



TC04869

Appeal number: TC/2014/4361

PROCEDURE – application for reinstatement of proceedings stuck out for non-compliance with directions – Tribunal Procedure Rule 8(5)

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MIDLAND CREDIT LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 8 February 2016

The Appellant did not appear and was not represented

Mr David Wilson (HMRC Appeals Unit) for the Respondents

DECISION

Background

1. On 7 August 2014 the Appellant filed a notice of appeal with the Tribunal appealing against a VAT assessment of £14,966 and an inaccuracy penalty of £2,438. The notice of appeal applied for permission to appeal out of time (section 6 of the notice) and stated (section 5 of the notice) that the disputed tax had not been paid but no application had been made to the Respondents (“HMRC”) for the appeal against the VAT to proceed without payment or deposit of the disputed tax (“a Hardship Application”) – s 84(3B) VAT Act 1994 refers.
2. On 14 August 2014 the Tribunal acknowledged the notice of appeal, notified the Appellant that the appeal was late, and stated that the appeal could not proceed without payment or deposit of the disputed tax or a Hardship Application being granted by HMRC or the Tribunal. The letter asked for confirmation by 28 August 2014 that a Hardship Application had been made to HMRC.
3. On 4 September 2014 HMRC applied for the proceedings to be struck out in the absence of a Hardship Application having been made (“the September 2014 Application”). The September 2014 Application erroneously cited the Appellant as “Midland Recruitment Ltd”, although it quoted the correct appeal number.
4. On 2 October 2014 the Tribunal notified the September 2014 Application to the Appellant (the Tribunal letter gives the correct name and appeal reference) and asked for a reply by 23 October 2014.
5. In the absence of any reply from the Appellant to the Tribunal’s letters dated 14 August and 2 October 2014, on 5 February 2015 the Tribunal (Judge Poole) directed the Appellant to reply by 19 February 2015, failing which the proceedings may be struck out (“the Unless Direction”).
6. In the absence of any reply from the Appellant to the Unless Direction, on 7 May 2015 the Tribunal (Judge Bishopp) struck out the proceedings (Tribunal Procedure Rule 8(3)(a) refers).
7. On 3 June 2015 the Appellant applied for the proceedings to be reinstated (“the Reinstatement Application”) (Tribunal Procedure Rule 8(5) refers), stating that it did not receive the Unless Direction. HMRC subsequently objected to the Reinstatement Application.
8. On 17 December 2015 the Tribunal notified both parties of the hearing of the Reinstatement Application on 8 February 2016 in Birmingham.
9. On Friday 5 February 2016 at 4.16pm the Appellant requested that the hearing be postponed, for stated reasons (“the Postponement Application”). On Monday 8 February 2016 I refused the Postponement Application, and that decision was

communicated to the parties by email at 10.34am that day. My reasons for that decision are stated at [10] below.

The Postponement Application

5 10. The grounds for the Postponement Application were that the bundle prepared for the hearing by HMRC “is a mess and includes information which is completely incorrect and refer[s] to other companies. We refer to page 55 which is for a company called Midland Recruitment Ltd and pages 69 to 82 which refer to a company called Jumbogate Ltd ...”.

10 11. The reference to Jumbogate is to the case report of an authority cited by HMRC, the Tribunal case of *Jumbogate Ltd v HMRC* [2015] UKFTT 0064 (TC), which HMRC had properly included in the trial bundle.

15 12. The other reference is to the September 2014 Application – see [3] above. The Appellant has had a copy of that document since the Tribunal copied it to the Appellant on 2 October 2014 – ie around 16 months ago – and the Appellant has not previously made any comment thereon. For completeness, I should emphasise that although the September 2014 Application sought the strike out of the proceedings, it was not progressed by the Tribunal beyond being notified to the Appellant; the reason for the strike out of proceedings on 7 May 2015 was because the Unless Direction had not been complied with and Judge Bishopp concluded the proceedings should be struck out. Although the mistake by HMRC was unfortunate, there is nothing to suggest that it has misled the Appellant, or even that the discrepancy had previously been noticed by the Appellant.

25 13. I concluded that there was nothing in the grounds that warranted granting a postponement of the hearing and thus refused the Postponement Application – see [9] above.

The hearing of the Reinstatement Application

30 14. The Appellant did not appear and was not represented. Prior to commencement of the hearing the Tribunal’s clerk telephoned the Appellant using the telephone number stated on the notice of appeal and the latest emails to the Tribunal from the Appellant, and was told that Mr Paul Cullen was in meetings all day. I was satisfied that reasonable steps had been taken to notify the Appellant of the hearing (see [8] above) and of the refusal of the Postponement Application (see [9] above), and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33. In particular, the guidance notes on postponements which accompany the hearing notification letter (see [8] above) clearly state “You must assume that the hearing of the appeal is going ahead unless you have been notified otherwise.”

15. Mr Wilson for HMRC confirmed:

- (1) HMRC objected to the Reinstatement Application.

- (2) HMRC had not received a Hardship Application from the Appellant.
- (3) The last correspondence received by HMRC from the Appellant was prior to the notice of appeal.
- (4) HMRC consider that the Appellant has no reasonable prospect of success in its arguments in support of its appeal against the disputed VAT, and HMRC's views had been made clear in their formal review decision dated 26 June 2014.

Approach

16. The approach to be adopted on determination of a reinstatement application was stated by the Upper Tribunal in *Pierhead Purchasing Ltd v HMRC* [2014] UKUT 0321 (TCC), where Proudman J stated (at [24]) “all the circumstances need to be considered and there should be no gloss on the overriding objective.” She stated (*ibid*):

“I was asked by Mr Jones [counsel for the taxpayer] to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case [*Former North Wiltshire DC v. HMRC* [2010] UKFTT 449 (TC)] that the matters they took into account are relevant to the overriding objective of fairness.”

17. Proudman J summarised those criteria (at [23]) as:

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

18. That is the approach I shall adopt to the Reinstatement Application. I note it is the same approach followed by Judge Sinfield in the *Jumbogate* case cited by HMRC (at [43-45]).

Consideration and Conclusions

19. The Appellant did not correspond or engage at all with the Tribunal – despite repeated requests – between filing its notice of appeal and making the Reinstatement Application. That failure to engage was clearly the reason why Judge Bishopp considered it was appropriate to strike out the proceedings. Even if I accept the Appellant's statement that it did not receive the Unless Direction, there is still no good explanation of why the Appellant has totally failed to engage with the appeal proceedings after filing its notice of appeal. Although the Appellant has been aware since 14 August 2014 of the need to make a Hardship Application, nothing has been

done almost 18 months later. This hearing was the Appellant's opportunity to explain its behaviour but it has chosen not to appear or be represented. On the basis of the information available to me I conclude that there was no good reason for the delays and failure to engage.

5 20. I have considered carefully whether a distinction should be drawn between the part of the appeal against the VAT assessment and that against the penalty. A
Hardship Application was not a prerequisite for the penalty appeal, only the VAT
10 appeal. However, Judge Bishopp's decision was to strike out the entire proceedings for failure to comply with the Unless Direction, and I agree that – given the total failure by the Appellant to reply to correspondence – its non-engagement was in relation to the entire proceedings. Accordingly, I consider there is no distinction to be drawn, in these circumstances, between the parts of the appeal against the VAT and the penalty.

15 21. I have noted that the Appellant has consistently contested the VAT status of its supplies throughout its dispute with HMRC and on to its grounds of appeal to the Tribunal. I have not heard arguments on the technical matter involved and so cannot reach any conclusions in that regard. HMRC's formal review decision on the dispute was issued on 26 June 2014 (the Appellant states it was received on 4 July 2014) and sets out HMRC's arguments in detail over five pages; they concern mainly the rules
20 relating to insurance intermediaries (Group 2 of sch 9 VAT Act 1994 refers) and HMRC concluded that the Appellant's supplies were exempt, and thus there was no recoverable attributable input tax.

22. I also note that the aggregate amount of the disputed tax and penalty is over £17,000, which is a significant sum.

25 23. Having applied the *Pierhead Purchasing* criteria I have concluded that, on balance and for the reasons set out above, it would not be fair and just to exercise my discretion to reinstate the proceedings.

Decision

24. The Reinstatement Application is REFUSED.

30 25. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**PETER KEMPSTER
TRIBUNAL JUDGE**

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RELEASE DATE: 10 FEBRUARY 2016