[2018] UKFTT 367 (TC)

TC06581

Appeal number: TC/12/4756

PROCEDURE – whether witness statement complied with rule 8(1) unless order - no – whether, if wrong on that, disclosure should be ordered – no – whether appeal should be struck out as lacking reasonable prospect of success – yes if not already struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FOOTLONG SUBS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 15 June 2018

There was no appearance on behalf of the Appellant

Ms S Hancox, HMRC officer, for the Respondents

DECISION

Non appearance of the appellant

1. No one appeared on behalf of the appellant. Rule 33 provides that if a party fails to attend a hearing, the Tribunal may proceed with the hearing but only if the Tribunal:

> (a) Is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) Considers that it is in the interests of justice to proceed with the hearing.

Notification of hearing?

2. The appellant had appointed a representative in these proceedings: FTI Fox Consultants ('FTI Fox'). The Tribunal had notified FTI Fox of the date and place of the hearing and FTI Fox were clearly aware of this as they had referred to the hearing in recent correspondence.

3. Moreover, the appellant had been sent notification of the hearing directly. Although the notification was not sent to the appellant's registered office, it had been sent to the address which was provided by the appellant on its notice of appeal and the Tribunal had not been informed that this address was no longer a current address for correspondence.

4. In these circumstances, I was satisfied that the appellant knew of the hearing and/or reasonable steps had been taken to notify the appellant of the hearing.

Interests of justice?

5. It was clear, at least from about a week before the hearing, that FTI Fox did not intend to represent the appellant at the hearing: Mr Z Isaac of FTI Fox emailed to say that he was unwell and would not attend. He did not ask for a postponement and he did not say whether the appellant would appoint anyone in his place nor whether the appellant's director would attend in person.

6. The last communication from FTI Fox was the day before the hearing in which Mr Isaac said that FTI Fox resigned as the appellant's representative and 'will notify' the appellant that they no longer act.

7. On the one hand, therefore, there was the possibility that the appellant was not aware that its representative had resigned, or at the very least, had only found out very shortly before the hearing was due to take place.

8. On the other hand, the appellant ought to have known for at least a week that Mr Isaac would not attend the hearing on its behalf. As I have said, a week before the hearing, Mr Isaac had told the Tribunal he was too unwell to attend, and I presume he would have given his client the same message. I certainly had no reason to think otherwise. Therefore, FTI Fox' resignation the day before the hearing did not suddenly deprive the appellant of representation: the appellant should have known it would have no representation at the hearing at least a week before. Yet, despite knowing this, it appeared the appellant had not appointed anyone else, turned up to the hearing itself, nor asked for a postponement.

9. Further, this was a hearing of a strike out application in circumstances where there was a history of late and inadequate compliance with Tribunal directions by the appellant: there was a real possibility that the appellant had never intended to come to the hearing. It was of some relevance that an earlier appeal by the appellant (TC/9/15338) had been struck out for non-compliance with directions.

10. Postponing the hearing risked injustice: this was at least in part a very long outstanding appeal, relating to an investigation into the appellant's VAT affairs which started nearly 10 years ago and some of the assessments under appeal dated back to 2011 and assessed as far back as 2009. The appeal itself was lodged in 2012. Justice requires that legal proceedings are not unduly protracted so I am reluctant to put off the hearing of this long outstanding appeal.

11. In all the circumstances of the case, I considered it was in the interests of justice to continue with the hearing. While there was a possibility that the appellant genuinely expected its representative to attend the hearing on its behalf, it seemed more likely (on what I knew of the file) that the appellant was aware that its representative would not attend, and despite this had, in line with its previous disregard of directions from the Tribunal, chosen not to attend the hearing nor to contact the Tribunal to ask for a postponement, nor to appoint a new representative. This long outstanding matter should be progressed and the hearing go ahead.

Purpose of today's hearing

12. The purpose of today's hearing was set out in a letter from the Tribunal dated 22 May 2018 and that was to determine:

> (a) Whether the appellant had breached the unless order of 20 February 2018 so that the appeal was already struck out; and if not
>
> (b) whether the appellant should be restricted to giving as evidence in the substantive hearing the evidence contained in the witness statement dated 25 February 2018 and served on 4 March 2018 in purported compliance with the unless order of 20 February 2018; and
>
> (c) whether the appeal should be struck out on the basis that it did not have a reasonable prospect of success; and if not,

(d) whether the witness statement should be treated as (at least in part) as an application for disclosure and whether disclosure should be ordered; and

(e) what would be appropriate case management directions.

(a) Was the appeal automatically struck out for failure to comply?

History of the appeal

13. The appeal TC/12/4756 comprised two consolidated appeals. The earliest of these appeals I will refer to as 'the first appeal' (although it was in fact the appellant's second appeal: the first (TC/2009/15338), which related to periods 2006-2009, was struck out in 2015 as mentioned above at §9).

14. The second of the consolidated appeals (originally lodged under number TC/17/1178) related to assessments in 2016 for periods 2012 to 2015. I will refer to it as the second appeal. It was consolidated with the first appeal in October 2017.

15. Just before that date, the Tribunal had been asking for listing information with a view to setting down the first appeal for hearing. However, HMRC applied for a direction for exchange of witness statements and the parties agreed to consolidation of the new appeal with the old appeal. So the hearing of the old appeal was postponed and a consolidated statement of case directed. Once that was served, the Tribunal issued directions to take the appeal to hearing, including directions for witness statements.

16. Lists of documents were due on 12 January 2018. HMRC filed theirs but the appellant did not. The Tribunal asked the appellant to notify it if it intended to pursue the appeal and to file its list of documents. The reply of FTI Fox of 21 January was that its client intended to pursue its appeal and would file its documents 'several weeks' before the hearing date. The due date for witness statements was 9 February and it passed without any being filed by the appellant.

17. On 20 February 2018, the Tribunal wrote to the parties. The letter stated that the appellant appeared aware of its obligation to file its list of documents, but had unilaterally decided not to keep to the timetable appointed by the Tribunal for doing so, but to do so on its own timetable and only to provide them shortly before the hearing. Moreover, the Tribunal was also concerned that the representative was telling different stories to different people because, although it continued to represent this appellant, it had informed another appellant in the Tribunal that it had ceased trading: what it said therefore appeared unreliable.

18. The appellant was given 14 days to make representations as the Judge was considering whether it would be appropriate to strike out the appeal under Rule 8(3)(b) on the basis that the appellant's failure to cooperate with the Tribunal was to such an extent that it might not be possible to deal with the proceedings fairly and justly.

19. At the same time, the Tribunal also issued an unless order stating that unless the appellant filed its list of documents and witness statements (or confirmed it did not intend to rely on any evidence and provided an explanation of how it thought it could win its appeal without evidence) by 6 March 2018, its appeal would be automatically struck out.

20. On 5 March 2018, the appellant filed a list of documents and a document signed by its director which purported to be a witness statement.

21. The Tribunal took the matter of a potential Rule 8 (failure to cooperate) strike out no further but did write to the parties to state that it had doubts whether the unless order of 20 February 2018 had been complied with because the witness statement appeared to largely comprise a statement of opinions and a request for information, and, to the extent that it contained evidence, it was so vague that it appeared the appellant had failed to comply with the spirit of the unless order and still intended to ambush HMRC with undisclosed evidence at the hearing, and in particular with evidence of the results of the invigilation exercise which it said it had carried out.

22. And today's hearing was set down to consider the issues at set out at [12] above.

Was there a failure to comply?

23. HMRC's position was that the appellant's list of documents was incomplete: in particular it lacked the spreadsheets referred to in the witness statement.

24. I find that it did not appear to contain anything likely to be relevant to the appeal. It largely comprised a list of letters exchanged between the parties. Only one item was potentially relevant to the question of the appellant's case (if not its evidence) and that was 'Analysis of quantum provided by Footlong Subs'. However, it appeared that although this document was on the list, the appellant had not provided a copy to HMRC and it was not clear that it even existed.

25. The witness statement was dated 25 February 2018, was one-and-a-half pages long, and was signed by Permjit Singh Guram, the director of the appellant. The greater part of the first page was a complaint that HMRC had victimised the appellant and in particular failed to provide information that would enable the appellant to challenge the assessments. It criticised (in very vague terms) some assumptions it said HMRC had made in its best judgment assessment but had a list of specific information which it said HMRC had not provided. I will deal with that below at §§37-53 below.

26. The rest of the statement contained evidence of fact to a very limited extent. It stated that the director had undertaken a self-invigilation exercise; it stated that he had asked a member of staff to identify what was hot and what was cold food, eat in or takeaway. It stated this information had been recorded on the receipts.

27. The rest of it appeared to be a statement of intent: it said that the receipts would be recorded on a spreadsheet, they would be compared to HMRC's invigilation

results, and the director would explain to the tribunal how the invigilation had been undertaken.

28. It failed to contain any 'concrete' information. There was no indications about the details of the invigilation, not even its date, nor the premises at which it was undertaken: most importantly, there was no indication about how it was undertaken nor its results. There were also indications that the appellant intended to 'spring' this information on HMRC at the hearing, which of course was the behaviour which had led to the unless order in the first place (see §18).

29. I also note that Mr Isaac a week before the hearing had said, when notifying the Tribunal he was too unwell to attend the hearing, that he would 'try' to email over the results of the self-invigilation 'recently' conducted by the director, thus recognising that the Tribunal still did not have this information. In any event, nothing was received.

Conclusion

30. The witness statement did, strictly, contain a few sentences of evidence in that it included a few statements of fact. But the unless order had required the evidence to be the evidence the appellant intended to rely on at the hearing. Quite clearly, the witness statement did not contain the evidence the appellant intended to rely on at the hearing: the witness statement itself stated that the appellant's director would 'explain the process' in court and would rely on the (undisclosed) receipts to back up its case, and moreover stated that the spreadsheets had not then even been prepared let alone disclosed.

31. I consider that in these circumstances the Unless order of 20 February 2018 had been breached and the appeal was automatically struck out under Rule 8(1) on the day after the due date of compliance: it was therefore automatically struck out on 7 March 2018.

(b) should the evidence the appellant is allowed to give at the hearing be restricted to that contained in its witness statement?

32. Strictly, I do not need to consider this because I have found that the appeal was automatically struck out on 7 March 2018: there will be no substantive hearing and so the evidence that the appellant should have been allowed to give at that hearing is no longer an issue. Nevertheless, in case this matter goes further, I consider it.

33. The concern, as had been explained to the appellant, is that it should disclose its evidence in advance so that HMRC were not taken by surprise with it at the hearing, but had the opportunity to give a considered response to it. (Obviously the converse is true as well but HMRC had complied with directions to disclose its evidence). Here, as I have said, the appellant had failed to disclose its evidence despite warnings.

34. There is also a concern that the production of the evidence should not be protracted as avoidable delays in dispute resolution are contrary to justice. The appeal

dated to 2012 and related to events as far back as 2009. Yet, if the appellant's only evidence to support its appeals was the results of is self-invigilation exercise carried out so 'recently' that the results had not yet been entered onto a spreadsheet, the concern was that (a) the evidence would be of little relevance and (b) the appellant was unduly stretching out the appeal proceedings by its delay in obtaining its evidence. The self-invigilation should have been done in 2012 if not earlier. I accepted what Mrs Hancox said which was that the appellant had promised HMRC in 2015 that it would carry out a self-invigilation exercise, and it was its failure to do so that prompted HMRC to carry out a further set of invigilations, which had led to the second set of assessments under appeal.

Conclusion

35. It would be contrary to justice to permit the appellant to spring on HMRC evidence at the hearing which should have been disclosed in advance, and, moreover, prepared many years before. If the appeal had not been struck out, I consider it would have been appropriate to make an order which refused the appellant the right to rely on its evidence (other than documents already disclosed) save with leave of the judge. It would have been right to couple this with a warning that the judge was most unlikely to give such leave if the evidence was produced in the course of the hearing; so that if the appellant wished to rectify the position it would need, long before the hearing, to produce its evidence and apply to the tribunal for leave to rely on it.

(d) should disclosure be ordered?

36. The original list of issue for the hearing had the question of disclosure only to be addressed if the appeal was not struck out as lacking a reasonable prospect of success, and the logic to that was no doubt that there would be no point in ordering disclosure if the appeal had been struck out.

37. But justice, I think, requires the question to be considered first. And that is because of the possibility that a lack of disclosure by HMRC might be preventing the appellant putting forward a case with a reasonable prospect of success. While it is true that the appellant bears the burden of proving that the assessment was wrong in law, not to best judgement, and/or too high in amount, and true also that the appellant should be the one holding all the evidence as it is its business that was assessed, nevertheless, in some cases, flaws in invigilations by HMRC do lead to reductions in, or even occasionally discharge of, assessments. Therefore, it is possible HMRC hold evidence that is relevant to the appellant's ability to successfully challenge the assessments.

38. The appellant's purported witness statement, as I said above, contained a list of some 5 items that it wanted disclosed. It also contained very general statements to the effect that disclosure by HMRC had been 'far below that which is to be expected'. The items requested were, word-for-word:

(a) All invigilation notes

(b) Calculations reconciling 'expectations' with VAT returns;

(c) Proper narrative relevant to assessment calculations that were not attached thereto;

(d) All statistical formulae adopted within assessment calculations;

(e) A schedule of all documentation not yet disclosed by HMRC.

39. HMRC's position was that the appellant had already been given all relevant material.

Had all relevant information been provided?

40. In the first appeal, the appellant had made a disclosure application on 16 March 2017 relating to 12 items. While not identical to the list of 5 questions above, it seems to me that all five of the current applications were a part of the 12 questions asked in 2017.

41. On 19 April 2017, the Tribunal directed an answer to be given. On 3 May 2017, HMRC's case worker replied in relation to 10 of the requested items, reserving her position on 2 until she had spoken to the assessing officer.

42. The reply on the 10 items was that (in summary) the information had been provided or HMRC did not understand the question. In particular, HMRC explained that the assessments were based on the outcome of invigilations undertaken by HMRC officers and not on the basis of HMRC's 'expectations' (see question (b) in §39 above) and the basis of the assessments were set out in the statement of case (see questions (c) and (d) above).

43. On 17 May, HMRC provided the reply to the 2 outstanding questions: the reply confirmed that the assessing officer believed she had disclosed all her notebook entries and explained why the receipts on which HMRC relied were not signed.

44. On 26 June 2017, nothing further being said by the appellant apart from a request for the bundle, the Tribunal informed the appellant that the Tribunal would presume, unless it was told otherwise, that, in light of the replies from HMRC, the appellant was no longer pursuing an application for disclosure.

45. Nothing further was said about disclosure until the appellant's purported witness statement was served in March 2018 which, as I have said, asked for 5 items. As I have also said, all of those 5 requests appeared subsumed within the original 12 requests and all appeared to have been answered.

46. It seemed to me, therefore, that the appellant already had its disclosure. There was no explanation why very similar questions to those already asked and answered should be repeated; there was no explanation of why, if the appellant was unhappy with HMRC's original answers, it did not pursue the matter at the time in response to the Tribunal's letter of 26 June 2017.

47. On the basis of this history, I was not satisfied that there was anything relevant to the appeal which could be disclosed by HMRC which had not already been disclosed, at least in relation to the first appeal.

Virtually identical requests to other cases?

48. This view was reinforced by the fact that I had seen virtually identical requests made by the same representative in a number of other cases. The requests appeared generic and to fail to relate to the specific circumstances of the appeal concerned. The first part of Mr Guram's 'witness statement', the part dealing with alleged lack of disclosure by HMRC, was verbatim that of another served by a different person in a different case (albeit with the same representative) bar the fact a few lines were omitted. I had real doubts whether the appellant had even checked the disclosure in this case before complaining it was inadequate.

49. I was not satisfied that HMRC had failed to disclose relevant material. Without further explanation from the appellant, from which I could conclude it was justified to put HMRC to the time and trouble of dealing with another disclosure application, I would not order any further disclosure.

The second appeal

50. The original application for disclosure was only made in relation to the first appeal: it was made before the appeals were consolidated. I had to consider the possibility that the appellant might want disclosure for the second appeal.

51. However, HMRC had already provided its list of documents on which it relied in this appeal, which included the second appeal. If the appellant wanted further disclosure simply in respect of the second appeal, it had failed to make that clear: on the contrary, it appeared to re-hash its generic application from 2017. I was therefore not satisfied that there was any relevant material relating to the second appeal which had not been disclosed, and not satisfied that it would be justified to put HMRC to the time and trouble of a further disclosure exercise.

Conclusion

52. It seemed to me that the request for disclosure was made without engaging in the specific circumstances of the appellant's appeals and I had no reason to think relevant material remained undisclosed. I would not order the disclosure.

(c) should the appeal be struck out as lacking a reasonable prospect of success?

53. Having concluded that it was not appropriate to order further disclosure from HMRC, I had to consider whether the appellant's appeal had a reasonable prospect of success on the evidence so far disclosed by the appellant.

54. As I have already said, there was no relevant evidence served by the appellant. It could not make out a case relying on its evidence.

55. I recognise that an appellant can (as I have said at §37) rely on HMRC's evidence to establish that the assessment was not to best judgment, or, even if to best judgment, nevertheless based on flawed assumptions or calculations and so should be reduced in amount. However, no such purported flaws have been identified by the appellant, other than generalised complaints about the assessments. I do not think a case based on these generalised complaints has a reasonable prospect of success. The appellant simply fails to engage with the specifics of the assessments.

56. So far as the second appeal is concerned, the appellant stated that its only ground of appeal was that the assessments were out of time. But the specifics of this generalised allegation are entirely missing. As it stands, I am not satisfied that this part of the appeal has a reasonable prospect of success.

57. I do not think that this appeal should be allowed to proceed to hearing: there seems to be nothing in the appellant's case, apart from very general complaints that fail to engage with the specific circumstances of its appeal, and nothing from which the Tribunal could conclude that the assessments should be discharged or reduced. I am satisfied that, as it currently is put, the appellant's case does not have a reasonable prospect of success and that it would be a waste of costs to allow it to proceed.

58. Even though I am satisfied that the appellant's case as it currently stands does not have a reasonable prospect of success, I have a discretion not to strike out the appeal. I recognise that it might well be appropriate *not* to strike out an appeal which currently has no reasonable prospect of success in circumstances where there is some reason to believe that further new evidence will be obtained that will assist the appellant's case.

59. In this case, there are two sources of potential new evidence: information from HMRC and the appellant's self-invigilation exercise. I consider whether either of these mean that I should not strike out the appeal.

60. Firstly, so far as the disclosure application for further evidence from HMRC is concerned, I have already said that if the appeal was not struck out, I would not order it. This is because, as explained above at §52, I have not been satisfied that HMRC have any relevant information to disclose that has not already been disclosed.

61. Secondly, even putting aside that fact that the evidence from the self-invigilation exercise has not been disclosed or admitted and (see §35) could not be admitted without leave of the Tribunal, it is wholly uncertain whether it would contain any information that would enable the appellant to succeed in its appeal. Firstly, the outcome of the self-invigilation is not known. The self-invigilation might even have revealed a higher amount of standard rated sales than HMRC assessed. Secondly, its reliability is not known. Its basis might be so flawed it would be unreliable as evidence. As the appellant has given no information about this, there is at present no way to judge this. Lastly, what is clear is that the self-invigilation was very recent and therefore it is very likely that it would be of limited relevance to the earlier years assessed.

62. Indeed, if the evidence from the self-invigilation exercise supported the appellant's appeal, I would have expected it to have been disclosed to HMRC as it would have been in the interests of the appellant to do so. But this has not happened. The invigilation apparently took place sometime before 25 February 2018 (the date of Mr Guram's witness statement). I have no explanation of why it still has not been disclosed some four months' later: if it was held back for no reason other than in order to 'surprise' HMRC with it at the hearing, it has already been made clear to the appellant that such conduct is not permitted.

Conclusion

63. The appeal as it stands has no reasonable prospect of success; there is no reason to suppose that further evidence will become available which will support the appellant's appeal; it is right to strike it out as the appellant has had plenty of opportunity to engage with its appeal but has failed to do so; HMRC should not be made to spend further time and money on an appeal which appears to have no reasonable prospect of success.

64. It should be struck out and, if not already struck out, I would hereby strike out the consolidated appeal under Rule 8(3)(c).

(e) appropriate case management directions?

65. I do not deal with (e) as it is not necessary; I consider that the entire appeal was automatically struck out on 7 March 2018 for non-compliance with the unless order; even if I am wrong about that, I consider that the appeal should now be struck out as it lacks a reasonable prospect of success for the reasons explained above.

Notification of right to apply for reinstatement

66. As this appeal was struck out for non-compliance with an unless order, the appellant has the right to apply for the proceedings to be reinstated but such an application must be (a) in writing, (b) supported by reasons and include an explanation for the non-compliance and (c) be received by the Tribunal within 28 days from the date of this decision. Such an application is not granted automatically.

Notification of appeal rights

67. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 6 JULY 2018