[2019] UKFTT 71 (TC)

TC06955

Appeal number: TC/2017/04490

Customs Duty - application for relief from sanction (to reinstate appeal against Post Clearance Demand Notice) - Combined Nomenclature Tariff - appeal struck out following appellant's agents failure to respond to HMRC's hardship application enquiries and an 'Unless Direction' by the Tribunal - Denton and Martland considered - Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LAURENCE SUPPLY CO (LEATHER GOODS) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ELIZABETH POLLARD

Sitting in public at Tribunal Tax Service, Alexandra House, 14-22 The Parsonage, Manchester on 31 August 2018

Mr Mark Gordon and Mr Laurence Gordon for the Appellant

Mr Simon Charles, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

The Application

1. This is an application by Laurence Supply Co (Leather Goods) Limited ("the appellant") for relief from sanction and to set aside a decision of the Tribunal dated 16 February 2018 to strike out its appeal against a decision by the Respondents ("HMRC") to issue a Post Clearance Demand Notice ("PCDN") amounting to £629,007.05 for Customs Duty and VAT, dated 3 April 2017, as amended to £603,548.68 on 4 May 2017, and to reinstate its appeal against the decision.

2. The PCDN related to an alleged misclassification of handbags and purses proper to various commodity codes under Chapter 42 of the Combined Nomenclature Regulations.

3. The basis of the substantive appeal is that the goods were correctly declared.

4. HMRC oppose the application.

Background facts

5. The appellant company (company number 01218644) was incorporated on 7 July 1975 and is based in Manchester. Its main trading activity is described at Companies House as 'Non-specialised wholesale trade'. The company principally trades in the wholesale sale of leather goods.

6. On 3 April 2017 HMRC issued a Post Clearance Demand for £629,007.05, subsequently amended to £603,548.68 on 4 May 2017. The issue related to the alleged mis-classification of imported goods for Customs Duty purposes. The Combined Nomenclature Council Regulation (Reg (EEC) No 2658/87 of 23 July 1987 as amended) provides the legal basis for Community's Tariffs. An annual amendment to this Regulation contains the Combined Nomenclature, which is reproduced in the UK Tariff, by reference to which all goods are classified on importation into the European Union for the purpose of determining, among other things, the rate of customs duty which is payable. The Combined Nomenclature provides a systematic classification for all goods in international trade and is designed to ensure, with the aid of the six General Rules of Interpretation, ("GIRS") that any product falls to be classified in one place and one place only.

7. The commodities imported by the appellant company for which the PCDN was issued are handbags and purses ("the goods"). The underlying issue between the parties relates to the correct classification of the goods for customs duty purposes: The appellant's import declarations allocated the goods to headings**:** 4202.12.9190; 4202.19.9190; 4202.22.9190 4202.32.9190 and 4202.39.9190 of the Combined Nomenclature which attract a duty of 3.7%.[bags having an outer sheeting of textiles or other (non-plastic) material]. HMRC took the view that the goods should have been declared under headings 4202.22.1000 and 4202.32.1000 [having an outer

sheeting of plastics], which attracts a higher rate of duty of 9.7% and the post-clearance demand is designed to recover the additional duty and VAT payable.

8. At an inspection visit by HMRC in February 2017, an examination of the goods, purchase invoices and other import documentation at the appellant's premises showed that the essential character of the plastic outer surface of the goods was considered to be polyurethane, categorised as `plastic sheeting' and therefore attracts a duty rate of 9.7%.

9. HMRC considered that some of the goods had a suedette outer material which constitutes a textile material. They determined that those items were made in two equal parts - one half made from a polyurethane plastic, and one half made from a textile material. As neither material predominated, the item was classified to the code which appears last in numerical order. In this instance, the outer which was of textile material. The item was therefore classified to commodity code 4202.32.9090 with a duty rate of 3.7%. These goods entry were excluded from HMRC's PCDN calculations.

10. HMRC asked the appellant to quantify bags/purses imported which were made of a textile material. HMRC did not receive a response and therefore sent a reminder by email with a deadline of 03 April 2017.

11. As no response was received, HMRC assumed in their calculations that all of the Appellant's imported goods were made with an outer material predominantly of polyurethane (plastic sheeting) and the PCDN was calculated accordingly on goods, brought into free circulation by the Appellant covering the period 04/04/2014 - 07/03/2017.

12. HMRC issued a PCDN for £629,007.05 on 3 April 2017. The calculations were amended on 4 May 2017 which resulted in the PCDN being reduced to £603,548.68

13. The appellant did not request a review of the decision and instead submitted a Notice of Appeal by email to the Tribunal on 30 May 2017. The grounds set out in its notice of appeal, stated that:

> "The quantum is disputed. The alleged arrears are based on an assumption by HMRC that the goods in question, imported since May 2014, were incorrectly declared and as a consequence import duty was underpaid. HMRC's position is that the goods were entered as liable to duty at 3.7% when in fact they were liable at 9.7%. The Appellant will be able to produce evidence that this is not the case and that an as yet unknown number of consignments were correctly declared, import duty at 3.7% being paid."

14. In the Notice of Appeal the appellant's representative was stated to be Mr Stewart Smith of SKS GB Ltd ("SKS"), a Tax Consultancy whose email address was correctly shown as stewart@sksgb.co.uk. No application for hardship was made to HMRC, although an indication of an intention to do so was given in box 5 of the Notice.

15. The Tribunal acknowledged receipt to the appellant's agent by letter and asked the agent to confirm the position regarding hardship within 14 days (by 28 June). The Tribunal also wrote to the appellant with a Form of Authority for completion and return (to formally confirm 'Notice of Representative'). The Tribunal's Acknowledgement to the Appellant was by both letter and email.

16. The Tribunal copied its acknowledgement of the appeal to HMRC by email and this showed the agent's correct email address.

17. The Tribunal received the appellant's written Notice of Representative on 16 June 2017. The email address of the agent was given incorrectly by Mr Mark Gordon, a director of the appellant company, as stewartsmith@sks.gb.com. Mr Smith was copied into the email filing the notice, but does not appear to have noticed the error.

18. On 20 June 2017, HMRC's hardship team wrote (by letter) to SKS seeking detailed information and grounds for seeking hardship, requesting a reply by 10 July 2017.

19. On 27 June 2017 SKS emailed the Tribunal (from stewart@sksgb.co.uk) stating that a hardship application had been made.

20. On 28 June 2017 the Tribunal emailed HMRC asking them to update the Tribunal once a decision had been made on hardship.

21. On 19 July 2017 HMRC emailed the Tribunal (copying in stewart@sksgb.co.uk) saying that the requested hardship information had not been received.

22. On 18 August 2017 the Tribunal contacted SKS by letter and email seeking clarification of the appellant's position regarding hardship, within 14 days.

23. On 16 October 2017 HMRC emailed the Tribunal, querying whether a reply had been received by the Tribunal to its letter and email of 18 August 2017.

24. On 4 December 2017 HMRC sought a further update from the Tribunal, as no reply had been received to their email of 16 October.

25. On 9 December 2017, of its own motion, the Tribunal issued a direction on the instruction of Judge Brooks, saying:

> "The Appellant having failed to reply to the letter from the Tribunal dated 18 August 2017 within the times stipulated therein or at all the Tribunal DIRECTS that UNLESS the Appellant no later than 5pm on 24 December 2017 confirms in writing to the Tribunal that he intends to proceed with the appeal then these proceedings MAY be STRUCK OUT without further reference to the parties."

26. On the same date a copy of the Unless Direction was sent by the Tribunal by letter to SKS.

27. On 16 January 2018 HMRC applied to strike out the appeal copying in the agent but sending the copy to the wrong email address - stewartsmith@sks.gb.com, - saying:

> "Dear Sirs,
>
> I refer to the attached direction.
>
> The Respondents APPLY to strike out these proceedings pursuant to Rule 8 (3) (a) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.
>
> Grounds for the application
>
> Nearly 8 months ago the Appellant submitted its notice of appeal on 30th May 2017. The Appellant subsequently applied for 'hardship', but did not provide any supporting documentation.
>
> The Tribunal wrote to the Appellant in August 2017 requesting an update. No reply was received.
>
> Rule 8 (3) (a) (Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 grants the Tribunal the discretion to strike out proceedings where the Appellant has, "failed to comply with a direction which stated that failure by the Appellant to comply with the direction could lead to the striking out of the proceedings ..." The Tribunal issued the attached direction last month. The direction warned the Appellant that its appeal may be struck out if it did not update the Tribunal by 24th December 2017.
>
> No reply was received.
>
> The Respondents have heard nothing at all from the Appellant or its adviser since shortly after the appeal was submitted and the Appellant was asked to provide supporting hardship evidence. The Respondents therefore apply to the Tribunal for it to exercise its discretion and strike out these proceedings.
>
> The Appellant's adviser is copied in to this email."

28. On 24 January 2018, having received a 'bounceback' of the email of 16 January 2018, copying in SKS, HMRC resent a copy of their email, but again to the wrong address - stewartsmith@sks.gb.com.

29. On 13 February 2018, having received another 'bounceback' to their email of 24 January 2018, HMRC resent the copy email to the agent, but this time to the correct address - stewart@sksgb.co.uk.

30. On 16 February 2018 the Tribunal struck out the appeal and on the same day wrote to the appellant, stating that the appeal was struck out, but the appellant had a right to apply to reinstate within 28 days.

31. On 18 April 2018, outside the 28 day period, SKS applied for relief from sanction that is to set aside the strike out direction of 9 December 2017 and to have

the appeal reinstated. They also asked that thereafter the Tribunal copy the appellant in to any communications from the Tribunal.

32. In their application, SKS said that they had not received HMRC's letter of 20 June 2017 (although this had been sent to their correct postal address) and that they were initially unaware that HMRC had applied to have the appeal struck out, the copy application having been sent by HMRC to the wrong email address on 16 January 2018 and again on 24 January 2018. SKS do not however refer to or explain why they did not respond to the 'Unless Direction', which was sent by the Tribunal by both letter to their correct postal address and emailed to their correct email address.

33. On 25 April 2018 the Tribunal notified HMRC of the appellant's application.

34. On 9 May 2018 HMRC objected to the application, and by email copied in both the agent, SKS, and the appellant. In the text of the objection HMRC asserted that their strike out application had been sent to the agent at its correct email address on 16 and 24 January 2018, but this is incorrect. The strike out application was only sent to the correct email address on 16 February 2018.

35. On 10 May 2018, Mr Mark Gordon, having apparently only then become aware of the strike out direction, advised HMRC that the company had not received any correspondence or other communication regarding the appeal after 14 June 2017, shortly after notification of the appeal.

36. On 15 May 2018 SKS (presumably after meeting with their client) submitted a revised application to reinstate the appeal. They explained that they had incorrectly interpreted the date by which a reinstatement application had to be made was 9 December <u>2018</u>, although the decision clearly states that any such application had to be made within 28 days of 16 February 2018, that is by 16 March 2018.

37. SKS submitted that:

> "The initial application to reinstate was in any event 'only' 4 weeks out of time.
>
> To date we have still not heard from HMRC in respect of the hardship application.
>
> The alleged debt is considerable, in excess of £600,000 and the Appellant believes the amount demanded is incorrect. The Appellant is confident that it will be able to provide evidence to the Tribunal proving this to be the case i.e. its case is arguable and has a reasonable prospect of success.
>
> It is accepted that by re-instating this appeal the Respondents will suffer some prejudice. However, it is submitted that this is greatly outweighed by the prejudice the Appellant would suffer i.e. the significant amount of import duty and VAT at stake that will cause irreparable damage to it. Therefore, for a matter of such importance and involving such a large amount of money, it would be unfair to the Appellant for it not to be heard by the Tribunal."

38. On 21 June 2018, the appellant's application for relief from sanction was set down for hearing by the Tribunal on 31 August 2018, and the parties notified accordingly.

39. On 2 August 2018 the appellant informed HMRC and the Tribunal that they were no longer represented by SKS.

40. On 31 August 2018, at the hearing, the appellant was unrepresented other than by its directors, Mr Mark Gordon and his father, Mr Laurence Gordon, who put forward submissions on behalf of the company. Our decision was reserved.

41. On 27 September 2018, after the hearing of the application, Messrs Kuits Solicitors, wrote to the Tribunal to say that the appellant was now represented by that firm. They said that:

- The appellant had been led to believe by SKS that a Hardship application had been made. They relied on SKS for advice and representation.

- The appellant only received a copy of the hearing bundle from HMRC on the morning of the hearing and had not previously seen some of the material in the bundle.

Kuits queried whether the HMRC Officer who made the decision of 3 April 2017 as varied by her on 4 May 2017, (Ms Emma Wilkes) still worked for HMRC as she was not present at the hearing. They believed HMRC had replied that she still worked for HMRC but had been promoted. The Tribunal Judge's contemporaneous notes of the hearing confirm HMRC's reply, that Ms Wilkes was no longer employed by HMRC. There was no mention of her being promoted.

The appellant's case

42. At the hearing, Mr Laurence Gordon for the appellant company said that he was very unhappy with the manner in which Officer Wilkes had arrived at her decision of 3 April 2017, as amended on 4 May 2017, which in his submission was fundamentally flawed. He said that her decision had been based on recent incorrect samples, not on the correct samples some of which were sold up to three years previously which he could not produce. The items on which she made her PCDN decision was therefore not representative of the goods sold. In his submission, the appellant's returns have been comprehensively accurate and no excise duty was due.

43. He said there had been no face-to-face meetings with Officer Wilkes or any other Officer of HMRC, nor any proper discussion between the parties. Evidence the company had provided had been ignored. He queried why Officer Wilkes had not returned to their company's premises to conduct a re-inspection and continue discussions. Ms Wilkes appeared to get confused in her terminology and the physics of what was what, that is, whether an item was all PVC or mainly PVC.

44. The company is a family business which has been operating for over fifty years. It had recently had an HMRC check which verified 100% compliance. It was

inherently unfair that a unilateral decision should be made by one Officer of HMRC without proper consideration of all the evidence and submissions of the appellant and subject to an independent review.

45. The company had taken advice from SKS in June 2017, but after appointing that firm as its agent, they had received very little communication. The first the appellant knew of the strike-out was when HMRC's debt collection department visited them.

46. HMRC may have inadvertently been given the incorrect email address for SKS by Mr Mark Gordon, but HMRC had the correct email address at all times. The Tribunal never used the wrong email address. HMRC should have used the email address which the Tribunal were using. In particular HMRC should have realised their mistake and used the correct email address when the first of the strike-out application notification messages which were sent to the incorrect address, bounced back. They did not do so, and that exacerbated the problem. Matters of such importance should have been sent by letter. In a matter as important as a strike-out application, it was essential that HMRC ensured the appellant was on notice as to the application. Notice was never given either to the appellant or the agent until the Tribunal struck out the appeal.

47. The bundle before the Tribunal does not contain copies of an exchange of emails between the appellant and Ms Wilkes in which her decision was questioned. She was so dogmatically wrong. HMRC know that if the matter goes to a full appeal hearing and the merits of the case tested, they will lose.

48. Clearly the appellant would have responded to the hardship information request and the strike-out application had they been aware of either. There was no reason for the company not to.

49. Mr Laurence Gordon said that payment of a demand for £603,000 was impossible for the Company to afford and would cause the company to go into administration.

The Relevant Legislation

<u>The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009</u>

Overriding objective and parties' obligation to co-operate with the Tribunal.

2 (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.

Striking out a party's case

8. (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-
(a) does not have jurisdiction in relation to the proceedings or that part of them; and
(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
(3) The Tribunal may strike out the whole or a part of the proceedings if-
(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that-
(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and
(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

Civil Procedure Rules

[The CPR's are not binding on the Tribunal but reference to the rules and how they have been amended, is necessary to understand the changes in the approach to applications for relief from sanction]

5 The rule before the Jackson reforms came into force on 1 April 2013 set out the circumstances that the court must take into consideration on any such application, as follows:

Rule 3.9 of the CPRs in its original form reads as below:

10 "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including -

(a) the interests of the administration of justice;
(b) whether the application for relief has been made promptly; (c) whether
15 the failure to comply was intentional;
(d) whether there is a good explanation for the failure;
(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre- action protocol;
(f) whether the failure to comply was caused by the party or his legal
20 representative;
(g) whether the trial date or the likely trial date can still be met if relief is granted;
(h) the effect which the failure to comply had on each party; and
(i) the effect which the granting of relief would have on each party."

25

With effect from 1 April 2013 Rule 3.9 and factors (a) to (i) were removed by the Civil Procedure (Amendment) Rules 2013 with a material change to its substance

CPR 3.9

30 "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

35 (a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders."

Case Law Authorities

45. A number of recent decisions have since clarified the approach to be applied in
40 applications for relief from sanction under CPR r. 3.9. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan and Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.

46. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify the approach that had been advanced in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 A three-stage approach is now required to applications for relief.

The Court took the opportunity to clarify the principles applicable to such applications as follows (at [24]):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

47. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered".

48. The first stage is a departure from the test of 'triviality' referred to in *Mitchell,* which the Court concluded had caused difficulties in its application. The Court accepted that in many circumstances the most useful measure would be to determine whether the breach imperilled future hearing dates or otherwise disrupted the conduct of litigation generally. If the Court concludes that the breach was neither serious nor significant, relief will usually be granted and it is unnecessary to devote time on stages 2 and 3. At stage 1, only the breach that resulted in the sanction should be considered. Other breaches by the defaulting party fall to be considered at stage 3.

49. The Court of Appeal was divided on the issue of how much importance should be placed on (a) and (b) of Rule 3.9. The majority view was that these two factors are of particular importance and should be given particular weight.

50. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

51. The majority expressed concern that some judges were adopting an unreasonable approach to CPR r. 3.9. In particular, they were approaching applications for relief on the basis that, if the breach was not trivial and there was no good reason for it, the application must fail. This had led to decisions which were manifestly unjust and disproportionate.

52. The court also noted that litigation cannot be conducted efficiently and at proportionate cost without cooperation between the parties and their lawyers. This applies to litigants in person as much as to represented parties. CPR r. 1.3 specifically requires the parties to assist the court in furthering the overriding objective.

53. With this in mind, the court expressed the view that parties should not act opportunistically or unreasonably in opposing applications for relief. The court will now expect parties to agree applications for relief where (a) the breach is neither serious nor significant, (b) there is a good reason for the breach, or (c) it is otherwise obvious that relief should be granted. The court will also expect parties to agree reasonable extensions of time of up to 28 days under the new CPR 3.8(4), which states:

> "… unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date."

54. The Court of Appeal was critical of the 'satellite litigation' and uncooperative attitude that the *Mitchell* decision had fostered. In its view, a contested application for relief should be very much an exceptional case. This is because (a) compliance should be the norm, and (b) parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even when a breach has occurred.

55. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FtT.

56. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the three stage approach [at 43 to 45]

> "43. ……Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). The clear message emerging from the cases - particularised in Denton and similar cases and implicitly endorsed in BPP - is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case"……."
>
> 44. 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. When considering "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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FtT's deliberations artificially by reference to those factors. The FtT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

57. 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.

HMRC's case

58. At the hearing, Mr Charles on behalf of HMRC addressed the three stage process that should be applied.

Length of delay

59. In HMRC's submission, the failure to comply with the 'Unless Direction' by the Tribunal (of 9 December 2017), was indeed serious and significant and was then compounded by the appellant's failure to timeously submit an appeal against the Strike-out Order within the requisite 28 day period.

60. The 'Unless' direction of the Tribunal made on 9 December 2017 contained a warning that the proceedings 'may be struck out' if the appellant did not respond and confirm that it intended to proceed with its appeal, accompanied by the outstanding hardship information requested by HMRC. No response was received from the appellant or its agent. HMRC subsequently applied to the Tribunal to exercise its discretion to strike out the proceedings. Whether or not in response to that application, the Tribunal struck out the proceedings.

61. The appellant may apply to reinstate the proceedings under rule 8 (5) and (6) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, provided the application is in writing and made within 28 days of the appellant being notified that the proceedings have been struck out.

62. The application for relief from sanction was not made within the requisite 28 days. The appellant's agent knew by 16 February 2018 that the Tribunal had made the Unless direction on 9 December 2017. The application is silent as to whether the agent received any communications from the Tribunal. No application for relief from sanction was made to reinstate the appeal within 28 days, that is, by 16 March 2018. No application of any kind was made until 17 April 2018, four and a half weeks out of time.

Reason for the default

63. The appellant has not offered any satisfactory explanation for the failure to comply with the 'Unless' direction or the delay to appeal against the strike-out order. There was a total lack of effort on the part of the appellant and/or the agent to provide the hardship information requested by HMRC. The request had been sent to the correct email address of SKS. They had also received a letter of reminder from the Tribunal on 18 August 2017. Furthermore, the application to reinstate is silent on the question of whether it is the appellant's case that no emails were received from the Tribunal either.

64. The appellant seeks to blame its agent, SKS. The appellant maintains that the proceedings ought to be reinstated because of an alleged email address issue (which HMRC do not accept). SKS were the appointed representative and HMRC and the Tribunal were entitled to expect the agent to deal with matters promptly and within the time limit set by directions. It appears that the appellant did not at any time verify that the agent was correctly and promptly dealing with matters. The appellant may have been let down by the agent but that is not a reason to reinstate the appeal. The appellant's remedy is by way of a negligence action against its agent.

65. The application by the agent states, *"To date we have still not heard from HMRC in respect of the hardship application"*. That is incorrect. A letter was sent to the adviser on 20 June 2017. A follow-up email to the Tribunal by HMRC was sent on 19 July 2017, which was copied to the correct email address of the agent.

66. The Tribunal sought clarification of the hardship application from SKS on 18 August 2017. SKS did not respond. At no stage did the appellant or its adviser ever chase up the progress of its hardship application.

67. HMRC do not accept that there has been any administrative failings on their part [regarding use of the incorrect email address]. The incorrect email stewartsmith@sks.gb.com was used on 16 and 24 January 2018 because it was the address listed by the appellant when it filed the Notice of Representative dated 16 June 2017 and was only ever used twice by HMRC. When it became clear that emails were 'bouncing back' (twice), the other email address was used.

The circumstance of the case

68. The third matter to be considered by the Tribunal is all the circumstances of the case. However as part of this application, the Tribunal is not able to consider the merits of the case in any detail. HMRC acknowledge that there may be an arguable issue - see *Martland* as to whether the Tribunal can consider any of the strengths or weaknesses in the appellant's case.

69. HMRC will be prejudiced if this appeal were to be allowed to proceed in circumstances where no convincing explanation has been given for the delays and lack of contact from the appellant. Time and costs will be incurred in litigating a case which in HMRC's submission has been properly struck out. This is not a

trivial default, there is no good reason to reinstate in the present circumstances and it would be manifestly unjust, given the delays, to reinstate.

70. Officer Wilkes is no longer employed by HMRC and that therefore could lead to prejudice to HMRC if the decision had to be revisited.

71. The guidance given in *Denton* and *Martland* cases clearly state the need for prompt response to court directions.

72. The fact that the decision to issue a post-clearance demand for £603,548.68 will affect the company financially is not relevant to the application.

73. The suggestion that there has been any conspiracy to protect Officer Wilkes or that she made an erroneous decision is entirely refuted.

Discussion

Stage 1 - whether the breach was serious and significant

74. Unless orders are usually only made when a breach of a direction has already occurred. It is therefore relevant to consider the events which gave rise to the Unless direction.

75. The breach was a failure to provide information required by HMRC in order to consider the application for hardship. There appears to have been no reason why the information should not have been readily forthcoming. The appellants were aware of the request; the Tribunal wrote directly to the appellant on 14 June 2017 (not the agent, as at that stage it did not have a signed Notice of Representation from the appellant), alerting the appellant to the fact that the appeal may not proceed without the tax being paid or a hardship application being allowed by HMRC.

76. Promptly, on 16 June 2017, the agent wrote to HMRC and submitted a hardship, application on the basis that payment of £603,548.68 would cause serious cash flow problems for the appellant. On the same date the agent notified the Tribunal of the application. The agent commented to HMRC that until the appeal had been determined by the Tribunal, “the alleged debt cannot be pursued”.

77. Applications for hardship are almost always granted by HMRC, subject to the appellant providing evidence to support their application. HMRC wrote to the agent on 20 June 2017 requesting copy accounts, bank statements, details of assets and liabilities, together with cash flow projections and other relevant information. A reply was requested by 10 July 2017, which allowed the agent approximately three weeks to respond.

78. The agent says he did not receive HMRC’s letter even though it was correctly addressed. On 19 July 2017, by way of reminder to the agent, HMRC emailed the Tribunal to say that they had not received a response and copied in the agent.

HMRC used the correct email address. HMRC referred the Tribunal to s 16(3) Finance Act 1994 which states that an appeal cannot be entertained if the amount in dispute has not been paid or deposited unless the Commissioners are satisfied that the appellant would suffer hardship. HMRC asked the Tribunal to take 'appropriate action'.

79. It is plainly evident that at this stage, the agent (and the appellant) must have been aware of the information request although possibly not of the potential serious consequences that could follow for non-compliance. On 18 August the Tribunal wrote to the agent requesting an update on whether the appeal was to be pursued and if so when the hardship application information would be provided. A reply was requested within 14 days, that is, by 1 September 2017. The letter was correctly addressed to the agent and also sent by email.

80. On 16 October 2017 HMRC requested an update from the Tribunal. Unfortunately it appears that the Tribunal did not respond to this email. Following a reminder by HMRC on 4 December 2017, the Tribunal issued the Unless direction on 9 December 2017, accompanied by a letter to the agent. A copy was also sent to the agent by email.

81. What happened after that, in terms of the striking out and the agent's failure to address the situation or appeal the sanction is set out in the chronology above.

82. There was therefore, a serious and significant breach, as the appellant's failure to appeal the strike-out within the requisite 30 days has to be viewed against the background of the underlying breach of the Unless Direction, which clearly warned of the possibility of strike-out for non-compliance, albeit one issued by the Tribunal earlier in the proceedings (that is without the appellant having breached a prior direction), than would normally be the case. The cumulative effect of that breach and the agent's subsequent failure to retrieve the situation timeously has to be taken into account.

83. As against that, there is no reason why the appeal, if this Tribunal were minded to grant relief from sanction, could not be conducted efficiently, at proportionate cost and without HMRC being adversely affected by the breach. The fact that Officer Wilkes is no longer employed by HMRC and that the facts upon which she made her decision may have to be revisited by HMRC, is not a factor that this Tribunal should readily take into account, particularly given that there had not been an independent review by an Officer not previously involved in the matter, (the Notice of Appeal states that there had been no review, although one had been offered by Officer Wilkes.)

84. The Notice of appeal was in time and there is an argument that the appeal proceedings were still in their infancy, suggesting that any prejudice caused to HMRC would be minimal. The delay in applying for relief from sanction was four and a half weeks, which in the context of the overall time the matter had taken to

reach that stage could not be described as an inordinate delay which could in no circumstances be excused.

85. The appellant could no doubt have supplied the Hardship information had the failure of their agent to deal with this been drawn to their attention; there is no evidence that it was, until the agent was called by an HMRC collection agent and the appellant was alerted to the strike-out order.

Stage 2 - reasons for the breach

86. No acceptable explanation has been offered by the agent for the breach of the Tribunal's Unless Direction of 9 December 2017.

87. There is however some explanation of the agent's inaction following the strike-out order. HMRC sent a copy of their strike-out application of 16 January 2018 to the agent, and again on 24 January 2018, but to the wrong email address. HMRC did not send the application by letter as one might have expected and the appellant company was not copied into the application. The application was not received by the agent until 13 February 2018 when it was resent by HMRC to the agent's correct email address. The Tribunal struck out the appeal only three days later, on 16 February 2018.

88. Under regulation 8(4) of the Tribunal Procedure Rules the appellant must be given an opportunity to make representations in relation to the proposed striking out. Clearly the agent was given very little time within which to respond. It is not clear from the bundle that HMRC ever explained their email mistake to the Tribunal and it appears the Tribunal did not know that the agent had not received notice of the strike-out application. The Tribunal had allowed one month from the date of HMRC's 16 January 2019 application before issuing the strike-out order on 16 February 2018. Had HMRC notified the Tribunal that the agent had not been copied in to its original incorrectly addressed email of 16 January 2108, the Tribunal would not have struck out the appeal on 16 February 2018. The appellant would have been given a reasonable opportunity to respond.

Stage 3 - the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]. This involves a balancing exercise which assesses 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.

89. The promptness of the application is a relevant circumstance to be weighed in the balance along with all the circumstances. The agent did not lodge the Relief from Sanction application until two months after notice of the striking out. Likewise, the previous breach and delays by the appellant's agent must be taken into account as relevant circumstances. Equally we cannot ignore the fact that the appellant had not been given due notice of the strike-out application and an opportunity to respond.

90. Other circumstances to be taken into account are:

i. Whether HMRC would be prejudiced by reinstatement. For the reasons outlined above we do not consider that HMRC would suffer undue prejudice if the appeal was reinstated. Conversely the loss to the appellant if reinstatement were refused would be very significant and the company may go into administration.

ii. The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration. There is no compelling evidence or argument that to allow reinstatement would be prejudicial to the interests of good administration.

iii. Consideration of the merits of the proposed appeal. This goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a strong case than a weak one. It is important that the Tribunal at least considers in outline the arguments which the applicant wishes to put forward and HMRC's reply to them. This is not so that the Tribunal 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. So far as they can conveniently and proportionately be ascertained from the information we have and taking into account HMRC's acknowledgement that "the appellant has an arguable case" these are clearly reasons pointing towards granting relief.

Disposition

91. Taking all the circumstances of the case into account and the need to deal justly with the application for relief from sanction, we are satisfied that, the only reasonable conclusion, is to allow the application and grant relief from sanction.

92. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2019