



TC03923

Appeal number: TC/2012/00217

Income Tax – Application for strike-out – failure by Appellant to obtemper Directions and general failure to co-operate with the Tribunal – Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – Application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DUNCAN McKEE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE KENNETH MURE, QC
DR HEIDI POON, CA, CTA, PhD**

**Sitting in public at George House, 126 George Street, Edinburgh on Friday
18 July 2014**

Appellant: Not present or represented

Respondents: Ms Ros Shields, Officer of HMRC

DECISION

1. This appeal has a lengthy procedural history. The Notice of Appeal was lodged
5 on 11 December 2011 and there have been about ten Case Management Hearings
since. Essentially these have been directed at the production by the Appellant of any
documentary evidence and also his Witness Statements. Two hearings (set down for
17/18 September 2013 and 13/22 May 2014) have had to be discharged because of a
lack of co-operation by the Appellant.

10 2. The Appellant, Mr McKee, was represented initially by a Mr Brian McLean, but
he has now ceased to act. Latterly Mr McKee has been assisted by his wife and on
occasion she has appeared before the Tribunal and sent emails to it on his behalf.

3. The appeal is in respect of assessments to income tax on a haulage business
15 allegedly owned and controlled by Mr McKee. He, however, not only questions the
quantum of the assessments but also disputes that he is or has ever been the owner of
the business. His stance is that the business is and at all material times has been
owned by his wife and that he is a mere employee.

4. Accordingly the Tribunal considered that it would be appropriate (and indeed
20 helpful to the Appellant) to divide the appeal into two stages, *viz* considering the
status of Mr McKee in relation to the business, and thereafter, if appropriate, deal
with *quantum*. (We refer to our Directions of 14 January 2013 and attached Note.)
On one occasion when the Appellant attended personally (on 4 September 2013), the
Tribunal set out in detail what researches might usefully be made by him. It identified
25 wage-slips and P60's in particular as items which should be in his own possession.
The production of Witness Statements by Mr McKee himself and any other potential
witnesses, such as customers of the business, trade suppliers, and professional
advisers was sought. To date, notwithstanding the Directions, nothing has been
produced in response to HMRC since December 2011. For their part HMRC have
produced all helpful documentation to Mr McLean.

30 5. Since the inception of the appeal Mr McKee has become the subject of
sequestration proceedings at Airdrie Sheriff Court. His Trustee, while interested in
the progress of this appeal, has not intervened and has not been represented. The
Tribunal understands that the sequestration proceeds on the basis that Mr McKee is
the principal of the business, and not an employee. An attempt to recall the
35 sequestration on the basis that he was a mere employee, was unsuccessful, as we
understand.

6. Today (18 July 2014) and on the occasion of the last hearing on 22 May 2014
Mr McKee was not present or represented. In response to a Direction of 22 May 2014
40 a medical certificate from Mr McKee's GP, Dr Johnston is produced. It speaks to his
suffering from stress over a period of up to two years which would extend to shortly
before 2013. Dr Johnston's letter does not say in terms that Mr McKee would be
unfit to appear at a hearing of the appeal at some future date, or the possibly less
demanding occasion of a procedural (Case Management) hearing. Indeed, Mr McKee
has appeared in person before the Tribunal within the period of illness stated. (There
45 is a separate and very brief certificate in relation to Mr McKee's failure to attend on
22 May 2014.)

7. However, and irrespective of Mr McKee's fitness to appear before it, the Tribunal's recent Directions have sought simply production of documents and Witness Statements. Mr McKee has had an extended opportunity to produce these. He has had the assistance of his wife throughout, and earlier for a period has had the assistance of Mr McLean. No reason has been advanced as to why there has been a complete failure to comply with these Directions to produce Witness Statements and documents.

8. The continued hearing today (from 13 and 22 May 2014) is for the purpose of considering an application for strike-out of the appeal at the instance of HMRC under Rule 8 of the Tribunal Rules. We refer to Ms Shields' letter to the Tribunal dated 29 April 2014, upon which she elaborated in her submissions to us.

9. That application falls to be read in the immediate context of the Tribunal's Directions of 28 February 2014. Directions 3 and 4 seek (again) the production of Witness Statements and all documents upon which Mr McKee would seek to rely. Additionally, Direction 5 forewarns him of a possible application for strike-out in the event of his continuing failure. The Note appended to these Directions and a further Note appended to the Direction of 13 May 2014 (which continued the hearing of this application) emphasises to Mr McKee the importance of compliance at this late stage. Notwithstanding nothing has been produced. Further, it may be noted that having regard to the second Direction of 22 May 2014, no evidence has been produced of Mr McKee's entitlement to state benefits for unfitness to work.

10. In these circumstances we consider that it is appropriate to accede to Ms Shields' application for strike-out of the appeal. There have been repeated requests and indeed Directions for production of Witness Statements and any supporting documentation. The nature of the items sought was explained in straightforward terms by the Tribunal to Mr McKee in person. He is not being criticised for any inability to attend the Tribunal. Rather the censure relates to his prolonged failure to produce the necessary "paperwork". This has been sought over an extended period for part of which, apparently, he was perfectly fit. While he apparently suffers from a stress-related condition presently, he does have the assistance of his wife in researching documentary records. He has not identified any potential witnesses other than himself. A simple narrative would be sufficient for any Witness Statements, and with the assistance of his wife he should be able to produce these.

11. In short the Tribunal considers that Mr McKee's failure to obtemper the Directions is deliberate and culpable. He has been cautioned as to the possibility of strike-out.

12. Accordingly the Tribunal strikes out the whole of these proceedings on the basis of a continuing failure to comply with necessary Directions in the appeal and that in terms of Rule 8(3)(a). In any event the Tribunal considers that it would be further justified to strike out these proceedings in terms of paras (3)(b) and (c) of the Rule because of the gross failure to cooperate which impedes the fair and just disposal of the appeal and in such circumstances the absence of a reasonable prospect of the appeal succeeding.

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13. 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.

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**KENNETH MURE, QC
TRIBUNAL JUDGE**

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RELEASE DATE: 18 August 2014