



TC04382

**Appeal numbers: TC/2013/04487
TC/2013/08108**

PROCEDURE – HMRC application for unless order – appointment of representative – legal professional privilege – failure to particularise grounds of appeal – failure to comply with Tribunal direction – company in settlement negotiations with HMRC– Rule 3 considered – application granted – directions issued

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**RAPID BRICKWORK LIMITED
(in liquidation)**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

**Sitting in public at the Tribunal Centre, Fox Court, Gray's Inn Road on 14 April
2015**

Mr Setu Kamal of Counsel, instructed by the Appellant, for the Appellant

**Mr David Yates of Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. HMRC applied to the Tribunal to issue directions that Rapid Brickwork Limited (“the company”) provide detailed grounds of appeal within the next 28 days, failing which the company’s appeals under references TC/2013/04487 (“the first appeal”) and TC/2013/08018 (“the second appeal”) should be struck out (“the Application”).

2. I gave my decision orally at the end of the hearing. I allowed the Application and issued the Directions which are attached as an Appendix to this decision. I specified that the 28 day time limit for the Directions began from the date of this hearing and it therefore ends on 12 May 2015.

3. The Tribunal had recorded a further appeal by the company, under reference TC/2013/09718. It was agreed by both parties’ representatives that this had been issued in error and should be removed from the Tribunal records. This is explained in more detail at §44-47.

4. This decision notice sets out:

- (1) preliminary issues relating to representation and legal professional privilege;
- (2) the facts relating to the first appeal, so far as relevant to the Application;
- (3) the facts relating to the second appeal, again so far as relevant to the Application;
- (4) the parties’ submissions on the Application; and
- (5) the Tribunal’s discussion and decision.

5. Before the hearing, I reviewed the correspondence and other documents already provided to the Tribunal (“the Tribunal Bundle”). At the start of the hearing, Mr Yates handed up a bundle of correspondence between the parties (“the HMRC Bundle”), which additionally contained some more recent documents.

Matters not in issue before this Tribunal

6. The company has been represented by a number of firms, three of which included in their names the words “Baxendale Walker”: Baxendale Walker MDP, Baxendale Walker LLP and Baxendale Walker Ltd. Some of the correspondence in the Tribunal Bundle concerned these changes of firm, and whether or not the firms had been properly appointed as representatives of the company. Mr Yates confirmed that HMRC now accept that proper authorisation was given by the company on each of these changes of representative.

7. The appeals were categorised as “complex” under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”). Other HMRC correspondence in the Bundles raised the question of whether the company is at risk of costs under Rule 10(1)(c). However, as HMRC’s application did not refer to that issue, it is outside the scope of this decision.

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The first preliminary issue: authorised representative

8. Rule 11 of the Tribunal Rules, so far as relevant to this issue, reads:

11 Representatives

- 5 (1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
- (2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.
- 10 (3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.
- (4) ...
- 15 (5) At a hearing a party may be accompanied by another person who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.
- (6) Paragraphs (2) to (4) do not apply to a person (other than an appointed representative) who accompanies a party in accordance with paragraph (5).
- 20 (7) In this rule "legal representative" means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act, an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland."
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9. Mr Nedim Ailyan was appointed as liquidator of the company on 8 April 2015. He did not attend the hearing, so Rule 11(5) could not apply. The Tribunal had not been provided with any documentation appointing Mr Kamal as the company's legal representative, and without that, Mr Kamal could not rely on Rule 11(3).

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10. Mr Kamal provided the Tribunal with a copy of a letter from Buckingham Wealth Ltd, a company with an address in Belize. This said that Mr Kamal had been instructed to act for the company and that "formal engagement of Mr Kamal is to be made by the liquidator: Mr Nadim Ailyan." However, Mr Kamal did not have a copy of a letter of appointment from the liquidator. The Tribunal suggested a short adjournment would be in the interests of justice and both Mr Kamal and Mr Yates concurred.

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11. At the end of the adjournment Mr Kamal provided the Tribunal with a copy of a letter from Mr Ailyan appointing him as the company's legal representative, dated 10 April 2015 (the day of this hearing), which had been emailed through via the Tribunal clerk. A copy was given to Mr Yates.

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12. Mr Kamal accepted that he had not previously informed the Tribunal of his appointment as a representative of the company. At the hearing I said that the Tribunal would use its power under Rule 7(2)(a) to waive that requirement. However, on further consideration I find that no waiver is required: the letter handed up to the

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Tribunal constitutes “written notice of the representative's name and address,” and so satisfies Rule 11(1).

The second preliminary issues: legal professional privilege

13. When Mr Kamal handed up the letter from Buckingham Wealth, a second page was attached (“the Attachment”). On a quick review it was clear that this contained Mr Kamal’s instructions from Buckingham Wealth Ltd and was legally privileged. Mr Kamal said that it had been handed up by mistake.

14. The final sentence of the Attachment was a request that this hearing be adjourned. As I had had no notice of an adjournment request, I asked Mr Kamal if he was willing for that sentence to be read in open court and he agreed.

15. Mr Yates submitted that the Attachment should be disclosed to HMRC as it had now been read by the Tribunal.

16. During the short adjournment I considered the more recent correspondence in the HMRC Bundle, and it was clear that the possibility of this hearing being adjourned had already been discussed with HMRC, and they had refused to agree.

17. I also considered the following case law relating to the disclosure of privileged documents:

(1) where a party has inadvertently disclosed a document, and this is an “obvious mistake,” privilege is not lost, see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027, CA;

(2) where privilege had been waived in relation to part of a document, it was for the judge to decide, having seen the whole document, whether fairness required that the other party should be entitled to see the whole of the document, see *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73, CA.

18. Mr Kamal had produced the letter with its Attachment only in order to demonstrate that he had been instructed to appear on behalf of the company. There was no intention to waive privilege in relation to his instructions. It was an “obvious mistake.” Furthermore, fairness did not require that HMRC see the whole of the Attachment simply because the sentence about adjournment had been read in open court.

19. When the Tribunal reconvened I set out my understanding of the law and my conclusions. I confirmed that the Attachment would not be taken into account by the Tribunal in coming to its decision on the Application, and no copy was taken for the Tribunal Bundle or provided to HMRC.

The facts relating to the first appeal

20. On 8 March 2010, HMRC wrote to the company saying that it had raised “discovery” assessments of £3,859,040 in relation to the tax year 2003-04. £2,000,000 of the total assessed related to a contribution made by the company to a trust; the balance related to a “factoring arrangement.” The extra tax charged was £1,338,163.80. The assessment was received by the company on 15 March 2010.

21. On 19 March 2010, the company’s then agents, Baxendale Walker MDP, appealed the assessment on behalf of the company. Their appeal letter said “as you

give no details of what your opinion, suggestion or consideration are based on, it is impossible for us to stipulate the grounds for our appeal.”

22. There then followed a long time gap, which was not explained to the Tribunal.

23. On 11 April 2013, HMRC issued a closely typed letter, running to over six pages with two appendices. The letter set out the detailed reasons for the assessment under the headings “Remuneration Trust” and “Factoring Scheme.”

24. On 30 April 2013, Baxendale Walker LLP asked for a statutory review, which was provided on 11 June 2013.

25. On 4 July 2013, Baxendale Walker LLP notified the appeal to the Tribunal. Under “grounds of appeal” was the single sentence “please refer to the enclosed copy of the Baxendale Walker MDP letter dated 19 March 2010.”

26. On 25 September 2013, HMRC wrote to the Tribunal by email, with a copy to Baxendale Walker Ltd, asking the Tribunal to direct the company to provide “full grounds of appeal.” They also asked that the deadline for service of a statement of case be postponed.

27. Baxendale Walker Ltd responded on the same day, saying that the company’s arguments “are well documented throughout more than six years of correspondence and the Respondent need only refer to that correspondence.” The letter went on to say that the company was still awaiting the results of the HMRC statutory review in relation to the later years (see §41 below), and that HMRC’s review decision in relation to those later years would have “a consequent impact on the grounds of appeal.”

28. On 1 November 2013, Judge Poole issued directions. He said he was “satisfied that the existing grounds of appeal are inadequate” and that “it is not sufficient to refer in general to all the grounds that have been raised in previous correspondence.” He directed that the company file and serve:

“no later than 28 days after the date of issue of these Directions, amended grounds of appeal which particularise in reasonable detail all the legal grounds upon which the Appellant relies in support of the appeal and the outline facts which, in its submission, support such legal grounds.”

29. No detailed grounds of appeal were filed or served by the company. On 3 December 2013, HMRC wrote to the Tribunal, inviting it to strike out the appeal under Rule 8, as the time limit for compliance with Judge Poole’s direction had expired and “HMRC has not received anything from the Appellants that purports to comply with it.”

30. On 1 April 2014, the Tribunal apologised for the delay and said that there would be a case management hearing to consider whether there had been compliance with Judge Poole’s direction, together with the other matters discussed later in this decision notice.

Post-liquidation correspondence

31. On 8 April 2014, Mr Ailyan was appointed as liquidator of the company. On 11 April Baxendale Walker Ltd wrote to the Tribunal saying that Mr Ailyan “has

instructed Baxendale Walker Limited that a response cannot be provided at this time because he has not yet been able to consider the contents of that letter.”

5 32. On 14 April 2014, Mr Ailyan wrote to the Tribunal saying that he had a copy of Judge Poole’s direction but that he was not yet in possession of the company documents relating to the appeal. He asked that the case management hearing be delayed

10 33. On 22 May 2014, Mr Ailyan informed the Tribunal that he had an informal meeting with HMRC and the legal representatives of the former directors of the company on 14 May 2014, and that he had subsequently written to the latter asking them to provide the “pertinent information” if they wished the company to defend the appeals. He asked the Tribunal to bear with him and confirmed that he would write again within 6 weeks. On 12 June 2014, the Tribunal granted a stay until 31 July 2014.

15 34. On 3 July 2014, Mr Ailyan wrote to the Tribunal asking for the case management hearing to be delayed as the company had recently appointed new legal advisers. On 31 July 2014, the Tribunal directed a further stay until 30 September 2014.

20 35. On 25 September 2014, Mr Ailyan wrote again, asking for a further stay to allow negotiations to proceed with HMRC. HMRC wrote on 3 October 2014, agreeing with the application for a stay up to 31 October 2014, but saying:

25 “after the 31 October, the insolvency practitioner will have had a period of four months within which to assess whether the Appellant Company will continue with the Tax Appeal and whether or not it can fund the litigation. This appears to be a reasonable period of time for the insolvency practitioner to reach that decision. In these circumstances we invite the Tribunal to list the matter for a case management hearing...after 31 October 2014...”

30 36. The Tribunal stayed the case until 31 October 2014. On 2 December 2014, HMRC wrote to the liquidator, advising that HMRC intended to pursue strike-out applications in respect of the first and second appeals at the hearing.

37. A case management hearing was listed for 17 December 2014. However, the hearing was postponed until the end of March 2015 following the joint application of both parties to allow time for settlement negotiations.

38. Finally, this hearing was listed and has taken place.

35 **The facts relating to the second appeal**

39. On 23 November 2012, HMRC wrote to the company saying that closure notices were to be issued in relation to enquiries opened into the accounting periods ending 31 March 2005, 2006, 2007 and 2008. The letter included a detailed analysis of the points at issue, being the “remuneration trust” and the “factoring scheme.” The assessments were issued on 28 November. The amount totalled just under £3m, made up as follows:

- (1) year ending 31 March 2005 £1,382,587.51
- (2) year ending 31 March 2006 £350,771.97

(3) year ending 31 March 2007 £953,779.80

(4) year ending 31 March 2008 £271,354.70

5 40. On 7 December 2012, Baxendale Walker LLP appealed the assessments on behalf of the company. The letter said “we note that the corporation tax assessments do not identify the basis of the alleged liability.”

41. On 30 April 2013, HMRC was asked to carry out a statutory review. The time limit for this was extended by agreement on 21 June 2013. By 23 September 2013, the statutory review had still not been completed.

10 42. On 1 October 2013, HMRC provided the results of the statutory review, and on 25 October 2013 Baxendale Walker Ltd notified the appeal to the Tribunal. Under “grounds of appeal” was the single sentence: “Please refer to the enclosed copy of the Baxendale Walker MDP letter [sic] dated 7 December 2012.”

15 43. As we have seen, on 1 November 2013, Judge Poole gave directions in relation to the first appeal. The covering letter said “the judge has also considered the new appeal and states that the grounds of appeal seem to be inadequate.”

20 44. On 29 November 2013, Baxendale Walker Ltd completed a new Notice of Appeal form. The attached covering letter said that the new Notice of Appeal was to be treated as replacement for that submitted on 25 October 2013. However, because it was a new form, the Tribunals Service mistakenly allocated a new reference number, being TC/2013/09178.

45. The grounds of appeal were stated in the replacement form to be as follows:

“1. The company has correctly self-assessed its liability to corporation tax in relation to [the relevant years];

25 2. The deductions claimed for the contributions to the Remuneration Trust and for the derecognised receivables falling under the Factoring Agreement were validly claimed.

3. Each and every one of the reasons stated by HMRC in its letters dated 23 November 2012 and 1 October 2013 why the decisions were incorrectly claimed was wrong.”

30 46. Mr Yates suggested, and Mr Kamal concurred, that this Notice of Appeal should be treated as a restatement of the company’s grounds of appeal in relation to the second appeal.

35 47. In the letter of 1 April 2014, referred to above, the Tribunal recognised that the issuance of a further appeal reference number was a mistake and said that this would be clarified at the case management hearing, as would the question of whether the grounds given for the second appeal were sufficiently particularised.

48. The post-liquidation correspondence, summarised above in relation to the first appeal, covered all three appeal reference numbers.

The parties’ submissions

40 49. Mr Yates said that:

(1) in relation to the first appeal, the company had failed to respond to Judge Poole’s direction of 1 November 2013;

(2) although amended grounds of appeal had been filed in the second appeal, these were “manifestly inadequate”; and

5 (3) the amounts involved were significant, totalling around £4m.

50. He asked that the Tribunal reissue Judge Poole’s directions, but add an “unless order” requiring compliance within 28 days.

51. Mr Kamal said that the company was negotiating with HMRC to try and settle the disputes. He asked the Tribunal to adjourn the appeals to allow these negotiations
10 to continue.

52. If, despite his submission that the appeals be further adjourned, the Tribunal nevertheless decided to direct an “unless” order, Mr Kamal asked that the company be given two months to provide the particulars for their grounds of appeal. He said that it was possible that the liquidator would be appointing new advisers, and time would
15 then be needed for any such new advisers to understand the issues.

53. Mr Yates responded by saying that the company had already had a very long period within which to comply. It had failed to respond to the direction from Judge Poole. There was no good reason why the Tribunal should give the company two further months, when the statute only allowed a taxpayer 30 days to provide the
20 Tribunal with its grounds of appeal after the issuance of a statutory review decision. [Taxes Management Act 1970, s 49G(5)(a)].

Discussion and decision

54. I agree with Mr Yates that the tribunal should issue an “unless” order with a 28 day time limit, for the reasons he gives and for the further reasons set out below.

25 *The Notices of appeal and the directions and request of 1 November 2013*

55. The company’s original grounds of appeal made no reference to the detailed letters provided by HMRC before the appeals were notified to the Tribunal. Those were simply ignored. The grounds of appeal merely cross-referenced to two earlier letters from the company’s representative, neither of which set out any particularised
30 grounds.

56. The company has been aware since at least September 2013 that HMRC had asked for more detailed grounds. Baxendale Walker Ltd told the Tribunal on 25 September 2013 that it was awaiting the results of the statutory review for the later assessments, and that this would have “a consequent impact on the grounds of
35 appeal.” That review letter was issued on 1 October 2013, but the amended grounds of appeal provided on 29 November 2013 were, as Mr Yates said, simply assertions of disagreement.

57. The company has not responded to Judge Poole’s direction in relation to the first appeal, given on 1 November 2013, or to Tribunal’s request for more
40 particularised grounds for the second appeal, contained in the covering letter from the Tribunal of the same date.

58. While I acknowledge that the company is now in liquidation, the liquidator has been aware of the need to provide more detailed grounds since soon after his appointment, now over a year ago.

Lack of particularisation

5 59. I agree with Judge Poole that it is not sufficient for an Appellant to refer in general to all the grounds that have been raised in previous correspondence: many arguments are raised in prior discussions, but by the time the appeal comes to the Tribunal, the parties' positions may have changed, with some arguments being abandoned and others developed or amended.

10 60. Rule 21(2)(g) of the Tribunal Rules specifies that grounds must be provided when an appeal is made to the Tribunal, and that is for the very good reason that these are the starting point for the proceedings. HMRC's Statement of Case is a response to those grounds, and if they are not properly particularised, the appeal cannot proceed because HMRC does not know what arguments the Appellant is seeking to make
15 before the Tribunal.

Negotiations

61. Mr Kamal's case rested heavily on the negotiations which are underway with HMRC. I considered whether Rule 3 was relevant. This says:

3 Alternative dispute resolution and arbitration

- 20 (1) The Tribunal should seek, where appropriate--
- (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and
 - (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.

25 62. I decided that Rule 3 was not in point. This was not a case where "*the parties wish*" the Tribunal to allow the company further time to facilitate the negotiation: HMRC's position is firmly that the detailed grounds are already long overdue and should be supplied within 28 days.

30 63. Furthermore, in my judgment it would not be in compatible with the overriding objective to allow further time for the company to provide particularised grounds of appeal, simply because there are ongoing settlement discussions. A taxpayer who receives a statutory review decision is not allowed an extension of time for filing its grounds of appeal with HMRC simply because it is also in the course of settlement discussions with HMRC. There is no reason why the company should be in a better
35 position.

64. Furthermore, the case has already been adjourned three times: in June 2014, to allow Mr Nailyan to communicate with the former directors; in July 2014, following the appointment of new legal advisers to the company, and on 17 December 2014, when the case management hearing was postponed to allow time for settlement. The
40 company has therefore already had the benefit of these considerable delays.

65. If the liquidator now decides to appoint different advisers, that is a matter for him. He has been aware for around a year that particularised grounds of appeal were required. I see no reason to allow a further period of grace.

The Directions

66. I therefore issue the Directions attached as an Appendix to this decision notice. These are, as requested by Mr Yates, in the same terms as those issued by Judge Poole but with the addition of an unless order.

5 67. If the company settles with HMRC before 12 May 2015, it can of course withdraw its appeals. If the negotiations are still ongoing on that date, then the company must either comply with the “unless” order, or the appeals will be struck out.

Appeal rights

10 68. 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 Rules.

15 69. 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 Redston

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**TRIBUNAL JUDGE
RELEASE DATE:**



Appeal numbers: TC/2013/04487
TC/2013/08108

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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**RAPID BRICKWORK LIMITED
(in liquidation)**

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

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**Sitting in public at the Tribunal Centre, Fox Court, Gray's Inn Road on 14 April
2015**

20 Having heard Mr Setu Kamal of Counsel, instructed by the Appellant and Mr David
Yates of Counsel, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents

IT IS DIRECTED that

25 70. unless the Appellant delivers to the Tribunal and to the Respondents, so as to be
received by both of them no later than 12 May 2015, amended grounds of appeal
which particularise in reasonable detail all the legal grounds upon which the
Appellant relies in support of the appeals and the outline facts which, in its
submission, support such legal grounds, the appeals SHALL BE STRUCK OUT
without further direction.

30 71. The time for delivery of the Respondents' statement of case shall be 42 days
from the date on which the Appellant complies with Direction 1.

For the avoidance of doubt, these Directions apply to the appeal registered by the Tribunal under reference TC/2013/04487 and to the appeal registered under reference TC/2013/08108.

5 Both parties agreed that the appeal registered as TC/2013/09178 was a duplicate of appeal TC/2013/08108. The Tribunal has removed TC/2013/09178 from its records. The Notice of Appeal originally registered under that reference has been added to the Tribunal bundle for TC/2013/08108. Paragraphs §44-47 of the attached decision provides further details.

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**ANNE REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 5 May 2015

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