



[2019] UKFTT 533 (TC)

TC07327

PROCEDURE – Application for reinstatement – Martland v HMRC applied – Application allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2015/02333

BETWEEN

BAHMAN NOWROOZI

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 12 July 2019

Sean Kivdeh for the Appellant

Bisi Sanu litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. On 12 July 2019, following a hearing, I allowed the application of the appellant, Mr Bahman Nowroozi, for the reinstatement of his appeal which had been struck out on 30 March 2016 for non-compliance with directions. Directions for the further progress of his appeal were issued on 15 July 2019. On 25 July 2019 H M Revenue and Customs (“HMRC”) wrote to the Tribunal requesting full written findings and reasons for the decision.

2. Under Rule 35(4) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, a party wishing to appeal to the Upper Tribunal must apply for full written findings and reasons for the decision before seeking permission to do so. This decision is therefore provided, in accordance with the Procedure Rules, in order to enable HMRC to decide whether to apply for permission to appeal.

LAW

3. Insofar as it applies to the present application, Rule 8 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides:

8 Striking out a party's case

...

- (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; ...

...

- (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.

4. Under the Tribunal’s case management powers contained in Rule 5 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 the Tribunal may by direction, “extend the time for complying with any rule” unless it would conflict with a provision of another enactment setting down a time limit (see Rule 5(3)(a)).

5. It is also clear from Rule 11 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 that a party may appoint a representative to represent him or her in the proceedings. Such an appointed representative may, with the exception of signing a witness statement, do “anything permitted or required to be done by a party”. In addition once due notice has been received of the appointment, Rule 11(4)(a) provides that a person, “must provide to the representative any document which is required to be provided to the represented party, and **need not** provide that document to the represented party” (emphasis added).

FACTS

6. By Notice of Appeal, dated 3 March 2015, Mr Nowroozi notified the Tribunal of his appeal against an assessment to capital gains tax, in the sum of £44,277 arising on the disposal of a property during 2007-08 on the grounds that between 6 April 2005 and 31 October 2005 the property was Mr Nowroozi’s principal private residence.

7. Details of Mr Nowroozi's representative, Rehncy Shaheen Chartered Accountants, were included on the Notice of Appeal.

8. On receipt of the Notice of Appeal, notwithstanding it was made outside the statutory time limit, the appeal was categorised as a 'standard' case and HMRC directed to provide Mr Nowroozi and the Tribunal with a statement of case in accordance with the Procedure Rules (Rule 25).

9. It is not clear whether HMRC objected to the late admission of the appeal but, as is apparent from the Tribunal's letter to HMRC of 7 December 2015, HMRC did provide its statement of case and directions were issued by the Tribunal on 7 December 2015 for the progression of the appeal towards a final substantive hearing.

10. On 27 January 2016 the Tribunal wrote to Rehncy Shaheen Chartered Accountants, Mr Nowroozi's duly appointed representative as follows:

"The Tribunal refers to the Directions sent on 7 December 2015, a copy of which is enclosed.

You do not appear to have complied with Direction 1, compliance with which was due on 15 January 2016.

Please advise the Tribunal of the position within 7 days of the date of this letter."

11. In the absence of any response to that letter from the accountants, on 22 February 2016 the Tribunal issued a direction that unless Mr Nowroozi confirmed in writing by 7 March 2016 that he intended to proceed with the appeal the proceedings may be struck out without further reference to the parties. Although the letter enclosing the Tribunal's unless direction was sent to Rehncy Shaheen Chartered Accountants it was also copied to Mr Nowroozi and HMRC.

12. Despite the clear warning contained in the unless direction there was no response from either Mr Nowroozi or Rehncy Shaheen Chartered Accountants and, on 30 March 2016, the Tribunal directed that the appeal be struck out. The letter from the Tribunal, dated 30 March 2016, enclosing the direction striking out the appeal stated:

"As you have not complied with the Directions (copy enclosed), and as permitted by Rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, the judge has struck out your appeal. Your appeal is therefore unsuccessful.

You have a right to apply for proceedings to be reinstated but such an application must be made in writing and received by the Tribunal within 28 days from the date of this letter. Such an application should be supported by reasons."

Although this letter was copied to HMRC neither the letter nor direction striking out the appeal were sent to Mr Nowroozi.

13. On 8 October 2018 Mr Nowroozi applied for his appeal to be reinstated.

14. Mr Nowroozi's application, as he confirmed in evidence, explained that having made an appeal to the Tribunal he was expecting his accountants to notify him of a date for the hearing. However, he had heard nothing from them other than assurances that the matter was in hand despite the repeated telephone calls he had made to their offices.

15. Mr Nowroozi had left matters to his accountants rather than deal with them himself as, in 2014, he had been diagnosed with stage four cancer of the prostate which had spread to his hip bone and lymph nodes for which he had been undergoing chemotherapy and other treatment

at Guy's and St Thomas' Hospital. It is not disputed that Mr Nowroozi, who is in his late sixties, continues to have serious health issues and is still undergoing treatment.

16. In October/November 2017, with the assistance of his daughter, Mrs Kivdeh who also gave evidence, Mr Nowroozi contacted HMRC and was "shocked" to discover that there was to be no hearing as the appeal had been struck out, something his accountants had failed to tell him. New accountants were instructed but there was difficulty and delay in obtaining relevant information including the hearing bundle from his previous accountants, Rehncy Shaheen. Having considered Mr Nowroozi's position the new accountants advised him that an application for reinstatement of his appeal was a "legal" rather than accountancy matter and although Mr Nowroozi considered instructing counsel he was put off by the cost of doing so.

17. Mr Nowroozi therefore dealt with the matter himself notwithstanding his continuing to receive chemotherapy and other medical treatment from which he suffered "serious side-effects" and, with Mrs Kivedeh's help, on 8 October 2018 made the application for his appeal to be reinstated.

DISCUSSION AND CONCLUSION

18. HMRC oppose the reinstatement of Mr Nowroozi's appeal. Mrs Sanu, HMRC's Presenting Officer, points to the fact that HMRC complied with the directions issued by the Tribunal on 7 December 2015 whereas Mr Nowroozi not only failed to comply with these directions but also did not respond to the unless direction of 22 February 2016. Moreover, she contends that as Mr Nowroozi did not apply for the reinstatement of his appeals within the 28 days permitted by Rule 8 but 716 days after that time limit had expired his application should be dismissed. Mrs Sanu submits that time limits are there to be observed and HMRC must be allowed to put closure to matters, within a reasonable time.

19. For Mr Nowroozi, Mr Kivdeh, his son-in-law, noted that the letters from the Tribunal concerning the appeal had been sent to Rehncy Shaheen Chartered Accountants rather than Mr Nowroozi. He contends that as Mr Nowroozi's appeal against the capital gains tax assessment will depend on documentary evidence there is very little, if any, prejudice to HMRC if the appeal was reinstated.

20. As Mr Nowroozi's appeal was struck out, as opposed to being withdrawn, the Tribunal has the power, under Rule 5, to extend the 28 day time limit contained in Rule 8(6) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 for an application for reinstatement to be made.

21. In *Martland v HMRC* [2018] UKUT 178 (TCC) the Upper Tribunal provided the following guidance to the First-tier Tribunal ("FTT") which, although was in relation to considering applications for permission to appeal out of time, is equally apposite to the present application:

"44. 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*:

(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.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.”

22. Given that in *Romaserve (Property Services) Ltd v HMRC* [2016] STC 1 the Upper Tribunal considered a delay of over three months to be “serious and significant”, it is clear that the delay of 716 days in present case cannot be described in any other way. However, the delay can be explained by the failure of Mr Nowroozi’s accountants to respond to and comply with the Tribunal’s directions coupled with the failure to keep Mr Nowroozi, who was undergoing medical treatment throughout the period, informed of what was happening.

23. Although the starting point is that of Mr Nowroozi’s appeal should not be reinstated, having regard to all the circumstances I am satisfied that, on balance, that it should.

24. In reaching such a conclusion I have taken into account Mr Nowroozi’s health and consider that, in the circumstance, it was reasonable for him to rely on Rehncy Shaheen Chartered Accountants to pursue the appeal on his behalf especially as, in accordance with Rule 11 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, all correspondence from the Tribunal, with the exception of the unless direction which was copied to Mr Nowroozi, was sent to them. Also, as the accountants failed to notify him that the appeal had been struck out, I have also considered whether Mr Nowroozi could pursue a claim against them but, without ruling out such a possibility, given his health and the potential time and costs involved, not to mention the vagaries of litigation, I do not see it as a practical alternative to reinstating his appeal.

25. Additionally, as Mr Nowroozi will primarily rely on documentary evidence in support of his appeal – and it is for him to adduce sufficient evidence to displace the assessment which will otherwise “stand good” – I consider that any prejudice to HMRC by the reinstatement of the appeal is outweighed by the injustice of denying Mr Nowroozi the opportunity of putting his case to the Tribunal. However, this should not be taken as any view on the merits or otherwise of Mr Nowroozi’s case which I have not taken into account. As Judge Herrington said in *Dominic Chappell v The Pensions Regulator* [2019] UKUT 209 (TCC) at [86]:

“... 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.”

26. Therefore, for the reasons above, I have in directions issued separately from but at the same time as this decision, directed that Mr Nowroozi’s appeal be reinstated and have made further directions for the (hopefully) smooth progression of the appeal to a hearing especially as Mr Nowroozi is now fully aware of the consequences of a failure to comply with directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

27. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 12 AUGUST 2019