



TC02884

Appeal number: TC/2013/02376

PROCEDURE– HMRC’s application to set aside decision in respect of a penalty for late return – paragraph 3 Schedule 55 Finance Act 2009 – alleged late submission of paper tax return followed by timely submission of online return – whether paper tax return a valid return – onus of proof in relation to penalties – no evidence that a valid paper return filed – appeal allowed – HMRC supply further evidence after decision communicated to parties- application by HMRC to set decision aside under Rule 38 of the Tribunal Rules

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**EXECUTOR OF THE ESTATE OF TERESA ROSENBAUM Appellant
(DECEASED)**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

**Application made by HMRC on 22 August 2013 to set aside the Tribunal's
decision of 8 July 2013**

DECISION

Introduction

- 5 1. The Respondents ("HMRC") have applied on 22 August 2013 to set aside my decision of 8 July 2013, notice of which was sent to the parties on 26 July 2013 ("the decision").

Background

- 10 2. In short, the decision concerned a penalty under paragraph 3 Schedule 55 Finance Act 2009 for the late submission of a paper tax return by the Appellant. HMRC, on whom the burden of proof lay, alleged that the Appellant had filed a paper tax return late and that the Appellant was therefore liable to a penalty. The Appellant, who had subsequently filed a tax return online (through its agents) in a timely fashion, argued that the paper document has simply been intended to be a copy of the online
15 return. The status of the alleged paper return was therefore crucial to the outcome of the appeal.

3. I agreed with HMRC's basic proposition that a subsequent online timely filing of a tax return by 31 January did not relieve a taxpayer, who had filed a valid paper return after the 31 October deadline, from a penalty.

- 20 4. However, although the nature of the paper document filed by the Appellant was plainly in dispute and central to the issues between the parties HMRC did not produce a copy of the return in the papers put forward to the Tribunal. The case had been allocated to the default paper category for determination without a hearing.

25 5. I held that HMRC had failed to discharge the burden of proof that the paper document filed by the Appellant after 31 October 2012 deadline was a valid tax return leading to a late filing penalty because no evidence as to the validity of the return had been put forward by HMRC. If the document filed by the Appellant was not a valid tax return no penalty could arise. HMRC simply did not submit the appropriate evidence to back up its case.

- 30 6. For these reasons, I allowed the taxpayer's appeal.

Set-aside application

7. HMRC have now applied to have my decision of 8 July 2013 set-aside.

8. In their letter of 22 August 2013 HMRC state as follows:

35 "On 8 July 2013 the Tribunal determined the appeal and found that the defaulters did not occur and allowed the appeal against the penalty of £100.

I am writing to request that the Tribunal sets aside its decision and takes into account the additional documentation attached in support of HMRC's view.

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In the Tribunal findings the Tribunal Judge indicated that HMRC had failed to discharge the burden of proof and [sic] questioning the validity of the paper return submitted prior to the online return.

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A scanned copy of the return is attached for your consideration which was logged following routine checks to ensure the return is valid, completed and signed by a trustee. As you can see the Return which is completed and signed by the trustee, gives no indication that this was other than a response to file a return under section 8A TMA 1970."

9. HMRC enclosed with their letter a copy of the Appellant's disputed return.

10. HMRC's letter contains no explanation why a copy of the return was not put forward by HMRC in the papers originally submitted for the Tribunal's decision.

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The Tribunal Rules

11. Rule 38 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("Rules") 2009 provides as follows:

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(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if-

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are-

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(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

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(c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party's representative, was not present at a hearing related to the proceedings.

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(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

(4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable.

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12. HMRC's application was made within the 28 day period specified in Rule 38 (3).

13. I can, therefore, set-aside my decision if (a) I consider that it is in the interests of justice to do so and (b) one or more of the conditions specified in paragraph (2) is satisfied.

5 14. I am also mindful of that the overriding objective of the Rules set out in Rule 2 is to enable the Tribunal to deal with cases fairly and justly. The Rules recognise that dealing with cases fairly and justly includes avoiding unnecessary formality and seeking flexibility in proceedings (Rule 2 (2) (b)).

Discussion

10 15. It seems to me more logical to deal with the conditions set out in Rule 38(2) first and then deal with questions relating to the interests of justice.

16. In this case the relevant condition is contained in Rule 38(2) (b). Plainly, on its face, a copy of the Appellant's tax return was not sent to the Tribunal at an appropriate time i.e. it was not included in the papers submitted to the Tribunal to be taken into account when the Tribunal decided the appeal under the default paper procedure.

15 17. Rule 38(2)(b) was considered in *Daksha Fraser (as representative partner for Starlight Therapy Equipment Partnership) v Revenue & Customs* [2012] UKFTT 189 (TC) by Judge Poole who said:

20 “35. The conditions in Rule 38 (2) which might most obviously be said to be satisfied in this case are those contained in Rule 38 (2)(a) or (b) – on the basis that “a document” (i.e. the new evidence which the appellant now seeks to put forward) “was “not sent to a party” [i.e. HMRC]” or “was not sent to the Tribunal at an appropriate time” (i.e. before the Tribunal was making its decision on the appeal).

25 36. However, I consider that a failure to send the new evidence would need to be in the nature of a “procedural irregularity” before it can satisfy the condition in (2)(a) or (b), because of the wording of paragraph (2)(c), which refers to “some **other** procedural irregularity” in a way which implies that (2)(a) and (2)(b) are considered to be specific examples of procedural irregularity.

30 37. It follows that the condition in Rule 38 (2)(a) or (b) is only satisfied if the representative’s failure to submit full evidence in support of the original appeal can be regarded as a “procedural irregularity”. Whilst his failure to submit full evidence at the correct time might certainly be considered procedurally inadequate, I do not consider it to have been a procedural irregularity – the question of what evidence should be submitted in support of an appeal is a matter for each party to decide for himself in conjunction with his advisers, and I do not see how a decision to submit what turns out to be inadequate evidence could be regarded as giving rise to a “procedural irregularity”.”
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18. I respectfully agree with the views of Judge Poole and in this case I see no element procedural irregularity in the simple fact that HMRC failed to produce the evidence that they required in order to prove their case. I therefore conclude that the conditions of Rule 38 (2) are not satisfied in this case.

5 19. Even if I were wrong about the requirement for a procedural irregularity and I had a discretion to set-aside my decision, if I considered that it was in the interests of justice to do so, that discretion must, of course, be exercised judicially taking account of all relevant factors.

10 20. On the one hand, it is quite possible that I would have reached a different decision if HMRC had included a copy of the Appellant's paper tax return in the evidence before me when I reached the decision. On the other hand, HMRC did not provide the evidence necessary to prove their case and have provided no explanation for their failure to do so. It was plain that HMRC had to demonstrate that a valid paper tax return had been filed late. It was also clear that the Appellant disputed the
15 nature of the document that had been lodged with HMRC, arguing that it was only a copy of the intended online filing. The need to establish that the Appellant had filed a valid paper tax return was (or should have been) obvious to HMRC.

20 21. I do not consider Rule 38 to be a provision which allows a party to an appeal before the Tribunal to have a "second bite at the cherry". The whole purpose of the default paper category of tax appeals is to enable simple tax penalty appeals to be dealt with swiftly on the papers put before the Tribunal. If Rule 38 is used to permit a disappointed party (particularly a party with the expertise of HMRC) to produce new evidence after the event when there is no good reason why that evidence could not have been put before the Tribunal in the first place, there would be no finality
25 regarding the Tribunal's decision. The default paper appeals would then involve a decision-making process which was iterative. Plainly, this cannot be what was intended by Rule 38. I decline to interpret or apply Rule 38 in this manner.

22. I note that a similar conclusion was reached by Judge Poole in *Daksha Fraser* (above) where he said:

30 "41. It might be said that it will always be in the interests of justice to consider new evidence before reaching a final decision, and that argument has some force. It is however only half the story. It could not be right that a party should be permitted to re-litigate the same dispute repeatedly simply on the basis of bringing forward some new
35 evidence every time the result went against him.

40 42. The function of the Tribunal is to provide efficient resolution of disputes between taxpayers and HMRC. Whilst some latitude may be allowed for taxpayers who are inexperienced in presenting their case, it would completely undermine the Tribunal's function if it were routinely to allow losing parties (whether taxpayers or HMRC) to re-litigate appeals on the basis that they did not feel they had put sufficient evidence before the Tribunal when it first heard the appeal. Parties should be well aware that an appeal offers a one-off opportunity to put their case as best they can, not an opportunity to hope for a

5 successful outcome on the basis of minimal effort and then make a better second attempt if the first fails, possibly followed by an even better third attempt, and so on. To put it in layman's terms, an appellant must realise that the appeals system gives him one bite at the cherry unless a very good reason can be shown why he should have a second."

23. Again, I respectfully agree with these comments.

10 24. In this case, HMRC failed to discharge the burden of proof by failing to put forward evidence that was plainly required in order for the Tribunal to reach a decision in their favour. There was no reason why the evidence (a copy of the disputed paper tax return) could not have been provided in the papers furnished for the original decision and no explanation for this failure has been put forward. The position might, of course, be different if there had been a good reason for the failure. It cannot be right or in the interests of justice to allow HMRC to re-litigate the issue
15 by producing evidence which should have been advanced first time round.

Decision

25. I have therefore decided that Rule 38(2) is not satisfied and that I cannot set aside my decision. Even if the conditions in Rule 38(2) were satisfied I would decline to exercise my discretion to set aside my decision in this case because, for the reasons
20 given above, I consider it would not be in the interests of justice to do so.

26. 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
25 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.

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**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 19 September 2013

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