TC06856

Appeal number: TC/2017/03188

Procedure – late application to set aside and/or for full findings of fact and reasons – treated as out of time application for full findings of facts and reasons and/or out of time application for set aside of original decision – Martland v HMRC applied – applications dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

THOYAB HALAL MEAT LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in Chambers on 4 December 2018

Decided on the basis of written representations from Amjad Mahmood, Director of the Appellant received on 7 September 2018 and from Phil Jones, Presenting Officer of HM Revenue and Customs, for the Respondents, received on 3 and 16 October 2018

DECISION

Introduction

1. This appeal concerns liabilities for Class 1A and Class 1 NI contributions totalling just under £10,000 in respect of the years 2012-16 and penalties totalling £4,100 for failure to submit employer's annual returns for the years 2012-12 and 2015-16.

2. After the Tribunal heard the appeal in the absence of the appellant and issued a summary decision on 18 June 2018 dismissing the appeal, an application for permission to notify an appeal to the Upper Tribunal was received at the Tribunal on 7 September 2018.

3. This decision deals with the appellant's application dated 7 September 2018.

The Facts

4. A notice of appeal dated 22 March 2017 was submitted to the Tribunal. It was defective in a number of respects, and after several attempts at clarifying the position, the Tribunal finally accepted it as representing a valid notice of appeal and on 4 May 2017 notified it to HMRC. The appeal was allocated to the standard category and HMRC were directed to deliver a statement of case within 60 days.

5. The notice of appeal named Thoyab Halal Meat Limited as appellant, giving an address in Tipton (which has at all material times been the appellant's registered office address) and also including the name "Amjad Mahmood", as well as providing an email address "mohammedayyub@[*one of the main ISPs*]", from which the notice of appeal form was lodged by email. Amjad Mahmood is shown at Companies House as having been the appellant's sole director since April 2008.

6. The notice of appeal form also included some material in the area reserved for giving details of the appellant's representative; the same details as above were repeated there.

7. HMRC applied for an extension of time for delivering their statement of case. A copy of this application was sent by email by the Tribunal on 22 June 2017 to the email address given for both the appellant and its representative, stating that the Tribunal would grant the application unless the appellant objected. No reply was received.

8. HMRC clearly started work on preparation of the statement of case but, understandably, found the notice of appeal form to be somewhat unclear about precisely what was being appealed. They wrote a letter dated 13 July 2018 to the Tribunal, seeking clarification and requesting a stay pending receipt of the same. In essence, the notice of appeal form only appeared to specify one decision as being under appeal to the Tribunal, but HMRC were aware of two other associated decisions which had been appealed to them, and they wanted clarification of whether it was intended that the appeal to the Tribunal should cover all three matters.

9. A technical caseworker considered the file at the Tribunal and took the view that the appellant appeared to have made an attempt, albeit a poor one, to appeal all three decisions to the Tribunal. The Tribunal therefore wrote to the appellant and HMRC on 21 July 2017, indicating that unless the appellant confirmed otherwise, the notice of appeal would be taken as applying to all three decisions. A direction was also issued for HMRC to deliver their statement of case by 3 October 2017, leaving adequate time for any uncertainty about the subject matter of the appeal to be cleared up before the statement of case needed to be prepared.

Again, the appellant's copy of this letter was sent by email to the appellant at the email address given on the notice of appeal form.

10. In carrying out this work, the technical caseworker also noticed that in the original exchange of emails when attempting to clarify the notice of appeal, some of the emails appeared to emanate from a "Mohammed Ayyub" at "Caldwell House Chartered Certified Accountants" in Birmingham, even though they were sent from the email address referred to above, which had been identified as the email address for the appellant. A second letter dated 21 July 2017 was therefore sent by email to that same email address, but with the accompanying letter being addressed to "Amjad Mahmood, Thoyab Halal Meat Ltd" at the Tipton address; that letter indicated that the Tribunal needed the appellant to provide written confirmation of its representative, should it wish to authorise him. The Tribunal's standard form of authority was sent with the email, and the appellant was informed that the Tribunal would correspond directly with the appellant unless a signed form of authority was received.

11. Nothing was heard from the appellant or any representative on its behalf in response. On 26 September 2017, HMRC accordingly delivered their statement of case, covering all three of the disputed decisions. They also sent a copy direct to the appellant; the Tribunal file includes a copy of their covering letter to the appellant at its registered office address in Tipton.

12. On 31 October 2017 the Tribunal issued case management directions to the appellant at its registered office address in Tipton. The appellant's list of documents and listing information, required to be delivered by 8 December 2017, were not received. On 16 December 2017 the Tribunal sent a chasing later, addressed to the appellant but sent by email to the same email address referred to above. The letter warned that in the absence of a list of documents, names of witnesses or "dates to avoid" for listing the hearing, the appellant might not be permitted to refer to any documents at the hearing, might not be permitted to call any witnesses, and might find it hard to persuade the Tribunal to postpone the hearing if it were fixed for a date which was inconvenient to the appellant.

13. In response, an email dated 18 December 2017 was received back from the same email address, unsigned but with "Caldwell House, Chartered Certified Accountants" at the foot, stating that there would be two named witnesses who would be giving evidence at the hearing, and asking to be informed where and when the hearing would take place.

14. In the continued absence of any list of documents, the matter was referred to Judge Cannan, who issued Directions on 25 January 2018 to the effect that unless the appellant provided its list of documents within 14 days, it would be precluded from relying on any documentary evidence at the hearing unless the Tribunal gave permission. Both parties were also directed to provide their "dates to avoid" for the hearing during the period 1 March to 30 June 2018. These Directions were emailed back, under a covering letter addressed to Mr Mahmood at the appellant, to the same email address as had been used by the appellant or its representative (or both) throughout the life of the appeal.

15. HMRC applied for a direction that witness statements should be provided by the appellant, but the Tribunal decided not to make such a Direction. HMRC provided their listing information, but nothing further was heard from the appellant or its "representative"; accordingly on 21 March 2018 the Tribunal notified both parties that the hearing would take place at the Tribunal's venue in Birmingham on 12 June 2018 at 10 am. The notice of hearing was sent to the same email address as before.

16. Nothing further was heard from the appellant or any representative. Only HMRC attended on 12 June 2018. Attempts were made to contact the appellant or its supposed representative that morning on either of the two telephone numbers which had been provided in the notice of appeal documentation, but without success.

17. In the circumstances, I decided to go ahead with the hearing and after Mr Jones had delivered his submissions, the Tribunal decided that the appeal should be dismissed.

18. A summary decision notice to that effect was issued by email on 18 June 2018 to the same email address as before, with a covering letter included addressed to Mr Mahmood at the appellant (bearing its Tipton address). Nothing further was heard until 7 September 2018 when the Tribunal received, by post, an application dated 31 August 2018 for permission to appeal the Tribunal's 18 June 2018 decision to the Upper Tribunal. This form was actually signed "A. Mahmood", on behalf of the Appellant, but still gave the same email address as had been used throughout, and specifically stated that the appellant did not have a representative. The form acknowledged that the application was being submitted out of time, and gave the following reasons:

> *"The reason for delay is that we haven't received the correspondence on time and also the correspondences that was sent to my representative were received late too because they moved their office and letters were probably sent to their previous address. Please consider our situation and allow us some extra time."*

19. The application form gave the following as the supposed errors of law in the Tribunal's decision:

> *"Due to some personal circumstances I couldn't attend the tribunal services hearing and couldn't clarify my side of the argument but now I would like to ask for review where I want to provide evidence."*

20. After summarising the history, HMRC's response to the application was summed up as follows:

> *"Since the appeal was notified to the Tribunal the appellant has failed to co-operate with Tribunal proceedings. The appellant has exhibited a disregard for what is required and I submit is now hard pressed to say "give me another chance". Indeed, the late application refers to "Due to some personal circumstances I couldn't attend". This HMRC submit suggests that the appellant was indeed well aware of the hearing date, but chose to do other things…*
>
> *If some last minute emergency had arisen the appellant could have asked for a postponement which of course would have been at the discretion of the Tribunal which might be influenced by the failure to give listing details. No such postponement application was made by the appellant so the hearing went ahead.*
>
> *HMRC submit it is not in the interests of Justice for the decision to be set aside and a new hearing take place. The appellant appealed to the Tribunal and was unsuccessful. The appellant disregarded the Directions of the Tribunal and made no representations to have the hearing postponed."*

21. HMRC also pointed out that there was nothing in the application form which suggested there had been any error of law in the decision.

The position in relation to an application for permission to appeal

22. A Tribunal which makes a decision which disposes of all issues in proceedings is required to issue a written notice of that decision to each party which (a) states the decision and (b) notifies the party of any right of appeal against the decision and the time within which, and the manner in which, the right of appeal may be exercised (see rule 35(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

23. The decision notice can take one of three forms. First, if all parties agree, it can simply set out the Tribunal's decision, without giving any findings of fact or reasons for the decision. If the parties do not agree on such a form of decision, then the Tribunal has a choice. Its decision notice can either "include a summary of the findings of fact and reasons for the decision" or it can "be accompanied by full written findings of fact and reasons for the decision" (see Rule 35(3)).

24. In the present case, the decision notice included the following text:

> *"This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal."*

25. The decision notice was also accompanied by a leaflet entitled "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)", which was adopted as part of the decision notice, and which amplified the rights of appeal. It includes the following text:

> *"If you want to make an application for permission to appeal to the Upper Tribunal and you have not received full written findings of fact and reasons for the decision, you must apply to the Tribunal for these. The Tribunal office must receive your written application for the full reasons within 28 days after the date that the Tribunal sent the decision notice to you.*
>
> *If, having considered the statement of reasons, you believe that the decision of the Tribunal was based on an error of law, you may then apply to us for permission to appeal against the decision to the Upper Tribunal.*
>
> *Your application for permission to appeal must:*
>
> - *be received in the Tribunal office no later than 56 days from the date the Tribunal sent you full written reasons; and*
> - *must identify the decision of the Tribunal to which it relates, the alleged error or errors in the decision and state the result you are seeking."*

26. It was (or should have been) clear to the appellant, therefore, that the decision notice dated 18 June 2018 contained only summary findings of fact and reasons; and that if it wished to appeal the decision contained in it, its necessary first step was to apply to the Tribunal within 28 days of 18 June 2018 (i.e. by 16 July 2018) for full findings of fact and reasons.

27. Rule 35(4) of the Rules makes it clear that any application for permission to appeal is premature if it is made before full written findings of fact and reasons have been sent to the applicant:

> *"(4) If the Tribunal provides no findings and reasons, or summary findings and reasons only, in or with the decision notice, a party to the proceedings may apply for full written findings and reasons, and must do so before making an application for permission to appeal under rule 39 (application for permission to appeal)".*

28. Thus it is clear that the application in this case cannot (irrespective of its lateness) take effect as a valid application for permission to appeal.

29. In such cases, it is the common practice of the Tribunal to treat an application for permission to appeal as an application for the provision of full written findings of fact and reasons, as the first step towards a subsequent application for permission to appeal. But, as is made clear by Rule 35(5) of the Rules, there is a 28 day time limit for making such an application:

> *"An application…must be made in writing and be sent or delivered to the Tribunal so that it is received within 28 days after the date that the Tribunal sent or otherwise provided the decision notice under paragraph (2) to the party making the application".*

30. In this case, that 28 day time limit expired on 16 July 2018, and the appellant's application for permission to appeal was received on 7 September 2018. The Tribunal has power to extend this time limit (see Rule 5(3)(a) of the Rules), and in doing so must seek to further the overriding objective of dealing with cases fairly and justly (see Rule 2 of the Rules). As is clear from a number of recent decisions of the Courts and Tribunals, however, the presumption is that the normal time limit should be observed unless good reason can be shown for it to be extended. The general approach was summarised out in *Martland v HMRC* [2018] UKUT 0178 (TCC) at [44] – [45]:

> *"44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider 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.*

> *45. 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."*

31. *Martland* was concerned with an extension of the statutory time limit for notifying an appeal to the Tribunal, whereas the present case is concerned with an extension of a time limit contained in the Tribunal's own Rules. However, as was made clear by the Upper Tribunal in *Terry Paul Bell v HMRC* [2018] UKUT 0254 (TCC) at [26], that is a "distinction without a difference". I consider the same approach should apply.

The position in relation to an application to set aside the Tribunal's decision

32. The Tribunal has an entirely separate jurisdiction to "set aside" any decision which is considered to be tainted by procedural irregularity, with a view to the appeal being reheard afresh. In an appropriate case, the Tribunal will sometimes treat an application for permission to appeal as an application to set aside the relevant decision under this jurisdiction. An express power to do so is conferred by Rule 42:

> *"The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."*

33. Rule 38 of the Rules provides as follows:

> *"**Setting aside a decision which disposes of proceedings***
>
> *38.—(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."*

34. In the present case, the appellant was not present at the hearing, and accordingly the condition in Rule 38(2)(d) is satisfied. But before moving on to consider whether it would be "in the interests of justice" to set aside the decision (as provided in Rule 38(1)(a)), the question of time limits arises.

35. As can readily be seen from Rule 38(3), there is a similar 28 day time limit for applying to have a decision set aside as applies to any application for the provision of full findings of fact and reasons. The appellant has not complied with this time limit as it required any such application to be delivered to the Tribunal by 16 July 2018, the same time limit as applied to any application for full findings of fact and reasons for the decision. The approach to deciding whether to extend the two 28 day time limits should, I consider, be the same.

Discussion and decision

36. As I consider the approach to extending the 28 day time limit is effectively the same in relation to both applications (to extend time for requesting full findings of fact and reasons, and to extend time for applying to set aside the decision) I propose to consider both applications together.

37. Adopting the approach from *Martland* set out above, I analyse matters as follows.

38. The length of the delay in each case was from 16 July to 7 September 2018 – a period of some 53 days, in the context of a 28 day time limit.

39. The reason given for the delay is that correspondence had supposedly not been received, possibly because of moving office. However, all relevant communication between the appellant and the Tribunal took place by email. The Tribunal sent correspondence to the email address which had been nominated by the appellant in its notice of appeal, and received a number of emails from that address. Crucially, on 18 December 2017 there was a very speedy email response to the Tribunal's email of 16 December 2017 which warned of possible major consequences of failing to comply with directions; and there is nothing to suggest that the application received on 7 September 2018 was prompted by anything other than receipt of the Tribunal's email dated 18 June 2018 which sent out the decision, nor is there any suggestion that the decision itself was not received (indeed, it is difficult to see how the appellant's application dated 31 August 2018 could have been made if it had not received the original decision). No other explanation for the delay in making the application is offered, accordingly it seems to me that the reason given is weak.

40. I then move on to an evaluation of all the circumstances. Obviously if the application is refused, the appellant will lose its chance to contest tax and penalty liabilities of over £14,000, which is clearly significant to it. However, a similar consequence will always result from a failure to comply with the time limits for appealing and similar applications. The strength of the case which the appellant has for appealing is entirely unknown; on the basis of its application, there is actually no error of law identified in the Tribunal's decision, the appellant simply seeks "a second chance". And the strength of its case for the decision to be set aside "in the interests of justice" is also weak; the appellant failed to comply with the preparatory case management directions or to turn up at a hearing which it was aware was being held, without any explanation beyond a statement that there were "some personal circumstances".

41. Taken in the round, after considering the above factors, and bearing in mind the "need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits

to be respected", I consider the balance weighs heavily against extending either 28 day time limit.

42. The implicit applications by the appellant to extend the time limits for applying for either (a) full findings of fact and reasons for the decision released on 18 June 2016, or (b) that decision to be set aside are accordingly REFUSED.

43. It follows that neither application can be admitted for consideration and the appellant's applications are accordingly DISMISSED.

44. This document contains full findings of fact and reasons for the decision to refuse to extend the relevant time limits. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 10 DECEMBER 2018