is at reasonably arguable that an appellant may, without making a PTA application, make an application by virtue of s 9(3)(c) TCEA for the tribunal to consider whether to review its decision. I am fortified in this view by references in the F-tT(Tax) Rules to an application for a review. There is rule 42 which expressly refers to "an application for a decision to be … reviewed". Rule 39(2) also points in that direction as it says:

> '(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application—
>
> (za) the relevant decision notice;
>
> (a) … full written reasons for the decision;
>
> (b) notification of amended reasons for, or correction of, the decision following a review; …
>
> …'

Rule 39(2)(b) assumes that a review may be undertaken before an application for permission to appeal is made.

38. This is all somewhat academic in this case as Dr Milton has made a simultaneous PTA application and so I am bound to consider whether to review. It is not though entirely academic, as I have decided to exercise the power in rule 42 and that expressly allows me to treat Dr

> Milton's application to set aside the decision as an application for the decision to be reviewed.
>
> 39. If I am right that Dr Milton's "request" for a review could be treated as an application under s 9 TCEA independently of his PTA application, then I think that in principle I am not limited to deciding to review only where there is an error of law. The other possibilities are that I could review if there was an error in fact finding or simply a slip, but the latter could anyway be corrected under rule 37. Dr Milton has not identified any error of fact that we might have fallen into so I intend to consider only whether there is an error of law. To so limit myself would make an independent s 9 TCEA application in this case consistent with rule 41."

23. I am satisfied that I have the power of my own motion to review my decision, applying s 9 TCEA. Having reviewed it and discovered an error of law I decided to remake the decision.

Approach to the remaking of my decision

24. In coming to my original decision in this case I had regard to the five questions referred to in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*") by Morgan J at [34], a passage referred to both by HMRC in their statement of case and by Mr Naderi. In that decision I put the Data Select questions in the broader context of the approach by the Court of Appeal in *Denton v T H White Ltd & ors* [2014] EWCA Civ 906 ("*Denton*") to applications of this nature.

25. After my initial decision and before I drafted this review, the Upper Tribunal (Judges Tim Herrington and Kevin Poole) released their decision in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"). *Martland* contains valuable guidance at [44] to [47] to the First-tier Tribunal on how to approach applications for permission to make a late appeal. It stresses at [44] that the approach should be to apply the *Denton* three stage process, which will take the matters raised into account in the *Data Select* questions and other relevant matters raised in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218, and at [45] it counsels a retreat from any suggestion of a checklist of matters, stressing that all the circumstances must be taken into account, but giving special weight to the two matters now mentioned in Rule 3.9 in the Civil Procedure Rules, the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

26. So far as seems necessary, given that I had adopted the *Denton* three stage approach in my original decision, I have in remaking the decision better reflected the guidance in *Martland*.

The remade decision

27. *Denton* Stage 1 requires me to consider whether the delay of 10 months referred to by HMRC is serious and significant. I find that it is. In *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) the Upper Tribunal (Judges Roger Berner and Sarah Falk) applying the first *Denton* stage said at [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."

28. 10 months is clearly even more serious and significant.

29. The reason for the delay (*Denton* Stage 2) given by the appellant is that he was in Iran caring for his terminally ill father until 25 December 2015 and that he returned to Iran in March 2016 coming back to the UK only in October 2016 when he appealed. Although he was in the UK for some of the time between the notices of penalties to both the company and to him under the PLN, he was suffering from depression and had became estranged from his wife and family, and had let his business go bust and had not attended to his affairs as a result. He had not been told by his accountant what had happened, and in evidence said that he had not returned to the marital home to which the PLN had been sent.

30. The treatment for depression was evidenced by medical statements from Iran.

31. I find as fact that the appellant was heavily affected by his father's illness and his estrangement from his family, and that this caused him to lose concentration on matters such his business generally as well as his tax affairs.

32. The appellant also said that he did not become aware of the PLN on his return from Iran in late 2015 as he did not visit the former marital home or attend to his business which had been disposed of to a new owner. HMRC did not challenge this evidence or seek to show that it was incorrect, and I accept it.

33. Pausing there I consider that the seriousness of the delay weighs against the appellant, but the reasons he has given for the delay weigh substantially in his favour.

34. Looking at all the circumstances (*Denton* Stage 3) there is some prejudice to HMRC in that a case which they considered was finished would have to be resurrected if I gave permission to appeal, while the appellant would on the face of it be substantially prejudiced if I declined to give permission: he would be liable to pay the penalties, which he says is something that would cause his bankruptcy.

35. In general when considering an application for relief from sanctions, the Tribunal or Court is encouraged not to examine the merits of the case. In *Martland* at [46] the Upper Tribunal says:

> "In doing so [exercising judicial discretion], 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. In *Hysaj*, Moore-Bick LJ said this at [46]:
>
> > 'If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy

> a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.'
>
> *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

36. In my original decision I decided, notwithstanding the other matters I had considered which weighed in the appellant's favour, to refuse permission because I said it would be pointless to allow an appeal to be made to HMRC and thence to the Tribunal if it was bound to fail.

37. My reasons for so saying were that the appeal is against the PLN and an appeal against a PLN could, I thought, only be made on the grounds that the company officer's actions did not cause the inaccuracies or that the share of the penalty attributed to the officer is excessive. In a situation where as here the officer is the sole director and shareholder and there is no one else "in the frame", as Mr Naderi admitted, any appeal would be hopeless. It was, I said, also not possible in an appeal against a PLN to contest the liability of the company to the penalties. The company must do that and in this case not only is it now nearly three years too late to do that, the company does not exist and so cannot appeal.

38. The main basis for my original decision was the extract from the Compliance Handbook I have quoted and my experience in a case involving s 61 Value Added Tax Act 1994.

39. Since issuing the original decision I have been preparing for a forthcoming hearing which does involve the question of the appeal rights of an officer who is issued with a PLN under paragraph 19 Schedule 24 FA 2007, ie the very point in this case. It is clear from case law cited to me in skeleton arguments that there are a number of decisions of this Tribunal which have held that in certain circumstances the recipient of a PLN may appeal against the penalty assessed on a company of which he was an officer. None of these decisions are binding on me, but they all point one way and do overcome the element of injustice to the appellant which I identified in observations in the original decision.

40. I was therefore committing an error of law in assuming that the appellant had no possible way of challenging the imposition of the penalty or its amount. On further reflection on the appellant's evidence I think it is also possible that the appellant may be able to demonstrate that he did not receive the PLN in sufficient time to enable him to make a timely appeal, and that any presumption established by s 7 Interpretation Act 1978 may be rebuttable. This is also a circumstance I should have taken into account.

41. In my original decision I said that if the circumstances set out in §§31 and 32 were the only circumstances to be taken into account, I would have been inclined to give the appellant permission to make a late appeal. Having weighed up all the factors and circumstances anew in the light of my subsequent knowledge of the state of the law and my reflection on the evidence, my remade decision is to now grant permission for the appellant to bring a late appeal.

42. The appellant should be aware that by giving him permission I am not by any means saying, let alone deciding, that his appeal, if and when heard by the Tribunal, will be successful.

43. 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: 11 JUNE 2018