



TC04271

Appeal number: TC/2013/06946

PROCEDURE – application to set aside strike out under rule 8(3)(c) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and reinstate appeals - application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JUMBOGATE LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public in London on 19 January 2015

Ben Elliott, counsel, instructed by PricewaterhouseCoopers Legal LLP, for the Appellant

Richard Vallat, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns an application by the Appellant (“Jumbogate”) for its appeal that had been struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the FTT Rules”) to be reinstated. The hearing of the application took place on 19 January 2015. As there was to be a further hearing of a winding up petition filed by the Respondents (“HMRC”) in relation to Jumbogate on 26 January, I gave my decision in relation to the application on 20 January. I decided to set aside the direction striking out Jumbogate’s appeal. Accordingly, Jumbogate’s appeal is reinstated. I stated that full written reasons would follow. These are those reasons.

Evidence

2. For the hearing, I was provided with various documents, including correspondence between the parties and a witness statement, dated 12 January 2015, of Mr Naresh Shah, the sole director and employee of Jumbogate. There was no dispute about the facts that led to the striking out of the appeal and I set out below various matters by way of background to the application.

Background facts

3. In October 2003, Jumbogate established an employee benefit trust which subsequently transferred 30,000 preference shares in another company, Jumbogate 2003, to four employees of Jumbogate. Each share carried a right to a dividend of £499, which was paid to the employees by Jumbogate 2003 at a later date.

4. On 2 September 2009, HMRC issued a determination under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 in the sum of £5,996,500.02 and decisions in respect of liability for unpaid National Insurance Contributions (“NICs”) under section 8 of the Social Security (Transfer of Functions etc) Act 1999 totalling £2,074,145.74 to Jumbogate.

5. On 13 October 2009, PricewaterhouseCoopers LLP (“PwC”), acting on behalf of Jumbogate, appealed to HMRC against the determination and decisions.

6. In a letter dated 26 June 2013, HMRC confirmed that Jumbogate was liable to account for income tax and NICs as set out in the determination and decisions. After a further review, HMRC informed Jumbogate, in a letter dated 5 September 2013, that they considered that the decision of the Court of Appeal in *HMRC v PA Holdings Limited* [2011] EWCA Civ 1414 applied to Jumbogate which was, accordingly, liable to account for income tax and NICs.

7. On 3 October 2013, PwC lodged a notice of appeal by Jumbogate with the First-tier Tribunal (Tax Chamber) (“the FTT”) appealing against the disputed determination and decisions. The grounds of appeal stated:

5 “The receipt of shares and subsequent receipt of dividends by the four employees does not fall to be taxed as emoluments or earnings for the purposes of PAYE (s62 ITEPA 2003) and NIC (s3 Social Security Contributions and Benefits Act 1992). Our view is that the amounts are properly taxed as dividends, and therefore not liable for PAYE or NIC, and that the case can be distinguished from that of PA Holdings Limited.”

10 8. The FTT acknowledged the notice of appeal in a letter, dated 30 December 2013, to PwC. The letter stated that HMRC had 60 days, ie until 28 February 2014, to produce a statement of case. On 27 February, HMRC applied to the FTT for a 14 day extension of the time limit for serving their statement of case. It appears that the FTT never formally acknowledged the application. HMRC served their statement of case on the FTT and Jumbogate on 14 March.

15 9. The FTT acknowledged receipt of the statement of case in a letter dated 20 March 2014 which stated that the parties had 42 days, ie until 1 May, to provide their lists of documents. By letter dated 30 April (but not received until 2 May), PwC served a list of documents on behalf of Jumbogate. HMRC served their list of documents on 7 May.

20 10. Following the service of the statement of case and the subsequent exchange of the parties’ lists of documents, the appeal was listed for a case management hearing on 30 June 2014.

25 11. Mr Shah’s evidence was that Jumbogate had traded very little since October 2013 and, consequently, the company had little in the way of funds. Jumbogate found it difficult to maintain the level of funding required by PwC to continue to assist with the appeal. At some point in June 2014, Jumbogate (effectively just Mr Shah) decided to pursue the appeal as a litigant in person and withdrew its instructions from PwC. On 13 June, PwC wrote to the FTT stating that Jumbogate would not be instructing anyone to represent the company at the case management hearing on 30 June or any subsequent hearing due to a lack of funds. That letter was copied to HMRC.

35 12. Jumbogate was not represented and no one from the company attended at the case management hearing before Judge Brooks on 30 June. Following the hearing, Judge Brooks issued Directions for the progress of the appeal on 2 July. The first direction was that Jumbogate should serve a draft statement of facts and issues on HMRC by 28 July. The penultimate direction stated that both parties should take note that failure to comply with the directions “may result in the proceedings being STRUCK OUT ... SUBJECT TO any application for reinstatement ...”

40 13. In a letter to the Tribunal dated 25 July, Jumbogate stated that, in view of an insufficiency of funds, it did not intend to be represented at the hearing of the appeal and did not intend to contest HMRC’s case. The letter then referred to the direction to produce a draft statement of facts and issues and set out some brief comments. In relation to the facts of the appeal, the letter stated that the facts were as set out in HMRC’s statement of case subject to two points, which were described. In relation to

the issues, the letter set out a brief analysis that was stated to be what was agreed by the FTT in *PA Holdings*. The letter ended by saying:

5 “We accept that this is a matter of tax law and interpretation and there is no dispute as to the facts. Hence we will not be attending the hearing.”

The letter was not copied to HMRC.

10 14. On 6 August 2014, HMRC wrote to the Tribunal asking for the appeal to be struck out. However, it appears that, before that letter was acted upon, the FTT, of its own motion, sent a letter dated 7 August to Jumbogate. In the letter, the FTT asked
15 Jumbogate to confirm whether its letter of 25 July had been intended to be a notice of withdrawal of the appeal. If Jumbogate had not intended to withdraw the appeal, the Tribunal asked Jumbogate to provide representations as to why the appeal should not be struck out on the ground that a failure to attend or be represented at the hearing of the appeal or otherwise contest HMRC’s case meant that there was no reasonable prospect of Jumbogate’s case succeeding.

20 15. Jumbogate replied to the FTT in a letter dated 11 August 2014. Jumbogate stated that it did not wish to withdraw the appeal. The letter stated that, by saying that it did not intend to contest the case, Jumbogate had meant only that it did not wish to contest the facts as outlined by HMRC. The letter stated that Jumbogate sought “to
25 rely on the judge’s legal analysis of these facts to determine the outcome of the case in [its] absence”. It concluded by saying:

 “We therefore wish to leave it to the judge to decide all legal aspects, as we are not qualified in such matters.”

30 16. Mr Shah’s evidence was that the reason that he sent this letter is that he did not feel that there was any way in which he could assist the Tribunal. He is not a lawyer and has no knowledge of Tribunal procedures. He did not feel confident enough to attend the Tribunal hearing alone and attempt to present arguments on the complicated issues raised in the appeal. He stated that he was under the mistaken impression that the Tribunal would be able to determine the issues in his absence.

35 17. The matter was referred to Judge Berner who dealt with it on the papers. In a direction issued on 15 August 2014 (“the Strike Out”), Judge Berner struck out Jumbogate’s appeal. The reasons for striking out the appeal are set out in [4]-[6] of the Strike Out:

40 “4. In these circumstances I am afraid there is no alternative but to strike out this appeal. It is not open to an appellant simply to take no part in the proceedings, and to expect the tribunal to undertake its own analysis. That, in effect, is expecting the tribunal to stand in the shoes of the appellant and to make out a case for the appellant before making a determination as between that case and the case put forward by the Respondents.

 5. That is not the nature of these proceedings, which are of their nature adversarial. The tribunal’s jurisdiction is to determine the appeal

5 brought by the Appellant against the determination issued by the Respondents under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003. That is an adjudication of a dispute between two parties. In the absence of a case put by a party, the tribunal does not, and cannot, carry out its own investigation or any independent legal analysis in the way that a legal representative would do for a party.

10 6. In this case, the burden of showing that the regulation 80 determination is wrong is on the Appellant. Where, therefore, the Appellant does not participate, in the sense that it does not put forward any counter-argument to the case put forward by the Respondents, the inevitable consequence is that the appeal must be determined in favour of the Respondents. There is no reasonable prospect of the Appellant's case succeeding. Accordingly, it is in the interests of justice that this appeal be struck out pursuant to rule 8(3)(c) of the Tribunal's Rules."

15 18. Jumbogate applied for its appeal to be reinstated in a letter to the FTT dated 29 August 2014. The letter referred to Jumbogate's misunderstanding of its role in the proceedings and belief that, as the facts were not in dispute, the FTT would "analyse the facts and determine the outcome of the case in line with the prevailing law".

19. On 17 September 2014, HMRC filed a winding up petition against Jumbogate. By order of the Court dated 3 November, a further hearing of the winding up petition was adjourned until 26 January 2015.

20 20. On 25 November 2014, the FTT sent the parties notification of the date for the hearing of Jumbogate's application.

21. In January 2015, the FTT received a notification from PricewaterhouseCoopers Legal LLP ("PwC Legal") that they had been instructed to represent Jumbogate in the appeal.

Relevant legislation

30 22. Rule 2 of FTT Rules provides

"(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

35 (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.

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(3) The Tribunal must seek to give effect to the overriding objective when it -

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.”

10 23. Rule 5 of the FTT Rules sets out the Tribunal’s case management powers and relevantly provides as follows:

“(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

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(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.”

Rule 5(3) describes the powers in paragraphs (1) and (2) of rule 5 as “general powers”.

20 24. Rule 8 of the FTT Rules relates to the striking out of a party’s case and provides as follows:

“(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

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...

(3) The Tribunal may strike out the whole or a part of the proceedings if -

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(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;

...

(c) the Tribunal considers there is no reasonable prospect of the appellant’s case, or part of it, succeeding.

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(4) The Tribunal may not strike out the whole or a part of the proceedings under [paragraph (3)(c)] without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(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.”

25. Rule 17 permits a party to an appeal to withdraw its case or part of its case.
5 Rule 17(3) provides that a party who has withdrawn its case may apply to the Tribunal for the case to be reinstated.

26. Rule 38 deals with setting aside a decision which disposes of proceedings. Rule 38 provides as follows:

10 “(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.

15 (2) The conditions are

(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;

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

(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.”

25 **Discussion**

27. This application raises two issues. The first issue is whether the FTT has the power to reinstate an appeal that has been struck out under Rule 8(3)(c) of the FTT Rules. If the FTT has such a power then the second issue is whether the appeal should be reinstated.

30 *Does the FTT have power to reinstate an appeal that has been struck out under Rule 8(3)(c)?*

28. In relation to the first issue, Mr Elliott, who appeared for Jumbogate, submitted that, although rule 8(5) only refers to the reinstatement of proceedings struck out under rule 8(1) and (3)(a), nothing in rule 8 prohibits the FTT from reinstating cases
35 that have been struck out under other provisions where the FTT has power to do so. Mr Elliott submitted that the FTT had such power under rule 5 and rule 38 of the FTT

Rules. Rule 5(2) provides for the FTT to exercise its general case management powers by giving directions. It specifically provides that the FTT may give a direction in relation to the disposal of proceedings, including a direction setting aside an earlier direction. Mr Elliott said that rule 5 applied to directions and the Strike Out
5 was a direction. He contended that rule 5, when read with the overriding objective in rule 2, gave the FTT the power to deal with an application to reinstate appeals that had been struck out other than in circumstances specified in rule 8(5).

29. Mr Elliott relied on the decision of Morgan J, sitting as a Judge of the Upper Tribunal, in *Foulser & Anor v HMRC* [2013] UKUT 38 (TCC), [2013] STC 917 as
10 support for the proposition that the FTT can exercise its power under rule 5 to give directions in circumstances which were outside the express provisions elsewhere in the FTT Rules. In that case, which was factually very different from this case and described by Morgan J as “somewhat exceptional”, the FTT decided that it did not have jurisdiction to bar HMRC from taking further part in the appeal proceedings on
15 grounds of abuse of process. The question considered by the Upper Tribunal was whether the powers in the FTT Rules were sufficient to enable the FTT to give directions to ensure that the appeal was dealt with fairly and justly. At [64], Morgan J stated that:

20 “I am not persuaded that I should hold that the FTT could not produce the desired just result by using its power under Rule 5 to ‘regulate its procedure’, particularly to deal with the case fairly and justly (as required by Rule 2(1) and (3)). Accordingly, I am not prepared to accept the submission of Ms Dewar for HMRC that the FTT could not
25 make a debaring order against HMRC if, on the facts, the FTT considered that the only way to deal with the case fairly and justly was to make such an order.”

30. Mr Elliott also submitted that rule 38 could apply to a decision to strike out an appeal under any of the paragraphs of rule 8. Rule 38 provides that the FTT may set aside a decision which disposes of proceedings where certain conditions are met. Mr
30 Elliott submitted that two of the conditions in rule 38 had been met in this case. First, he contended that there had been a procedural irregularity in that HMRC had served some documents late. Secondly, he submitted that Jumbogate was not present or represented at the case management hearing on 30 June 2014. Mr Elliott said that rule 38 showed that rule 8(5) was not intended to be an exhaustive list of the
35 circumstances in which the FTT could reinstate an appeal.

31. Mr Elliott contended that rule 17, which relates to the withdrawal of a case by a party, was also relevant in considering the application of the FTT Rules. Under rule 17(3), a party who has withdrawn a case may apply for it to be reinstated. Mr Elliott
40 submitted that it was anomalous and unfair that a party who has withdrawn an appeal may apply to have it reinstated under rule 17 but, if HMRC are correct, a party whose appeal has been struck out under rule 8(3)(c) because the party had indicated that it would not attend the hearing cannot do so.

32. Mr Vallat, who appeared for HMRC, submitted that rule 8 of the FTT Rules provides a complete code in relation to the striking out of appeals. In the absence of

any provision in rule 8 providing for the reinstatement of an appeal, the FTT cannot reinstate an appeal after it has been struck out. The words of rule 8(5) only refer to paragraphs (1) or (3)(a) of rule 8. Accordingly, rule 8(5) does not apply to proceedings struck out under rule 8(3)(c) and Jumbogate cannot now apply for these proceedings to be reinstated. He contended that the draftsman must have had in mind the circumstances in which proceedings could be struck out when providing in rule 8(5) that an appellant could only apply for the proceedings to be reinstated where they had been struck out under paragraphs (1) or (3)(a) of rule 8. Mr Vallat submitted that, although the FTT has wide-ranging case management powers in rule 5, these should not be construed as giving the FTT a wider power to reinstate proceedings than is allowed by the specific provisions in rule 8. Mr Vallat referred to the principle of construction that general words do not derogate from specific words, as stated by Peter Gibson LJ in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at [27].

33. Mr Vallat suggested that HMRC's interpretation did not offend against the overriding objective of the FTT Rules as, in cases struck out under rule 8(3)(c), the party must be given the opportunity to make representations before the FTT considers whether there is any reasonable prospect of the case succeeding. If the FTT makes any error of law in its decision to strike out the proceedings then the appellant may appeal against that decision. In this case, Jumbogate had not suggested that there was any error of law in the Strike Out and, therefore, there was no possibility of any appeal.

34. Mr Vallat submitted that Jumbogate had confirmed that it had not withdrawn its appeal so rule 17 was not relevant. Mr Vallat said that HMRC accepted that rule 8 does not oust rule 38 where that rule applies but contended that rule 38 was not relevant in this case. Mr Vallat submitted that a decision disposing of proceedings could only be set aside if the conditions in rule 38 were met. He contended that, in this case, the specified conditions had not been met and the appeal could not be reinstated.

35. I have concluded that rule 8(5) of the FTT Rules does not override the FTT's general power under rule 5(2) to set aside an earlier direction in relation to the disposal of proceedings, such as a direction striking out all or part of proceedings, in the circumstances of this case.

36. Rule 8(5) provides that where proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a) then the appellant may apply for them to be reinstated. It does not state that an appellant may not apply for a direction striking out all or part of proceedings to be set aside. I accept that there is a principle of construction that general words do not derogate from specific words, as stated by Peter Gibson LJ in *Vinos*. In *Vinos*, the issue was whether the court could extend the time for service of a claim form, where the conditions of CPR 7.6(3) which provided for such extensions were not met, by use of a general power to extend time in CPR 3.1(2)(a) or a power to remedy a failure to perform in CPR 3.10. Peter Gibson LJ concluded, in [27], that the court could only extend time where the conditions of CPR 7.6(3) were satisfied. He considered that this was "crystal clear" from the words "[the court may make such an order] only if" that preceded the conditions in CPR 7.6(3).

37. Rule 8(5) does not state that the FTT may only reinstate proceedings that have been struck out under paragraphs (1) or (3)(a). I asked Mr Vallat why, if it was intended that proceedings that had been struck out under provisions of rule 8 other than paragraphs (1) or (3)(a), the rule did not say that only proceedings struck out under paragraphs (1) and 3(a) can be reinstated. He said that the word “only” would not add much to the sense of the rule. I disagree. The words “only if” were clearly considered to be significant in *Vinos*. There are no unambiguous and restrictive conditions in rule 8(5) like those referred to by Peter Gibson LJ in *Vinos*. Even if Rule 8(5) implicitly excludes applications to reinstate proceedings that have been struck out under provisions other than paragraphs (1) or (3)(a) of the rule, it does not say that an appellant may not apply for a direction striking out proceedings to be set aside under rule 5(2). There is nothing in rule 8 that prohibits the FTT from setting aside a direction under rule 8 that disposes of proceedings. Mr Vallat accepted that a person could appeal against a direction striking out proceedings where there was an error of law in the decision. It seems to me that, just as the right of appeal against a strike out is not excluded by rule 8(5), the power of the FTT to set aside such a direction is not excluded by the rule. In my view, the words in rule 8(5) of the FTT Rules are not specific enough to exclude the general provision in rule 5(2).

38. I consider that the overriding objective in rule 2 supports my conclusion that the FTT’s general power under rule 5(2) to set aside an earlier direction in relation to the disposal of proceedings is not displaced by rule 8(5). The overriding objective is to enable the FTT to deal with a case fairly and justly. If Mr Vallat is correct then the only remedy available to a person whose appeal is struck out under provisions other than paragraphs (1) or (3)(a) would be an appeal on a point of law. Such an outcome does not seem to me to be consistent with the exhortation in rule 2 to avoid unnecessary formality and seek flexibility in the proceedings while also ensuring that parties are able to participate fully in proceedings. Rule 5(2) provides the flexibility to enable the FTT to deal with a situation, such as in this case, where it cannot be said that there is any error of law in the decision to strike out but that decision is challenged on the ground that it arose from a misunderstanding of the nature of the proceedings by the appellant.

39. Having reached the conclusion that the FTT has power under rule 5(2) to set aside an earlier direction in relation to the disposal of proceedings, such as a direction striking out all or part of proceedings, I need only deal briefly with the other points relied on by Mr Elliott.

40. Mr Elliott contended that it was anomalous and unfair that a party who had withdrawn a case under rule 17 could apply, subject to the 28 day time limit, for it to be reinstated whereas an appellant whose case had been struck out under rules other than 8(1) and (3)(a) could not do so. I do not consider that the different treatment under rules 8 and 17 is necessarily anomalous as they deal with very different situations. In this case, however, it does appear that the conduct of Jumbogate that led to the appeal being struck out was similar to a withdrawal under rule 17. Although, in its letter dated 11 August 2014, Jumbogate stated that it did not wish to withdraw the appeal, it indicated that it would not take any part in the proceedings. As Judge Berner pointed out, that decision meant the appeal must fail. In my view, even if it

was not formally a withdrawal, Jumbogate's decision not to participate was tantamount to being a withdrawal. In the circumstances of this case, I agree that the difference in treatment under rules 8 and 17 appears to be anomalous. If Jumbogate had stated that it was withdrawing its appeal rather than saying that it would not take any part in it then there would be no dispute that Jumbogate would be entitled to apply for the appeal to be reinstated. That is not to say that I consider that Jumbogate is entitled to rely on rule 17(3) and apply for its appeal to be reinstated. Jumbogate did not withdraw its appeal and rule 17 does not apply. The apparent anomaly in this case reinforces my view that, applying the overriding objective, I should interpret rule 5(2) as allowing the FTT to set aside a direction, under rules other than 8(1) and (3)(a), to strike out proceedings. If rule 5(2) applies, there is no anomaly as the position is the same under both rules 8 and 17, ie the appellant may apply for the decision that brought the proceedings to an end to be reconsidered.

41. Mr Elliott also relied on rule 38 which provides that the FTT may set aside a decision that disposes of proceedings where certain conditions are met. The Strike Out certainly disposes of proceedings but it is in the form of a Direction with reasons and is described as a direction on its face. If there is a distinction between a decision and a direction with reasons (and I reach no conclusion on this point) then it appears that rule 38 would not apply to the Strike Out as it is not a decision although rule 5(2), which refers to directions, would do so. I do not need to determine whether the Strike Out is a decision for the purposes of rule 38 because, even if it is, it seems clear that the conditions for the application of rule 38 are not met in this case. Mr Elliott sought to rely on the fact that HMRC had submitted some documents late as a procedural irregularity and the fact that Jumbogate was not present or represented at the case management hearing on 30 June 2014. In relation to the first point, it appears that HMRC served their list of documents late but that was not relevant to the Strike Out. In relation to the second point, the fact that Jumbogate was not present or represented at the hearing was due to its own deliberate choice and it would not be in the interests of justice to allow Jumbogate to rely on its own decision not to attend the hearing as a ground for setting aside a decision that disposes of proceedings. Accordingly, I do not accept that rule 38 applies in the circumstances of this case.

Should Jumbogate's appeal be reinstated?

42. If, as I have held, the FTT has the power under rule 5(2) to set aside the direction striking out Jumbogate's appeal, then the second issue is whether I should do so, thereby reinstating Jumbogate's appeal. Consideration of whether to set aside the Strike Out does not involve revisiting Judge Berner's reasons for striking out the appeal. There is no appeal against the Strike Out and no criticism was made of the reasoning that led to it being made.

43. In relation to the approach that I should take when considering whether an appeal should be reinstated, both parties referred me to the decision of the Upper Tribunal in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321 (TCC). Although that case concerned an application under rule 17(3) of the FTT Rules to reinstate an appeal that had been withdrawn, the parties accepted that the same principles applied to this application. At [21], Proudman J observed:

“There is no guidance in the rules as to how such a decision is to be reached other than the application of the overriding objective.”

44. Having then set out the overriding objective in rule 2, Proudman J continued at [23]:

5 “Although, as I have said, there is no guidance in the rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9(1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56]-[57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were,

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- The reasons for the delay, that is to say, whether there is a good reason for it.
 - Whether HMRC would be prejudiced by reinstatement.
 - Loss to the appellant if reinstatement were refused.
 - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
 - Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.”

25 45. I gratefully adopt the approach described by Proudman J in *Pierhead Purchasing*. In deciding whether to grant the application to set aside the Strike Out and reinstate, I bear in mind that I must give effect to the overriding objective of the FTT Rules to deal with cases fairly and justly. *North Wiltshire* concerned an application for an extension of time in which to appeal and so the relevant criteria were necessarily rather different. In this case, I consider that the relevant factors that I should take into account when considering whether to set aside the Strike Out are:

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- (1) whether the appeal is arguable and has a reasonable prospect of success;
 - (2) the reasons for the Strike Out;
 - (3) whether there has been any material change since the Strike Out;
 - (4) whether HMRC would be prejudiced if the Strike Out were set aside;
 - (5) what prejudice would Jumbogate suffer if the Strike Out were not set aside; and
 - (6) the conduct of the parties.

40 46. Mr Elliott provided a detailed outline of the arguments that Jumbogate proposed to put forward in the appeal and submitted that it clearly has a real prospect of success. Mr Vallat did not seek to contend that Jumbogate’s case was unarguable. For the purposes of this application, I accept that Jumbogate’s appeal is arguable and has a reasonable prospect of success.

47. It is clear that the appeal was struck out because Jumbogate decided that it would not take any part in the proceedings. As Judge Berner stated in the Strike Out, if Jumbogate took no part in the proceedings then its appeal was bound to fail. The evidence of Mr Shah, which I accept, was that he withdrew instructions from PwC and did not attend the case management hearing due to a lack of funds. He said that, as the dispute only concerned points of law and he was not a lawyer, he did not believe that he could add anything useful to what had been said in the correspondence. Mr Shah wrongly believed that the FTT would determine the appeal without any further input from Jumbogate. He did not realise that his conduct of the appeal would inevitably lead to it being struck out. Mr Shah said that he was now aware of his mistake and apologised.

48. Mr Shah attended the hearing of the application although he was not required to give evidence. At the hearing, Jumbogate was represented by Mr Elliott, instructed by PwC Legal. Mr Shah's evidence was that he now realised that he would be unable to progress the appeal without professional assistance. Mr Elliott told me that Jumbogate was fully represented and keen to engage with the appeal process. Mr Elliott submitted that, accordingly, the grounds on which the appeal was originally struck out no longer existed.

49. In relation to prejudice, Mr Vallat submitted that HMRC would be required to engage in litigation again if the Strike Out is set aside. He did not seek to argue that there would be no prejudice to Jumbogate if the application were to be refused. It seems to me that the position in relation to prejudice is clear. The amounts of tax and NICs at stake are substantial – some £8 million plus interest – and the financial consequences for Jumbogate would be serious. The prejudice to HMRC on the other hand would be comparatively minor. If the Strike Out is set aside, HMRC will have to undertake litigation and, potentially, will forego a windfall that would accrue to them if the application were refused. In my view, Jumbogate moved relatively quickly to reinstate the appeal after the Strike Out had been issued and so HMRC should not have been under any illusion that the appeal had been concluded. In my view, the balance of prejudice is clearly in favour of granting Jumbogate's application.

50. On the facts as presented to me, I cannot see anything in the conduct of Jumbogate that would lead me to conclude that it would be unfair or unjust to grant the application to set aside the Strike Out. Mr Vallat criticised Jumbogate for not engaging in the appeal process and for withdrawing instructions from PwC shortly before the case management hearing. It is clear that from late 2013, Jumbogate experienced difficulties in funding the appeal and, in June 2014, Mr Shah withdrew instructions from PwC and sought to minimise Jumbogate's involvement in the appeal. I accept, as did Mr Vallat, that Jumbogate was effectively a litigant in person at that point. In the circumstances, and bearing in mind the overriding objective, I consider that Jumbogate should be allowed a degree of latitude when its conduct is considered. It appears to me that Jumbogate's failure to attend the case management hearing and its declared intention not to take part in the appeal were not due to deliberate disregard of its responsibilities but to the difficult financial situation in which it found itself and Mr Shah's lack of experience of tax appeals.

51. In conclusion, I accept that Jumbogate's appeal is arguable and has a reasonable prospect of success. I also accept that the Strike Out arose from a misunderstanding of the nature and requirements of the appeal process by Jumbogate's director, Mr Shah. At the time, Jumbogate was unrepresented due financial difficulties. That
5 misunderstanding could have been corrected and the strike out avoided if Jumbogate had continued to be professionally represented. The misunderstanding has now been corrected and, funds having been found, Jumbogate is once again professionally represented. The circumstances that were described in and underpinned the reasons for the Strike Out no longer exist. In my view, that is a material change of
10 circumstances. If the Strike Out were not set aside then the financial consequences for Jumbogate would be severe whereas the prejudice to HMRC is to my mind comparatively minor. In conclusion, I consider that setting aside the Strike Out in this case is consistent with the overriding objective and not to do so would be neither fair not just in the circumstances.

15 **Decision**

52. For the reasons given above, I direct that the Strike Out be set aside. Accordingly, Jumbogate's appeal is reinstated.

53. In anticipation of such a decision, Mr Vallat had prepared draft directions for the progress of the appeal which Mr Elliott agreed. I endorsed the draft directions as
20 agreed, subject to one minor point, and issued them to the parties on 22 January 2015.

Right to apply for permission to appeal

54. 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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**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 10 February 2015