



Neutral Citation: [2022] UKFTT 00470 (TC)

Case Number: TC08667

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/00840  
TC/2021/00843  
TC/2021/00844  
TC/2021/00845

*PROCEDURE – late application to opt out of the costs regime in complex category appeals – refused*

**Heard on:** 14 October 2022

**Judgment date:** 09 December 2022

**Before**

**TRIBUNAL JUDGE ANNE FAIRPO**

**Between**

**(1) OPUS LABOUR SERVICES (IN LIQUIDATION)**

**(2) JASON GILLER**

**Appellants**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Mayes of Simmons Gainsford LLP

For the Respondents: Ms Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### Introduction

1. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
2. This concerns a late application, dated 24 December 2021, to opt out of the costs regime applying to appeals allocated to the complex category under Rule 10(1)(c) of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) Rules 2009 ('the Tribunal Rules').

### Background

3. The appellants have brought four appeals before this Tribunal which have been joined to be heard together.

4. On 6 May 2021 the Tribunal sent three letters to the appellants, as follows:

- (1) To the first appellant, in respect of appeal TC/2021/00845, advising that the appeal had been assigned to the complex category and that, if the appellant wished to opt out of the costs regime, it must apply to the Tribunal within 28 days of the date of the letter.

- (2) To the second appellant, in respect of appeal TC/2021/00844, advising that the appeal had been assigned to the complex category and that, if the appellant wished to opt out of the costs regime, it must apply to the Tribunal within 28 days of the date of the letter.

Both of these letters confirmed that the appeals were stayed until resolution of a hardship application made in respect of appeal TC/2021/00843. Each appeal had included an application to be joined with TC/2021/00840 which was similarly stayed.

- (3) To the first appellant, in respect of appeal TC/2021/00843. This letter did not state that the appeal had been allocated to the complex category. This appeal included an application in respect of hardship, and so could not be accepted and allocated until the hardship application had been resolved (or the tax in dispute paid). There had also been a request for the appeal to be joined with TC/2021/00840. The appeal and decision on joining was stayed pending a decision on the hardship application.

5. On 11 May 2021 the Tribunal wrote to the first appellant in respect of TC/2021/00840 advising that the appeal had been assigned to the complex category and that, if the appellant wished to opt out of the costs regime, it must apply to the Tribunal within 28 days of the date of the letter. This letter also stated that the appeal, and the joining application in respect of the other appeals, would be stayed until resolution of a hardship application made in respect of appeal TC/2021/00843.

6. On 2 August 2021, HMRC granted the hardship application in respect of TC/2021/00843 and advised the first appellant accordingly. The stay in the appeals TC/2021/00840, 00844, and 0045 therefore expired on that date.

7. On 24 September 2021, the Tribunal wrote to the parties advising that "Following the resolution of the application for hardship in the appeal TC/2021/00843, the appeal is allocated to proceed under the complex category. The appellant has 28 days to apply, should they wish to opt out of the costs regime."

8. On 14 December 2021, the first appellant entered into creditors voluntary liquidation.

9. On 24 December 2021, the appellants applied to the Tribunal for permission to make a late application to opt out of the costs regime in respect of each of these appeals.

### **Appellants' submissions**

10. In their application, the appellants stated that the failure to opt out within the required time limit for TC/2021/00843 arose “by oversight on the part of” the appellants’ representative. The representative had been “preoccupied with delays relating to the hardship application”. The failure to opt out in respect of the other three appeals had arisen from the same oversight “while focussing on other aspects of these Appeals”.

11. The appellants noted that this was a matter of particular importance for the liquidators of the first appellant “who may otherwise have to consider whether to pursue their Appeals”. In the hearing it was stated that the liquidator had “cautiously” said that they would consider their position subject to the outcome.

12. In the hearing, it was submitted that the representative had “simply taken their eye off the ball” and overlooked the time limits for opting out.

13. It was further submitted that the Tribunal should adopt the three-stage process in *Denton v TH White Ltd* [2014] EWCA Civ 906 and in particular, following *Kersner* [2019] UKFTT 221 (TC), consider whether HMRC had acted in reliance on the absence of an opt-out and taken decisions on the conduct of the litigation on that basis. It was submitted that HMRC had not indicated that they had taken any decisions on conduct which were made in reliance on the absence of an opt-out.

14. It was submitted the question of seriousness and significance of any delay should be considered not only in respect of the time involved but also the impact on the conduct of the case. If there had been no such impact then the delay was submitted to be less serious or significant than it otherwise would have been.

15. The appellants agreed that time limits should be observed but submitted that the purpose of Rule 7(2)(a) was to consider the matter and take such actions as considered just. The representative had made an honest mistake, with no intention of obtaining any tactical advantage in making the late application.

16. It was submitted that HMRC had not been put to any detriment and that it would be in the interests of justice to put the appellants back in the position that they would have been in had their representatives made the application on time. The delay referred to by HMRC in their submissions had arisen principally from Tribunal delays in respect of the application.

17. Further, considering the decision in *Mitchell* raised by HMRC (below), it was noted that the court in that decision had also noted that the culture of the court was such that both sides should take a common sense approach and work in an orderly manner; the time and money spent on minor failures was the antithesis of this. HMRC could have accepted the application in December 2021.

### **HMRC submissions**

18. HMRC submitted that these were professionally represented appellants who had failed to comply with the Tribunal Rules and the directions of the Tribunal in correspondence which required that any opt-out should be made within 28 days.

19. It was submitted that the delay was significant as to the length of time and the manner in which the application had been made. If the liquidators were unlikely to proceed with the appeals, HMRC would be required pause progress to ensure that they did not build up significant potential wasted costs.

20. With regard to the reasons given, even if the representatives had been distracted by the hardship application, that application related to only one of the appeals (TC/2021/00843) and it was not a good reason for the failure in respect of the other appeals.

21. HMRC agreed that the three stage process in *Denton* should be followed, in line with the reasoning of Judge Aleksander in *Greencyc Limited* [2021] UKFTT 0480 (TC). HMRC therefore submitted:

(1) The length of the delay for TC/2021/00844 and 00845 was 120 days, the delay for TC/2021/00840 was 116 days and the delay for TC/2021/00843 was 63 days. In each case this was serious and significant, with the delay in three of the appeals exceeding 100 days. Even the shortest of delays was over one month, which was not trivial. The impact on litigation was not also not trivial, with the progress of the appeal having been delayed by more than a year as a result of the failure.

(2) No good reason had been provided for the delay, and no witness evidence had been given to support the statement that the delay was due to an oversight by the representative, nor how the hardship application related to the delay. The Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCACiv 1537 had concluded that “overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason”.

(3) The appellant should not be able to rely on the self-assertion that it would suffer more prejudice as HMRC would proceed with the appeal whether or not the appellant opted out of the costs regime. The statutory time limit would be pointless if this were the case.

(4) The interests of justice needed to consider the wider system and not just the parties; the Court of Appeal in *BPP Holdings Ltd and others* [2016] EWCA Civ 121 (at [3]) noted that the “correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system”. The Supreme Court did not disagree with this statement in their consideration of the same case.

## **Discussion**

22. Rule 10(1)(c) of the Tribunal Rules allows the Tribunal discretion to award costs in cases allocated to the complex category. Rule 10(1)(c)(ii) allows the appellant to opt out of this costs regime within 28 days of being notified that the appeal has been categorised as complex.

23. There was no dispute that the appellants did not opt out of the costs regime within 28 days of being notified that the relevant appeals had been categorised as complex.

24. Considering the case law on the point, and particularly Judge Aleksander’s analysis of the position in *Greencyc Limited*, I agree that the three-stage process set out in *Denton* is appropriate, as this is an application for the extension of a time limit after that time limit has expired, and the principles governing applications for relief from sanctions apply. I note also that the overriding objective in Rule 2 of the Tribunal Rules, to deal with cases fairly and justly, will also apply.

25. The three stage process in *Denton* requires that the Tribunal establish the length of the delay, the reason why the default occurred and then evaluate all of the circumstances of the case in a balancing exercise to consider the merits of the reasons for the delay and the prejudice which would be caused by granting or refusing the application.

## **Delay**

26. The appeals TC/2021/00840, TC/2021/00844 and TC/2021/00845 were all stayed at notification pending resolution of the hardship application in TC/2021/00840. This hardship application was granted in a letter dated 2 August 2021. The letter was sent to the appellants

on 30 July 2021. An email from the appellants' representative of 2 August 2021 acknowledges receipt of that determination and refers to both appellants.

27. I find therefore that the stay in these three appeals expired on 2 August 2021. The time limit for opting out of the costs regime was therefore 30 August 2021. The application was made on 24 December 2021, 116 days later. HMRC had submitted that the delay in two of these appeals was 120 days, presumably by reference to the email of 30 July 2021. However, given that the letter granting hardship was dated 2 August 2021, I consider that is the appropriate reference date.

28. In the case of TC/2021/00843, the notification to the appellant that the case had been categorised as complex was sent on 24 September 2021. The deadline for opting out of the costs regime for this appeal was therefore 22 October 2021. The application was made on 24 December 2021, 63 days later.

29. The delays are therefore 116 and 63 days. In the context of a 28 day time limit for opting out, I consider the delays are serious and significant.

30. I note the appellants' submissions that the question of seriousness and significance should also consider the impact of the delay and not only the length of time involved. I do not agree: the impact of the delay is a matter for the third stage of the *Denton* process, evaluating all of the circumstances.

### **Reason for the delay**

31. It was not disputed that the reason for the delay was that the appellants' representative overlooked the time limit for opting out of the costs regime on both occasions. It was suggested in the application that they were concerned with the hardship application but that process had obviously ended at the time the time limit started, and there was no explanation as to why the hardship application process might have caused any delays in any case.

### ***Evaluating all the circumstances***

32. The first appellant submitted that their liquidator might reconsider whether to proceed with the appeals if this application is not granted. The liquidator did not give evidence directly. No submissions were made with regard any prejudice to the second appellant of a refusal to grant this application.

33. The appellant submitted that there was no prejudice to HMRC in granting the application, as they had not indicated that they had taken any particular action in reliance on the costs regime in complex category cases and would have proceeded even if the appellants had opted out in time. HMRC submitted that the prejudice was to the operation of the tribunal system in general if time limits were not respected.

34. I note that the application was made after HMRC had submitted their Statement of Case but before case management directions were issued to the parties.

35. If the application is granted then each party will have to bear their own costs (assuming that neither party acts unreasonably in relation to the proceedings). If the application is refused, then the eventual 'loser will be likely to pay the costs of the 'winner' as well as their own costs. There were no submissions as to the respective merits of the parties' positions, so I have not taken this into consideration.

### **Decision**

36. The Tribunal Rules provide an appellant in a complex category case with the choice of whether or not to participate in the costs regime: the Tribunal cannot refuse an in-time election to opt out of the regime. HMRC cannot opt out of the costs regime.

37. It was, in effect, submitted that as there has been no significant progress in this appeal that HMRC would therefore not be prejudiced by the application being granted as it would be in the same position that it would have been in if the appellants had elected to opt out in time.

### **Decision**

38. I note the parties' reference to the cases of *Kersner* and *Greencyc* but, in evaluating all of the circumstances, do not consider that either case is particularly helpful. In the case of *Kersner*, the appellant had not received the notification of the categorisation of the case as complex. The appellant therefore had not received notification that they were within the costs regime and could opt out. In the case of *Greencyc*, the appellant had believed that an in-time opt out in respect of one appeal had survived the consolidation of that appeal with another and that it applied to the consolidated appeal. The appellants therefore believed that they had successfully opted out of the regime.

39. In this case, the appellants do not dispute that they received the notifications. They have been advised (in aggregate) four times that there is a 28 day time limit for opting out of the costs regime. The reason for their late application is that their representative nevertheless overlooked the need to opt out within 28 days even with the reminder when appeal TC/2021/00843 was notified as complex in September 2021. The submissions as to concerns with the hardship application process do not assist as that process had concluded when the time limits began in respect of three of the cases and had been over for some time when the time limit began in respect of the fourth appeal.

40. I find that the appellants have not shown any clear prejudice to them if the application is refused; there has been no direct evidence from the liquidators or any evidence from the second appellant to that effect, only a suggestion that the liquidators might not wish to go ahead if this application is refused.

41. I find that there is also no clear prejudice to HMRC if the application were granted.

42. However, as set out by the Court of Appeal in *BPP Holdings Ltd and others* the wider system also needs to be considered. The starting principle is that time limits should be respected unless there is a good reason for failure to comply with a time limit. In this case, there has been a delay of at least two months and almost four months from the time limit for opting out. I do not consider that forgetfulness on the part of the adviser provides a good reason for that failure; nor do I consider that the fact that there would be no significant impact on the proceedings constitutes a good reason for accepting the failure.

43. On balance, and evaluating all of the circumstances in these appeals, the application is refused.

### **Right to apply for permission to appeal**

44. 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.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**Release date: 09<sup>th</sup> DECEMBER 2022**