TC07788

Procedure – application to set aside strike out – continuing non-compliance with direction - refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/04027

BETWEEN

VIKING ENTERPRISES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE GREG SINFIELD

Application dealt with on papers in chambers on 16 July 2020, without a hearing under Rule 29(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 having first read the application dated 17 February 2020 by the Appellant and the Respondents' Notice of Objection dated 30 March as well as email correspondence up to and including 30 June 2020.

DECISION

INTRODUCTION

1. By application dated 17 February 2020, the Appellant, Viking Enterprises Limited ('VEL'), applied for these proceedings to be reinstated pursuant to rules 2 and 8(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules'). The Respondents ('HMRC') opposed that application in a Notice of Objection dated 30 March and in subsequent emails.

BACKGROUND OR PROCEDURAL HISTORY OF PROCEEDINGS

2. On 2 March 2017, HMRC notified VEL that its application for approval under the Alcohol Wholesaler Registration Scheme ('AWRS') scheme had been refused. VEL applied for a departmental review of the refusal decision. On 22 April, HMRC notified VEL that a formal departmental review had upheld the refusal decision.

3. On 16 May, VEL lodged a Notice of Appeal against the refusal decision confirmed by a departmental review. The Tribunal acknowledged VEL's appeal on 5 June.

4. HMRC lodged their statement of case on 3 July. In the statement of case, HMRC alleged that:

(1) there was evidence of illicit trading by VEL which indicated that the business was a serious threat to the revenue or that key persons involved in the business have been previously involved in significant revenue non-compliance or fraud, either within excise or other regimes;

(2) there were connections between VEL or key persons involved in VEL and other non-compliant or fraudulent businesses;

(3) there were outstanding, unmanaged HMRC debts or a history of poor payments in relation to VEL's sole director;

(4) VEL had not provided sufficient evidence of its commercial viability and/or credibility;

(5) VEL's due diligence processes did not meet the requirements of HMRC Public Notice 2002, Section 12: Excise due diligence; and

(6) VEL's record keeping did not meet the requirements of HMRC Public Notice 2002, Annex A: Items and records to be kept and preserved.

5. The proceedings were subsequently stayed pending the decision of the Upper Tribunal and then, following a further appeal by HMRC, the Court of Appeal in *HMRC v Smart Price Midlands & Another*.

6. On 16 May 2019, the Court of Appeal released its judgment in *HMRC v Smart Price Midlands & Another* [2019] EWCA Civ 841, in which it clarified the scope of the disclosure to be made by HMRC in AWRS appeals before the First-tier Tribunal.

7. Between 16 and 25 September, HMRC attempted to agree case management directions with VEL but received no response.

8. On 27 September and, in modified form, on 18 October, HMRC applied for case management directions. The Tribunal endorsed and issued the proposed case management directions on 24 October.

9. The first case management direction was that both parties should complete disclosure of documents by no later than 5:00 pm on 29th November 2019. HMRC subsequently made five

applications for extensions of time to comply with their disclosure obligations and provide their list of documents. VEL either agreed or did not object to any of the applications. HMRC served their list of documents and disclosure statement on 12 December 2019. VEL did not serve a list of documents.

10. On 19 December, VEL's solicitors, ASW, notified the Tribunal and HMRC that they were no longer acting for VEL.

11. On the same day, having received ASW's letter, HMRC emailed VEL to ask when it would provide the list of documents. The email stated that if HMRC did not receive VEL's list of documents by 5:00 pm on the following day, they would apply to the Tribunal for an unless order. VEL did not respond.

12. Also on 19 December, the Tribunal wrote to ASW asking for confirmation that VEL had complied with its disclosure obligation under the case management directions. ASW responded that it was no longer instructed by VEL.

13. On 20 December, HMRC sent a follow up email to VEL stating that as VEL had failed to provide their list of documents, HMRC would now apply for an unless order without further reference to VEL. VEL did not respond. Later the same day, HMRC applied to the Tribunal for an order that unless VEL provided their list of documents within 14 days, the proceedings would be struck out automatically without further order. HMRC copied in VEL but it did not respond.

14. On 23 December, the Tribunal issued an unless order which stated that

> (1) unless VEL confirmed in writing that it intended to proceed with the appeal no later than 5:00 pm on 17 January 2020, the proceedings would be struck out automatically without further reference to the parties; and
>
> (2) unless VEL by the same date and time, also provided its list of documents together with an application for it to be permitted to comply out of time then the proceedings may be struck out without further reference to the parties.

15. The Tribunal sent the unless order to VEL by email and also emailed a copy to HMRC. VEL maintained that it has no record of receiving the unless order, either by e-mail or by post, and, therefore, it was unable to comply with it.

16. Notwithstanding the fact that the time limit for compliance with the first direction had been extended by two weeks, there was no extension of the dates for compliance with the remaining directions. The second direction provided that VEL was to serve witness statements by no later than 5:00 pm on 10 January 2020. VEL did not serve any witness statements.

17. On 15 January, VEL emailed HMRC in response to their email of 19 December referred to at [11] above. VEL stated that it was in the process of arranging alternative representation and asked for more time to organise that.

18. HMRC replied by email on 16 January attaching a copy of the unless order issued by the Tribunal and stating that HMRC expected VEL to comply with its terms.

19. At 19:02 on 17 January, HMRC emailed the Tribunal and asked for confirmation that the proceedings had been struck out because VEL had failed to comply with the terms of the unless order of 23 December 2019.

20. On 21 January, the Tribunal sent an email to VEL stating that its appeal had been automatically struck out and that it had 28 days, ie by 18 February, to make a reinstatement application.

21. On 22 January, VEL wrote to the Tribunal requesting that its appeal be reinstated as it had only found out in the last week of December that its lawyers had withdrawn their services. VEL stated that it was looking for representation but it did not have sufficient time over the Christmas holidays.

22. Between 22 January and 10 February, HMRC sent five emails to the Tribunal asking for confirmation that VEL's appeal had been struck out and asking whether VEL had applied for it to be reinstated.

23. On 12 February, the Tribunal sent an email to HMRC which attached a copy of its email to VEL on 21 January informing VEL that the appeal had been struck out (see [20] above). The email also confirmed that, at that time, the Tribunal had not received any formal application to reinstate the appeal.

24. On 18 February, ASW filed an application dated 17 February by VEL for its appeal to be reinstated. Unfortunately, due to a clerical error, the application was not referred to a judge at that time. ASW copied the application to HMRC who lodged a Notice of Objection to the application with the Tribunal on 30 March. Unfortunately, the impact of the coronavirus pandemic meant that the application and objection were not dealt with at the time. A follow up email from ASW on 7 May was not acted on until early June.

RELEVANT LEGISLATION

25. Rule 2 of FTT Rules provides

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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> (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;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues.
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> (3) The Tribunal must seek to give effect to the overriding objective when it-
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> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

26. Rule 8 of the FTT Rules relates to the striking out of a party's case and provides as follows:

> "(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.
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> …
>
> (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;
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> …
>
> (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."

CASE LAW

27. In *Martland v HMRC* [2018] UKUT 178 (TCC), the Upper Tribunal provided guidance on the correct approach to applications for permission to appeal out of time. The Upper Tribunal's guidance is summarised at [44] of *Martland*:

> "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 v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926]:
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> > (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."

28. The Upper Tribunal observed at [45] that the balancing exercise in stage three of the *Denton v TH White Ltd* process 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.

29. It is clear from the judgment of the Supreme Court in *BPP Holdings Ltd v HMRC* [2017] UKSC 55 that the same approach should be applied to applications for proceedings to be reinstated where they have been struck out for failure to comply with a direction. The *BPP* case concerned an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an unless order rather than a strike out but nothing turns on that.

30. The application of *Martland* to an application to reinstate an appeal was considered by the Upper Tribunal in *Dominic Chappell v the Pensions Regulator* [2019] UKUT 209 (TCC). In that case, the Upper Tribunal held that a Tribunal should not take the merits of an appellant's case into account when considering an application for reinstatement following striking out for failure to comply with an unless order, unless the appellant has an unanswerable case (see [86] and [93]). The Upper Tribunal also held at [95] that, in assessing the seriousness of the breach of an unless order, the Tribunal should consider the underlying breach and the failure to carry out the obligation which was imposed by the original direction or rule and extended by the unless order when assessing the seriousness and significance of that breach.

SUBMISSIONS BY VIKING ENTERPRISES

31. In its application, VEL stated that it had no record of receiving the unless order issued by the Tribunal on 23 December 2019 and was therefore unable to comply with it. VEL pointed out that it was without a representative at the time which was a very busy trading period for the company.

32. VEL also relied on the fact that it responded to the Tribunal's email of 21 January 2020 informing VEL that its appeal had been struck out within a day of receiving that communication. VEL submitted that this strongly suggests that VEL did not receive the original unless order.

33. Addressing the *Martland* factors, VEL submitted that the length of any delay was short by reference to the length of time that these proceedings have been stayed. By this, it refers to the stay pending a final decision in the *Smart Price* case and the extensions of time, sought by HMRC, for compliance with the directions to provide disclosure and service of a list of documents. VEL contended that if HMRC had accepted its disclosure obligations in this type of case at the outset of the proceedings then the hearing of the appeal would have happened by now. VEL submitted that if the application to reinstate is refused then HMRC will have profited from that delay.

34. VEL maintained that, considering all the circumstances of the case, HMRC's allegations are serious ones that plainly imperil the very existence of the company. If the appeal is not reinstated then VEL will not be able to trade in any manner that falls within the AWRS.

35. VEL submitted that reinstating the appeal would cause little prejudice to HMRC and it would best serve the over-riding objective of dealing with cases fairly and justly.

SUBMISSIONS BY HMRC

36. HMRC's principal submission was that VEL had failed to provide disclosure and a list of documents by the extended compliance date of 12 December 2019 and that the failure continued up to and beyond the date of VEL's application for reinstatement on 18 February 2020.

37. HMRC submitted that VEL was aware of its obligation under the directions because HMRC had sent VEL an email on 19 December asking when it would provide the list of documents, see [11] above, to which VEL responded on 15 January 2020, see [17] above. HMRC pointed out that VEL was also aware of the existence of the Tribunal's unless order because HMRC sent VEL a copy of the unless order on 16 January, see [18] above.

38. HMRC also observed that VEL had still not provided any disclosure or list of documents at the time of their Notice of Objection dated 30 March. HMRC acknowledged that VEL made its application for reinstatement promptly but assert that VEL had not provided any credible reason for its failure to provide disclosure and a list of documents, which remained outstanding. HMRC asserted that, as a result, there is obvious prejudice to them.

39. HMRC relied on the principle of finality and referred to comments made by the FTT in *Bilkus & Boyle Solicitors v HMRC* [2018] UKFTT 571 (TC) at [71]-[75]. I do not find that case or those comments helpful in this instance. The *Bilkus & Boyle* case concerned an application to reinstate that was made almost one year after the proceedings had been struck out. The FTT observed that "… there can be no justification to consider an application for reinstatement of an appeal that is so significantly out of time." That is not the situation in this case where the application to reinstate was made in time.

DISCUSSION

40. Applying the three-stage approach set out in *Denton v TH White Ltd*. I must first consider the seriousness and significance of the failure to comply with the original direction to provide disclosure and a list of documents and the failure to comply with the unless order.

41. The purpose of the original direction to provide disclosure and a list of documents, which is quite standard in proceedings such as these, is to ensure the parties are aware of each other's documentary evidence and are able to prepare properly and efficiently for a hearing. The list of documents is an essential step in the preparation of a case for a hearing and a failure to provide such a list brings that process to a halt. Failure to comply with that direction is clearly a serious matter and significant in that it effectively prevents there being any substantive hearing.

42. The second stage is to consider the reason for the failure to comply. VEL has not put forward any reason for its failure to comply with the original direction to provide disclosure and a list of documents by the extended time limit of 12 December 2019. At that time, VEL was still represented by ASW but no reason has been given by ASW or VEL at the time or subsequently to explain why VEL did not comply with the direction. Accordingly, I conclude that there was no good reason for VEL's failure to comply with the original direction.

43. That failure was compounded by VEL's failure to comply with the second part of the unless order which required VEL to comply with the original direction. Although VEL would still have been at fault for not complying as originally directed, if it had complied with the unless order then it would have avoided its appeal being struck out. VEL did not do so.

44. VEL's principal submission in support of its application for reinstatement is that it had no record of receiving the Tribunal's unless order which led to the proceedings being struck out and was therefore unable to comply with it. VEL said that when it was notified by the Tribunal that its appeal had been struck out, it acted with due expedition. As HMRC pointed out, VEL was or should have been aware of aware of the unless order on 16 January 2020 when VEL received an email from HMRC attaching a copy of the unless order. That gave VEL time to comply with the unless order or apply to the Tribunal for an extension of time. VEL did neither but waited until the Tribunal informed it by email on 21 January that the appeal had been struck out before contacting the Tribunal. Even then, VEL did not comply with the original direction as repeated in the second part of the unless order.

45. I consider that it is relevant that VEL has never complied or sought to comply with the terms of the original direction to provide disclosure and a list of documents or with the terms of the second part of the unless order. Where proceedings have been struck out on the ground that an appellant has failed to comply with a direction and consequential unless order then it seems to me that any application for reinstatement should not be granted unless the appellant has complied or provided a compelling explanation for the failure to comply. In this case, VEL has done neither. Accordingly, I am compelled to conclude that there was no reason for VEL's continuing failure to comply with the direction to provide disclosure and a list of documents in the original direction and the second part of the unless order.

46. The third stage is to consider all the circumstances of the case, balancing the merits of the reasons given for the default and the prejudice which would be caused to both parties by granting or refusing to reinstate the appeal. I have already found that there was no good reason for VEL's failure to comply with the directions and unless order so no question of merits arises. The prejudice to VEL is obvious in that it will be denied the chance to argue its case and must necessarily lose its appeal. Against that is the need to ensure that appeals in the FTT are conducted efficiently and the need to enforce compliance with the FTT Rules. I bear in mind that, as can be seen from the facts set out above, VEL has a history of not responding to HMRC

and the Tribunal as well as not complying with the original direction and the second part of the unless order. Further, the non-compliance with the directions continues. I have concluded that it would not be right, in the circumstances of this case, to reinstate the appeal in circumstances of a clear and continuing deliberate failure to comply with a direction.

47. For the reasons given above, I refuse VEL's application for its appeal to be reinstated and, therefore, this appeal remains struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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 FTT Rules. 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.

JUDGE GREG SINFIELD

CHAMBER PRESIDENT

RELEASE DATE: 22 JULY 2020