[2016] UKFTT 0267 (TC)

TC05042

Appeal number: TC/2009/9720

REINSTATEMENT APPLICATION – appellant failed to comply with Unless order when legally advised appeal likely to fail due to failure of 'Sub One' litigation – automatically struck out - applied for reinstatement when learnt other solicitors taking new ground of appeal – no real prospect of success in new ground – reinstatement refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MALTAVINI LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, Strand, London on 18 April 2016

Mr L Allen, Solicitor, of Mishcon de Reya, for the Appellant

Mr E West, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These are the written reasons for a decision given in an applications hearing. The appellant, acting by its original solicitors, Dass, lodged an appeal with the Tribunal on 31 March 2009, to which the above reference number was allocated. It appealed against a decision (but not an assessment) that certain supplies made by it, trading as a Subway franchisee, were standard rated. It has not been assessed but is seeking repayment of allegedly overpaid VAT.

2. Its appeal was stood over for many years behind the litigation involving another Subway franchisee which was finally resolved by the Court of Appeal decision in *Sub One Limited t/a Subway* [2014] EWCA Civ 773. On 10 July 2015, the Tribunal wrote to the appellant giving it 14 days to notify the Tribunal if it intended to pursue its appeal in view of HMRC' success in the *Sub One* litigation and, if it did, what its new grounds of appeal would be.

3. On 30 July 2015, no reply to the Tribunal's letter having been received, the Tribunal issued an unless order. It stated that the appeal 'WILL be STRUCK OUT' if the appellant did not notify the Tribunal no later than 13 August 2015 of an intention to pursue the appeal. It also stated that the appeal 'may' be struck out if the appellant did not notify the Tribunal of revised grounds of appeal by the same date.

4. No reply was received. It was accepted by Mr Allen, of Mishcon de Reya, now representing the appellant, that the appellant did not notify an intention to pursue the appeal by the directed date of 13 August 2015 and indeed that it only notified an intent to pursue the appeal when it applied by letter of 2 October 2015 for reinstatement of the appeal. Mr Allen accepted that a reinstatement application was necessary if the appeal was to be pursued because the appeal had been automatically struck out under Rule 8(1) on 14 August 2015:

> **Rule 8**
>
> (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.

5. The Tribunal had no actual evidence of why the appellant failed to comply with the unless order. The Tribunal hearing proceeded on the basis that the reason was no better than the reason given by Mr Allen in the hearing. That reason was that the appellant did not notify an intent to pursue the appeal because Dass advised the appellant that in view of the outcome of *Sub One Ltd*, its appeal, based on the same grounds, had no real prospect of success; It was only in early September 2015, when the appellant became aware from an organisation connected with the Subway franchise that Mishcon de Reya were pursuing an alternative ground of appeal, that it chose to instruct Mishcon de Reya and decided to pursue the appeal once again.

6. The revised grounds of appeal on which it now wished to pursue the appeal were accepted by all parties to be identical to those put forward in *Lake Avenue and others* [2016] UKFTT 215 (TC). Very recently, and long after the appellant made its reinstatement application, I struck out these other appeals on the basis that the ground of appeal now relied on had no real prospect of success. Mr Allen chose to reserve his position on this; he did not seek to persuade me in this hearing that my decision in *Lake Avenue* was wrong. His clients in those four appeals are considering whether to make an application to appeal that decision. Mr Allen also said he thought it unlikely that Maltavini Ltd would chose to pursue its appeal if the four appellants all chose not to appeal my decision in *Lake Avenue and others.*

7. There was an issue between the parties over the time it took for the appellant to apply for reinstatement. In brief, the Tribunal originally notified the appellant that the appeal had been struck out, and of its right to apply for reinstatement within 28 days, by letter dated 24 September 2015. The letter was erroneous as it referred to the appeal being struck out by a judge. The appeal had not been struck out by a judge but simply by operation of Rule 8(1) as set out above. That error was noticed when the appellant applied for reinstatement on 2 October; the error was corrected by letter dated 15 October 2015 by which the Tribunal gave a further 28 days to apply for reinstatement. HMRC's point was that the appeal was struck out on 14 August but no reinstatement application was made for over one and half months.

8. I won't refer to this again as I do not consider that there is anything in HMRC's point. Even treating the earlier Tribunal letter as the notification, the appellant was not notified of the strike out by the Tribunal until 24 September 2015 and applied for reinstatement on 2 October, a week later. It is the date of notification which matters: Rule 8(6) provides for 28 days running from the date of notification in which to apply for reinstatement. I do not consider that there was any delay by the appellant in making the application. It is irrelevant the technical date for the strike out was 14 August 2015.

Decision

9. There is public interest in finality in litigation. The appellant applies for relief from sanctions. Its reason for failing to comply with the unless order was that, on advice from its solicitors, it thought its appeal could not succeed and it therefore chose not to pursue it. After the appeal was struck out, however, it received different advice from different solicitors, and now wishes to revive its appeal.

10. I do not consider that a good reason, without more, for reinstatement. If appeals could simply be reinstated where the party concerned, having chosen not to pursue the appeal, receives later, more optimistic, legal advice, then the other party would have no certainty that the litigation had truly ended once it was struck out.

11. Moreover, if it had wished to pursue the appeal, having received negative advice from its original legal advisers, the appellant could have taken active steps to see if other advisers were more optimistic about its chances. I accept that the two weeks permitted by the Tribunal in which to notify of an intention to pursue the

appeal may have been insufficient for this: but if the appellant was actively seeking new legal advice, the appellant could have (but did not) apply for an extension of time for compliance. Rather it seems, on Mr Allen's version of events, that the appellant was prepared to take no action in the knowledge that the appeal would be struck out. It was only when, as Mr Allen explained in his skeleton, the appellant fortuitously heard that Mishcon de Reya were actually putting forward a new case that the appellant decided to take steps to revive its own appeal. This somewhat opportunistic attitude to the litigation continues in that Mr Allen also informed me the appellant is unlikely to pursue its appeal if the four appellants in *Lake Avenue* decide not to apply for permission to appeal.

12. In these circumstances, I considered that the public interest in finality in litigation meant that the appellant must abide by its own decision not to pursue this appeal. Even if the original solicitor's advice was erroneous (and I see no reason to suppose that it was), the appellant's remedy is to take legal action against them: it is unfair to put HMRC to the expense of defending these struck out proceedings because the other party relied on (claimed) erroneous advice from their own legal advisers not to pursue the appeal. This is particularly the case in view of the appellant's opportunistic attitude to the litigation: while there is nothing wrong in seeking to litigate on the back of lead cases, the appellant should abide by its decision to jump off the bandwagon; it should not be able to jump back on, at the respondent's expense, just because it now likes its chances better.

13. As I have said, the appellant did not actually prove its reason for non-compliance but I have proceeded on the assumption it was what Mr Allen said. If I proceeded on the basis that I simply did not know the reason for non-compliance, I would also find against it. Without knowing the reason for non-compliance, it is difficult to excuse it and certainly there is no basis for doing so in this case.

The merits of the appeal

14. Mr West's position was that he could find no authority to suggest that the merits of the underlying appeal were relevant on a reinstatement application but that to the extent, if any, the merits of the appellant's underlying appeal were relevant, his view was that the appellant's revised grounds had no real prospect of success for the reasons he had given in support of HMRC's successful strike out application in *Lake Avenue and others.*

15. I consider that the merits can be relevant in a reinstatement application: if the merits of a case were very strong, I think that might weigh in favour of reinstatement; if a case does not have a real prospect of success that ought to weigh heavily against reinstatement. Where the prospects for success are neither very strong nor very weak, then I agree that the consideration of the merits may be irrelevant on a reinstatement application.

16. In this case, the appellant does not seek to pursue its original grounds of appeal but wishes to amend its grounds to include a sole ground of appeal being that ground explained at [23-37] of my recent decision in *Lake Avenue.* In view of the Court of

Appeal's decision in *Sub One Ltd* everyone appears agreed, and I find, that its original grounds of appeal have no real prospect of success. And even assuming that it would get leave to amend its grounds of appeal, I consider that the merits of its proposed new ground of appeal to be very weak, for the reasons given at [46-73] of *Lake Avenue.* Mr Allen does not agree with my recent decision in *Lake Avenue,* but he did not in this hearing chose to try to persuade me that it was wrong.

17. There is no point in reinstating an appeal, such as this one, which I would strike out for having no real prospect of success.

Similarity to reinstatement following withdrawal?

18. Mr West pointed out that this application was for relief from sanctions and following *Mitchell* [2014] 1 WLR 795 and *BPP* [2016] EWCA Civ 121 the Tribunal should put be slow to excuse non-compliance with Tribunal directions. While that is strictly true, I do not consider it was right to say that the cases Mr Allen cited (in particular *Pierhead*, cited below) which concerned applications for reinstatement following a withdrawal were irrelevant. There are clear parallels in that, by choosing not to comply with the unless order in this case the appellant was effectively withdrawing from the appeal. The real difference, it seems to me, is that a withdrawal by a party is unprompted by the Tribunal; but where an unless order is issued by the Tribunal requiring a party to state if they intend to pursue the appeal, the Tribunal is in effect prompting the appellant to state if it does not wish to withdraw.

19. But it seems to me that even if this were to be treated as an application for reinstatement following an unprompted withdrawal from an appeal, the outcome would be the same. Proudman J in *Pierhead Purchasing Ltd v Commissioners of Revenue & Customs* [2014] UKUT 321 (TCC) stated that the Tribunal should take into account:

> "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."

20. Considering each of these factors my view is as follows:

(1) There was no good reason for the delay. As I have said, on Mr Allen's case, the appellant chose to do nothing to actively pursue the appeal until it heard that Mishcon de Reya was putting forward new grounds; in reality it failed to prove its reason at all.

(2) There is clear prejudice to HMRC in that the appeal had been struck out and reinstatement would put HMRC to the cost of defending it;

(3) It is difficult to see that there is loss to the appellant in that my opinion is that the new ground of appeal has no merit, so that in reinstatement being refused it is saved the expense of pursuing a hopeless appeal;

(4) I have already said that reinstating the appeal is against the public interest in finality in litigation;

(5) I have already dealt with the lack of merits in the proposed appeal.

21. In conclusion, even if this reinstatement application following a Rule 8(1) strike out for non-compliance is treated as equivalent to a reinstatement following withdrawal of the appeal, the result was still clearly in favour of the application being refused.

22. The application for reinstatement was refused.

23. 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.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 20 April 2016