[2021] UKFTT 0046 (TC)

TC08032

PROCEDURE – reinstatement application – appeal struck out following breach of unless order – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2009/11943

BETWEEN

HAPPY CUSTOMER LIMITED T/A SUBWAY **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

The Tribunal determined the appeal on the papers without a hearing with the consent of the parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic. The documents to which I was referred are the Appellant's application, HMRC's objections, correspondence between the parties and appendices attached to the correspondence.

DECISION

INTRODUCTION

1. This application is for the reinstatement of an appeal which was struck out by the First-tier Tribunal (FTT) in September 2015. The application for reinstatement was made following receipt of HMRC's demand for payment of the assessments in September 2020.

BACKGROUND AND FACTS

2. The Appellant's appeal relates to the VAT treatment of hot take-away food. The appeal was made by the Appellant in 2009 against assessments issued in respect of VAT for the periods 03/06 to 09/08 (the Appeal).

3. On 18 May 2015 HMRC wrote to the Appellant to advise that HMRC intended to apply to the Tribunal to strike the Appeal on the basis that it had no reasonable prospect of success in the light of the Court of Appeal's decision dated 10 June 2014 in *Sub One Limited (t/a Subway)(In Liquidation)* [2014] EWCA Civ 773 *("Sub One")* concerning the application of the standard rate of VAT to hot take-away food.

4. On 13 July 2015, the FTT wrote to the Appellant requesting confirmation about whether it intended to pursue the Appeal, noting that if the Appellant did intend to pursue its appeal, it should provide a response to HMRC within 14 days to explain its grounds of appeal given the decision of the Court of Appeal in *Sub One*.

5. On 20 July 2015, in the absence of a response, the FTT directed that unless the Appellant notified the FTT that it intended to pursue the Appeal by no later than 4pm on 25 August 2015, the Appeal would be struck out without further reference to the parties, and further, that unless the Appellant notified the FTT and HMRC of its revised grounds of appeal following the decision of the Court of Appeal, the Appeal might be struck out without further reference to the parties (the "Unless Order").

6. On 16 September 2015, the FTT wrote to the Appellant stated that, in the absence of a response to directions dated 20 July 2015 from the Appellant, or from the Appellant's representative, the Appeal had been automatically been struck out 13 September 2015.

7. In May 2015 HMRC opened a VAT enquiry into the representative member of the Appellant's current VAT group, Happy Customer Holdings Ltd. The VAT group was formed on 1 January 2013 and the Appellant joined the VAT group on 5 January 2013. The enquiry was closed at some point after 22 September 2015 without a VAT assessment being raised. The Appellant has questioned why no reference was made to the outstanding assessments the subject of the Appeal in the course of the enquiry. HMRC have responded that the officer involved (as highlighted in correspondence produced by the Appellant) had no involvement in the assessments the subject of the Appeal made in 2009 and struck out on 13 September 2015.

8. On 16 September 2020 HMRC's VAT-Debt Management wrote to the Appellant seeking payment of £151,153.79 outstanding. This relates to VAT that was the subject of the assessments for the 03/06 to 09/08 periods and the Appeal against those assessments that was struck out on 13 September 2015.

THE PARTIES' APPLICATION AND OBJECTION

9. On 2 October 2020, the Appellant filed an application to reinstate the Appeal. The Appellant accepts that it failed to respond to the Unless Order, but claims that this was because the appeal process was "misunderstood" between the Appellant and its representative at the time (Dipak Jotangia Dass Solicitors ("Dass Solicitors")). The Appellant claims that it understood that the solicitors had been seeking further specialist advice in respect of both

quantum and other possible new revised liability grounds on behalf of several Subway franchisees as a group action, without specifically naming the appellant. The Appellant claims that it believed that the appeal process was still ongoing until it received the letter from HMRC dated 16 September 2020 (referred to in paragraph 8 above) seeking payment of the VAT assessments the subject of the Appeal.

10. The Appellant claims that it had received no communication from HMRC concerning the assessments since 14 September 2009. When the Appellant received the demand in September 2020 it appointed new advisers, RA Accountants LLP, who have advised the Appellants that their case is suitable for alternative dispute resolution (ADR). The Appellant submits that it should be given the "opportunity to explore the various avenues available". The Appellant's application is therefore that the Tribunal should reinstate the Appeal in accordance with the overriding objective, and that it should be referred for alternative dispute resolution as the appropriate forum for the Appellant to discuss the matter with HMRC and demonstrate why the assessment is excessive.

11. The Appellant relies on *Deluni Mobile Limited C&E Commrs* (VTD 19205) in support of its application on the basis that the tribunal in that case decided that the most important factor to take into account when considering whether to exercise its discretion is the prejudice caused to a party by the other party's failure to comply with a direction. The Appellant submits that in this case HMRC have not suffered prejudice.

12. HMRC object to the Appellant's application to reinstate the Appeal of the grounds that the Appellant has provided no compelling reason why its appeal should be reinstated. The Appellant has provided no credible explanation why it failed to respond to the Tribunal's letters of 13 and 20 July 2015 or to act on receipt of the letter of 16 September 2015.

13. HMRC accept that there has been a passage of some years between the strike out of the Appeal and the collection of the amount the subject of the disputed assessment, but the debt remains valid and collectable. Following the decision of the Court of Appeal in *Sub One* that determined the issue under appeal, alternative dispute resolution would not be appropriate.

RELEVANT LAW

14. The jurisdiction of the FTT in relation to the strike out and reinstatement of an appeal is set out in rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). The relevant provisions in rule 8 are 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.
>
> (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."

15. Rule 5 of the Tribunal Rules states that the Tribunal may extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with the provision of another enactment setting down a time limit.

16. Rule 2 of the Tribunal Rules provides that the Tribunal should apply the overriding objective when considering an application for reinstatement of an appeal made under the Tribunal Rules. Rule 2 provides as follows:

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

17. The Appellant's application for its appeal to be reinstated was not made within the 28 day time limit set out in Rule 8(6). The Appellant seeks to rely on the authority of a case that precedes the decisions of the Court of Appeal and Supreme Court in *Denton and others v TH White Limited and others* [2014] 1WLR 3926 ("*Denton*") and *BPP Holdings Limited v HMRC* [2017] 1 WLR 2945 ("*BPP*") that determined the approach to be adopted in considering relief from sanctions and extensions of time. The Upper Tribunal's decision in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") has since determined the approach to be taken by the FTT in the exercise of its discretion in relation to relief from sanctions in the context of permission to appeal out of time, and the decisions in *Pierhead Purchasing Ltd v Revenue and Customs Commrs* [2014] UKUT 321 ("*Pierhead*") and

Dominic Chappell v The Pensions Regulator [2019] UKUT 0209 ("*Chappell*") provide guidance in relation applications for reinstatement.

18. In *Martland* the Upper Tribunal considered the approach to be taken by the FTT in relation to applications for relief from sanctions following the decisions in *Denton* and *BPP*. The Upper Tribunal concluded by providing the FTT with the following guidance [at paragraphs 44-47]:

> "[We consider that] 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.
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> 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. … The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
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> 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. "

19. The guidance in *Martland* was considered by Judge Herrington in *Chappell* in the context of an application for reinstatement following the making of an unless order. The decisions also reviews cases that considered reinstatement applications, including the decision of the Upper Tribunal in *Pierhead*. Judge Herrington confirmed that the tribunal should adopt the three-stage approach set out in *Martland*, adapted to take account of the fact that the application concerns the reinstatement of an appeal as follows(at para [99]):

> " In the light of the analysis set out above, in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* as quoted above, adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order, taking account also of the previous breaches of the Rules that led to the making of the Unless Order. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders. I shall only consider the merits of [the case] to the extent that it appears that [the] case has any feature such as those that I have described at [93] above."

20. The last sentence in the passage above refers to Judge Herrington's conclusion that, in dealing with an application for reinstatement following a strike out, the tribunal should follow the binding authority provided by the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495. He concluded as follows at [86]:

> "In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch*, generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuburger said at [29] of the judgment in that case:
>
> > "In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment…."

DISCUSSION

21. I have considered the Appellant's late application for reinstatement in accordance with the powers and discretions set out in rules 8 and 5 of the Tribunal Rules, the overriding objective in rule 2 of the Tribunal Rules and the guidance provided by the caselaw summarised above. I have gratefully adopted the headings used in *Chappell* (discussed in the passage cited in para 19 above) in my consideration of an application.

Seriousness and significance of the breach

22. HMRC informed the Appellant in May 2015 that they intended to apply to the FTT to strike out the Appeal on the grounds that it had no reasonable prospect of success following the decision in *Sub One*. The Appellant was asked by the FTT to confirm if it wished to pursue its appeal, and to explain its grounds, taking into account the decision in *Sub One*, but it failed to respond to this letter, the Unless Order and the letter advising that the Appeal had been struck out. This was a profoundly serious and significant breach of the clear and necessary requirements of litigation before the FTT in these circumstances.

23. The Appellant's application for reinstatement of the Appeal was not made within the 28 days of the notification of the strike out. The 5-year delay cannot be described as anything other than serious and significant.

Reasons why the breach occurred

24. The Appellant claims that its representative at the time of the issue of the Unless Order, Dass Solicitors, was seeking specialist advice in respect of quantum and possible new liability grounds on behalf of several Subway franchisees. The Appellant has not provided evidence of these grounds or of the ongoing engagement in relation to the Appeal. The Appellant claims that it was not aware that the progress of the Appeal had stopped, and blames the late application on its misunderstanding that the appeal was still in progress.

25. There is no suggestion that the Appellant was misled by its representative. The Appellant was aware of the outcome of the decision in *Sub One* and, presumably, either did not hear from its representative about the progress of its appeal or did not seek an update. The submissions suggest that the Appellant assumed that the amounts assessed had been written off or would not be pursued, notwithstanding the outcome of the litigation in *Sub One* and its failure to take any further action in respect of its appeal for over 5 years. I note that HMRC have not explained the reason for the delay in collection, but it is an appellant's

responsibility to pursue its appeal and the progress of an appeal is not be dependent on HMRC chasing for payment of the amounts assessed. Similarly, an enquiry into later VAT periods need not address outstanding assessments in respect of earlier periods.

26. The Appellant has referred to both the absence of contact from HMRC between 2009 and 2015, and from 2015 until 2020. The evidence provided does not make clear, but it is possible that the 2009 Appeal was stayed pending the decision in Sub *One* and, if so, the Appellant would have been aware of this. Any complaint about the delay in collection of the debt after the striking out of the appeal is outside the scope of the Appeal.

27. The Appellant has not provided a good reason for the breach of the Unless Order or for the delay in applying for a reinstatement until some 5 years after the expiry of the 28-day time limit.

Evaluation of all the circumstances

28. In evaluating all the circumstances, I note that both *Martland* and *Chappell* refer to the fact that particular importance should 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.

29. The Appellant has not pursued its appeal or complied with the FTT's directions. The appointment of a new representative does not hide the fact that the Appellant took no action for 5 years. Further, the Appellant does not dispute that the subject matter of the Appeal was determined by the decision in *Sub One*, and as HMRC submit, the enforceability and collection of the debt is outside the scope of an appeal to the FTT. A late application to reinstate the Appeal in these circumstances, to discuss the enforceability and collection of the debt with HMRC, is not conducting litigation efficiently.

30. It follows from this that the prejudice which would be caused to HMRC if the appeal were to be reinstated is considerable. It would mean that HMRC would have to incur the time and costs of dealing with an appeal in relation to which an application under Rule 8(3)(c) (on the grounds that it had no reasonable prospect of succeeding) was in point, and which has been closed for 5 years.

31. The prejudice which would be caused to the Appellant by refusing the application to restore is that it would not have an opportunity to "explore the various avenues available", presumably including the possibility of producing further grounds of appeal to support its appeal following the decision in *Sub One* or to challenge the quantum of the debt. As the Appellant has failed to do this over the last 5 years, this prejudice is minimal. As the FTT does not have jurisdiction to consider the enforceability or collection of the debt or complaint abouts HMRC's conduct, the refusal of the application does not prejudice the Appellant's ability to discuss the debt with HMRC's debt management service or to make its complaint through HMRC's complaints process about the very serious and unexplained delay in collection of the debt.

32. I am only required to consider the merits of the substantive appeal to the extent outlined in the decision in *Chappell*. The Appellant did not provide further grounds of appeal in the light of *Sub One* when HMRC stated that they intended to apply for the Appeal to be struck out under Rule 8(3)(c), or in response to the Unless Order, or in support of this application. Instead, the Appellant states that it needs time to challenge the enforceability and collection of the debt, and seeks an opportunity to discuss this with HMRC through the ADR process. The Appellant has not provided grounds for the Appeal or even as to the basis on which it may dispute the quantum of the debt. The Appellant clearly does not have an unanswerable case under appeal.

Conclusion

33. I have taken account of the factors that weigh in favour of a reinstatement and those that point against in the light of the overriding objective, and conclude that the prejudice to the Appellant is heavily outweighed by the other factors considered above. I do not underestimate the difficulties caused by HMRC's delay in collecting the debt, but the FTT is not the forum in which to make the complaint or seek redress.

DECISION

34. For the reasons set out above, the application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2021