Neutral Citation: [2022] UKFTT 00465 (TC)

Case Number: TC08665

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2019/02748

REINSTATEMENT following striking-out – three-stage test - Chappell v the Pensions Regulator *applied – application dismissed*

Judgment date: 08 December 2022

Decided by:

TRIBUNAL JUDGE ALEKSANDER

Between

JEFFREY JOHN ASHFIELD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the application for reinstatement on [ ] without a hearing under the provisions of Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (striking out a party's case) having first read the Appellant's application dated 14 September 2022, HMRC's objections dated 10 October 2022 and the Appellant's reply dated 27 October 2022.

DECISION

INTRODUCTION

1. Mr Ashfield's appeal was automatically struck-out under Tribunal Rule 8(1) because he failed to comply with an "unless order" released on 5 July 2022 which required him to provide his list of documents and witness statements to HMRC (and copied to the Tribunal) by no later than 4:30pm on 29 July 2022. He was notified of the striking out by letter dated 18 August 2022.

2. On 14 September 2022, Mr Ashfield applied for his appeal to be reinstated.

BACKGROUND FACTS

3. In considering Mr Ashfield's application for reinstatement, it is helpful to set out a chronology of the matters leading up to the striking-out of his appeal.

4. Following an investigation into Mr Ashfield's tax affairs, on 12 April 2013, HMRC issued closure notices for 1999-00 and 2002-03 and discovery assessments for 2000-01, 2001-02, 2004-05 and 2005-06 assessing additional tax totalling £208,751.59. On the same date they also issued penalty assessments totalling £177,397 in respect of those years. Significant potential interest charges would have accrued since that time.

5. On 28 February 2019, Mr Ashfield filed a late appeal against the assessments and penalties. Following a hearing on 17 February 2020, the Tribunal granted Mr Ashfield's application for permission to appeal out of time.

6. The Tribunal issued directions for the conduct of the appeal on 24 January 2022. These directed that (amongst other things):

   (1) The parties (a) serve on each other and on the Tribunal a list of the documents on which they intended to rely by 11 March 2022, and (b) provide copies of the documents on that list to the other party if that other party did not already have a copy;

   (2) Serve their witness statements on the other party by 8 April 2022 and notify the Tribunal that they had done so.

7. On 4 April 2022 HMRC applied for an extension of time for service of their list of documents (and copies) and witness statements – that the time for service by HMRC of their witness statements be extended to 30 April 2022, and at the same time they would serve copies of all documents relied upon in their lists of documents and any further documents exhibited to the witness statements. Mr Ashfield's time for service his witness statements would be extended to 28 May 2022. Mr Ashfield consented to HMRC's application.

8. On 29 April 2022, HMRC emailed Mr Ashfield advising that hard copies of their list of documents and bank documents, being over 300 pages of evidence, were being posted to him, and that the witness statements would be emailed to him on 3 May 2022 (30 April being a Saturday and 2 May being a bank holiday). In that email, HMRC advised Mr Ashfield that the next step would be for him to respond with a witness statement of his own having looked at the evidence.

9. On 3 May 2022 HMRC applied to the Tribunal for an extension of time for the service of the witness statements and for an amendment to their list of documents, as some documents exhibited to one of the witness statements had (in error) been omitted from the original list.

10. HMRC's applications of 4 April and 3 May 2022 came before me, and I granted both. The letter to the parties notifying them of my decision was dated 25 May 2022 and included the following:

> Judge Aleksander also notes that the Tribunal does not appear to have received the Appellant's List of Documents in compliance with Direction 1, which was due on 11 March 2022, and reminds the Appellant that his witness statements are due on 28 May 2022. It is important that each party to an appeal discloses in advance to the other party the documents and the evidence of the witnesses on which they rely, so that both parties can properly prepare for the hearing. If the Appellant wants to rely on any documents that are not already included in HMRC's list, please ensure that the list of these documents are sent to the Tribunal and to HMRC within 14 days (together with an application for them to be admitted out of time). Copies of such documents must also be sent at the same time to HMRC. If there are no such documents, please so inform both the Tribunal and HMRC.
>
> The appellant must ensure that his witness statements are served on HMRC by the due date (and that he notifies the Tribunal that he has done so). Please remember that where the appellant intends to rely on his own evidence, a witness statement by the appellant must still be provided.

11. In view of the failure of Mr Ashfield to comply with the directions for the service of his list of documents and witness statements, on 16 June 2022 the Tribunal issued an unless order. Mr Ashfield was given a deadline of 30 June 2022 to confirm his intention to proceed with the appeal, also, by the same date, he was required to provide his list of documents and witness statements together with an application for their service to be allowed out of time.

12. HMRC state (and this is not challenged by Mr Ashfield) that they wrote to Mr Ashfield on 16 June 2022, enclosing for reference a copy of the Tribunal's unless order. and explained that he would need to provide to the Tribunal his list of documents or confirm there are no further documents, and that he will not be allowed to continue with his appeal if he fails to do this. HMRC also advised that he will need to provide a witness statement explaining why he thinks the assessments and penalties were not payable. Apparently, Mr Ashfield replied to HMRC on the same day, thanking HMRC for the guidance. He explained "I was not aware of the timetable but will now do my best to comply".

13. On 20 June 2022 Mr Ashfield applied to the Tribunal asking for an extension of time until 30 July 2022 for submission of his list of documents and witness statement. The Tribunal granted him an extension of time until 4.30pm on 29 July 2022 for service of his list of documents and witness statement (30 July was a Saturday). The directions stated that this was a final extension of time and unless he complied with these directions in full, then the proceedings would be automatically struck out.

14. HMRC state that Mr Ashfield contacted them on 7 July 2022 to ask whether they would agree to a further extension of time. HMRC apparently responded advising it was for the Tribunal to decide. No such application was ever made by Mr Ashfield.

15. On 22 July 2022, the Tribunal received Mr Ashfield's list of documents, but not his witness statements.

16. As Mr Ashfield failed to serve his witness statements, his appeal was automatically struck out, and he was so notified by a letter from the Tribunal dated 18 August 2022.

RELEVANT LEGISLATION

17. Rule 8 of Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules"), so far as material, provides:

> (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.

> […]
>
> (5) If the proceedings, or part of them, have been struck out under paragraph (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 on which the Tribunal sent notification of the striking out to the appellant.

18. The Upper Tribunal in *Chappell v the Pensions Regulator* [2019] UKUT 209 (TCC) decided that when exercising its discretion to reinstate, the this Tribunal must apply the three-stage test articulated in *Denton v White* [2014] EWCA Civ 906. This test was summarised by the Court of Appeal in *Denton* at [24] as follows:

> 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) [of the Civil Procedure Rules]. 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) in CPR 3.9]."

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

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

THREE STAGE TEST

First stage – identify and assess seriousness and significance of the default

20. The default that led to the striking-out was the failure of Mr Ashfield to file his witness statement. This was the subject of an "unless order" which stated that if he failed to comply with the directions, his appeal would automatically be struck out.

21. The failure to comply with directions is a serious matter, and failure to comply with directions which are clearly labelled as giving a final extension of time and will lead to a striking-out if not complied with, is clearly a serious and significant matter.

Second stage – why default occurred

22. In his application, Mr Ashfield states that the reason why he failed to file any witness statements (or a statement that no witness evidence would be given) was due to a "misunderstanding" on his part "as the appellant, I did not realise I am also classed as my own witness and that I am required to provide a statement as such".

23. I do not find this explanation to be credible. The Tribunal's letter of 25 May 2022 makes it clear that Mr Ashfield needed to provide a witness statement in respect of his own evidence. And this point was reinforced by HMRC in their emails of 29 April and 16 June 2022. Mr Ashfield was aware of the need for him to provide a witness statement in respect of his own evidence.

Third stage – all the circumstances of the case

24. Mr Ashfield makes the following points in support of the appeal being reinstated:

(1) He will provide a witness statement should his application for reinstatement be successful;

(2) Mr Ashfield was given permission to file his notice of appeal out of time. One of the reasons given by the Tribunal for allowing his application was because of the serious prejudice that he could suffer if permission were refused. Mr Ashfield submits that to refuse reinstatement would be contrary to the approach taken in relation to that application;

(3) He has not objected to HMRC's previous applications for extensions of time, and that his application for reinstatement is in reality nothing more than an application for an extension of time for service of his witness statement;

(4) HMRC control the records on which he has to rely, as all the relevant documents were sent to HMRC or to his previous advisers (Price Waterhouse), who no longer have them. This prejudices Mr Ashfield, as he will need to review the documents copied to him by HMRC which extend to over 300 pages. In consequence, should his application for reinstatement be granted, he should be allowed 60 days to review HMRC's documents before being required to file his witness statement; and

(5) There should be an opportunity for Mr Ashfield and HMRC to meet following service of his witness statement to see if settlement of the appeal by agreement is possible.

25. That Mr Ashfield will need to provide a witness statement if this appeal is reinstated is a statement of the obvious. But Mr Ashfield does not explain why such a statement had not been provided (or could not be provided with his application for reinstatement). Mr Ashfield had three months from the service of HMRC's evidence to the final deadline given by the second unless order – effectively he has already had the benefit of two extensions of time for the service of his witness evidence, The fact that he now seeks a further 60 days to undertake a review suggests that he has not yet reviewed any of this evidence – a review that he ought to undertaken in May. I acknowledge that there is a considerable volume of documentation to be reviewed. But much of this ought to be familiar to Mr Ashfield as it was originally provided by him to HMRC through his then accountants. It is only because he did not retain copies (and his former advisers are unable to provide copies to him) that copies had to be provided to him by HMRC. This lax attitude to his conduct of this appeal does not sit well with the requirement for him to conduct litigation efficiently and to comply with rules, directions, and orders.

26. I appreciate that Mr Ashfield will suffer prejudice if his appeal is not reinstated. However, the cause of this prejudice was his own failure to comply with the Tribunal's directions in circumstances where he was warned that failure would result in striking out.

27. I note that Mr Ashfield did not object to HMRC's previous applications for extensions of time. On the other hand HMRC did not object to his application for an extension of time. The fact that the parties may have previously agreed to extensions of time is irrelevant. The important point is that he was warned by the Tribunal in the second unless order that this was to be a final extension, and that failure to comply would lead to a striking out of his appeal.

28. I find that Mr Ashfield is disingenuous in stating that HMRC "control" the records on which he relies. A significant proportion of these documents were provided by Mr Ashfield to HMRC and his previous representatives. It is not the fault of HMRC that he did not keep copies, and that his previous representatives are unable to provide him with copies. HMRC have provided him with copies of the documents on which they intended to rely – and these have within his possession since the beginning of May 2022.

29. Mr Ashfield has previously raised in correspondence with the Tribunal the possibility of a meeting between the parties to see if settlement by consent was possible. The Tribunal wrote to the parties in March 2022 stating that it was always open to the parties to arrange such a meeting. There has been nothing to stop Mr Ashfield arranging a meeting with HMRC to discuss settlement at any time in the last nine years (since 2013 when the closure notices and discovery assessments were made). The fact that no such meeting has taken place – or the possibility that such a meeting might be arranged in the future – is not relevant to reinstatement.

CONCLUSION

30. In reaching my decision, I am required to give effect to the overriding objective in FTT Rule 2, that the Tribunal must deal with cases fairly and justly. The parties are also required to help the Tribunal in furthering the overriding objective, and must co-operate with the Tribunal generally (FTT Rule 2(4)).

31. I have found that Mr Ashfield's default, namely his failure to comply with an unless order, is serious and significant. I have also found that his explanation for the default is not credible, as he was informed by the Tribunal in terms that he would need to provide a witness statement if he was giving evidence himself.

32. When looking at all the circumstances of the case, I find that none of the points raised by Mr Ashfield weigh heavily in favour of restoring his appeal when balanced against the requirement set out in *Denton* to give particular weight to the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders. I find that it is in the interests of fairness and justice that the requirements set out in *Denton* are met.

33. I find that Mr Ashfield's failure to comply with an unless order demonstrates lack of co-operation with the Tribunal. I find that he was warned of the consequences of failure to comply with the order, and that is neither unfair nor unjust for the appeal to be struck out in these circumstances and for it not to be reinstated.

34. I dismiss Mr Ashfields application. His appeal is not reinstated.

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.

NICHOLAS ALEKSADER
TRIBUNAL JUDGE

Release date: 08th DECEMBER 2022