[2016] UKFTT 0357 (TC)

TC05112

Appeal number: TC/2014/04113

PROCEDURE – non-appearance of Appellant – application to set aside decision – Rule 38 – whether in the interests of justice to set aside – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

KAVEH RASHIDI **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 1 April 2016

Mr Kaveh Rashidi appeared in person

Ms Rebecca Young of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is an application by the Appellant to set aside a decision of the First-tier Tribunal (Judge Jennifer Dean and Mrs Elizabeth Pollard) released on 5 June 2015 ("the Decision"). The appeal was dismissed.

2. The Decision followed a hearing in Manchester on 3 June 2015 which the Appellant did not attend. The Tribunal recorded that the Appellant had been notified of the hearing date in writing and that there had been no answer to a telephone call from the Tribunal Clerk on the day of the hearing. The Tribunal was satisfied that the requirements of Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 had been met and proceeded to hear the appeal in the absence of the Appellant.

3. The appeal itself was against a civil evasion penalty of £1,371 ("the Penalty"). The Penalty was imposed on the basis that the Appellant had dishonestly evaded excise duty and customs duty on the importation of 10,000 cigarettes at Manchester Airport on 24 October 2014 when the Appellant was returning from a trip to Iran.

4. The Appellant contends that he was unaware of the hearing date and if he had been aware of it he would have attended the hearing. On that basis he applies for the Decision to be set aside.

5. The jurisdiction to set aside a decision which disposes of proceedings is in Rule 38 which provides as follows:

> *" 38(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.*
>
> *(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;*
>
> *(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.*

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is

received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

(4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

6. It is clear that the condition in Rule 38(2)(d) is satisfied. The question therefore is whether it is in the interests of justice for me to set aside the Decision.

Chronology

7. The following is a chronology of events. In so far as necessary I make findings of fact based on the documents before me, the Appellant's evidence before me and the Tribunal file.

8. The Respondents confirmed the Penalty in a review decision dated 4 July 2014. The Appellant then lodged his Notice of Appeal with the Tribunal on 30 July 2014. The Notice of Appeal gave the Appellant's address in Middleton, Manchester together with an email address and a mobile phone number. The Tribunal confirmed receipt of the appeal in a letter dated 7 August 2014. There is no indication that confirmation was sent by email and I am satisfied that it was sent by post.

9. On 14 October 2014 the Tribunal chased the Respondents for their Statement of Case which had been due on 6 October 2014. A copy of that letter was sent by email to the Appellant for his information.

10. On 27 October 2014 HMRC applied for an extension of time in which to serve their Statement of Case. The application was forwarded to the Appellant, apparently by post in a letter dated 31 October 2014 which gave him an opportunity to object to the application.

11. The Respondents lodged their Statement of Case with the Tribunal on 18 December 2014 by email. The Appellant was copied in to that email by the Respondents. The Respondents then lodged their List of Documents with the Tribunal on 8 January 2015.

12. On 20 January 2015 the Tribunal sent standard directions to the Appellant by email together with a covering letter. The directions required the Appellant to lodge and serve his List of Documents by 27 February 2015 and required both parties to provide listing information by the same date. The Respondents provided their listing information on 27 January 2015 and a copy was emailed by the Tribunal to the Appellant on 29 January 2015.

13. The Tribunal heard nothing from the Appellant in response to the directions. On 5 March 2015 the Tribunal emailed a letter to the Appellant chasing his List of Documents and his listing information.

14. On 26 March 2015 the Respondents sent the hearing bundle to the Appellant in accordance with the directions. It was sent by "track and trace" but it was returned on 1 April 2015 because it did not appear anyone was living at the address. The bundle was then sent to the same address by Royal Mail at the beginning of April and it was not returned undelivered. The Appellant accepted that he did receive the hearing bundle.

15. On 15 April 2015 the Respondents lodged an application with the Tribunal seeking an unless order in terms that unless the Appellant supplied his list of documents and listing information by 8 May 2015 then the appeal should be struck out.

16. In the absence of any response from the Appellant to the Tribunal's letter dated 5 March 2015 the Tribunal emailed a letter to both parties on 22 April 2015 informing them that the appeal would be heard on 3 June 2015.

17. The Respondents' application for an unless order was sent by the Tribunal to the Appellant with a covering letter dated 23 April 2015. From the facts referred to in the next paragraph I am satisfied that it was sent by post addressed to the Middleton address.

18. The Appellant sent various documents to the Tribunal which were received on 8 May 2015 without any covering letter. Those documents included the original letter from the Tribunal to the Appellant dated 23 April 2015, a copy of the Respondents' application and other documents possibly relevant to the appeal itself. The Appellant was treated as having thereby served his List of Documents.

19. On 19 May 2015 the Tribunal wrote to the Appellant acknowledging receipt of his documents, inviting any questions he might have in relation to the directions dated 20 January 2015 and confirming that the hearing would proceed on 3 June 2015 as previously notified. There is no indication that this letter was emailed and I find that it was sent by post to the Appellant in Middleton

20. On 21 May 2015 the Respondents lodged their skeleton argument with the Tribunal.

21. The hearing proceeded on 3 June 2015. The Respondents were represented by counsel. Also in attendance were their two witnesses, Mr Haigh who was the Border Force officer who seized the cigarettes being imported by the Appellant and Mr Dawson who was the HMRC officer responsible for issuing the Penalty.

22. The Decision was released on 5 June 2015. It was sent by email to the Appellant on the same date together with a covering letter and guidance notes.

23. On 1 September 2015 the Respondents' Debt Management section wrote to the Appellant seeking to recover the sum of £1,371. On 16 September 2015 the Appellant wrote to the Tribunal enclosing a copy of that letter. He stated that he had appealed the sum claimed and was waiting for a hearing. He said that he had not received any notification of a hearing date. The first he had heard about the Decision was when the Respondents sent him a letter to an old address which he had been lucky to receive.

24. In so far as the Appellant may have been suggesting that correspondence from the Tribunal was sent to an old address, that is not the case. Where documents were sent by post, the address used was the Appellant's home address in Middleton.

25. The Appellant told me that once he had lodged the Notice of Appeal in July 2014 he had no contact from the Tribunal until receiving a letter from the Respondents about the Decision. That letter was not produced and I infer that the Appellant was referring to the letter from the Respondents' Debt Management section dated 1 September 2015. In any event, nothing turns on whether there was another letter from the Respondents following the hearing. The key point is that the Appellant stated that he had received nothing from the Tribunal between July 2014 and September 2015.

26. I do not accept that was the case. The Appellant plainly received the Tribunal's letter dated 23 April 2015 sent to him by post, because he replied to that letter returning the actual letter he had received to the Tribunal on 8 May 2015. It was only after some prompting from me that he recalled receiving that letter from the Tribunal. I also find that the other communications identified above as being sent by post were received at the Appellant's Middleton address, even if for some reason they did not come to his attention.

27. On 29 September 2015 the Tribunal emailed the Appellant with a letter acknowledging his letter of 16 September 2015 and asking him to confirm whether he was seeking to set aside the Decision or appealing against the Decision. The Appellant then phoned the Tribunal on 21 October 2015 chasing a response to his letter and stating that he had not received the letter dated 29 September 2015 which was subsequently re-sent to him by email.

28. The Appellant replied by email on 9 November 2015. He stated that he wished to appeal the Decision on the ground that the hearing had been conducted in breach of proper procedures. He re-stated that he had not received any notification of the hearing date and also stated that he had not received any phone call on the day of the hearing. He indicated that the phone number used by the Tribunal which was taken from the Notice of Appeal was out of date and gave his current mobile phone number.

29. The Appellant has only one email address but he does not use it all the time. He does not open all the emails he receives. He tries to identify and open the important emails but as at the date of the present hearing he had 700 unopened emails.

30. In early 2015 the Appellant was studying for a City & Guilds qualification as a plumber. He would receive hundreds of emails in a month. He would only check his

emails approximately once a month and he found it hard to identify important emails. He said that he had assumed the Tribunal would send him a letter through the post to notify the hearing date.

Reasons

31. The grounds relied upon by the Appellant are directed towards setting aside the Decision under Rule 38 rather than appealing the Decision on the grounds that it contains an error of law. Pursuant to Rule 42 I shall treat the Appellant's application as an application to set aside under Rule 38.

32. I must consider whether it is in the interests of justice to set aside the Decision. The starting point for that consideration is that the Appellant is entitled to attend a hearing of his appeal. Rule 30 provides as follows:

> "*Subject to rules 19 (proceedings without notice to a respondent) and 32(4) (exclusion from a hearing), each party to proceedings is entitled to attend a hearing.*"

33. Rule 31 provides that the Tribunal must give each party entitled to attend a hearing reasonable notice of the time and place of any hearing. In the case of a hearing to consider the disposal of the proceedings at least 14 days notice must be given, save where the parties' consent or in urgent or exceptional circumstances.

34. It is worth noting that Rule 13 makes provision for the sending and delivery of documents. For present purposes the following paragraphs of Rule 13 are relevant:

> " *13(2) Subject to paragraph (3), if a party or representative provides a fax number, email address or other details for the electronic transmission of documents to them, that party or representative must accept delivery of documents by that method.*
>
> *(3) If a party informs the Tribunal and all other parties that a particular form of communication (other than pre-paid post or delivery by hand) should not be used to provide documents to that party, that form of communication must not be so used.*
>
> …
>
> *(5) The Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.*"

35. Rule 33 then makes provision for cases where a party does not attend the hearing as follows:

"*If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –*

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

36. It is clear from my findings of fact that the Tribunal which heard the appeal on 3 June 2015 was entitled to conclude that reasonable steps had been taken to notify the Appellant of the hearing. It was also entitled to conclude on the basis of the information available to it that it was in the interests of justice for the hearing to proceed. Notice of the hearing had been sent to the Appellant by email on 22 April 2015 and it was confirmed in a letter sent by post on 19 May 2015. The Respondents were ready to proceed. There was no reason not to proceed.

37. The Appellant had provided an email address so that he was required to accept service of documents by that means. He had not informed the Tribunal that any particular form of communication should not be used. The Tribunal was entitled to assume that the addresses provided by the Appellant remained the addresses to which documents should be sent and no notification to the contrary was given. We take the reference to "address" in Rule 13(5) to be a reference to both a postal address and any email address provided pursuant to Rule 13(2).

38. The effect of Rule 13 accords with common sense. The Tribunal is entitled to use any address given to it by a party for the service of documents unless told otherwise by that party.

39. The jurisdiction to set aside under Rule 38 only arises where it is in the interests of justice to set aside. In exercising our jurisdiction we must also give effect to the overriding objective of dealing with cases fairly and justly in Rule 2. I am mindful that Rule 2 provides as follows:

"*2(2) Dealing with a case fairly and justly includes--*

(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.

(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.

(4) Parties must--

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

40. I also have regard to the approach taken by the courts in cases of non-appearance by a party. That is governed by Civil Procedure Rule 39.3 which provides as follows:

"*(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.*

…

(5) Where an application is made under paragraph … (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –

(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial."

41. In *Bank of Scotland v Pereira [2011] EWCA Civ 241* Lord Neuberger MR as he then was gave guidance as to the application of that rule:

" *24. … An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in Regency Rolls Ltd v Carnall [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.*

25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention, that all parties in a case are

entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order."

42. I accept that the Appellant acted promptly when he found out about the Decision in early September 2015. Rule 38(3) provides that an application to set aside should be made no later than 28 days after the Tribunal sends out the decision notice. The question of whether I should extend that time limit in the present circumstances really depends on the view I take on the merits of the application to set aside.

43. The grounds of appeal which the Appellant seeks to pursue are essentially that this was the first time he had imported cigarettes from abroad and he was unaware that there was a limit of 200 duty free cigarettes when imported from a third country outside the EU. He says that he did not seek to dishonestly evade duty. For present purposes I shall assume that the Appellant would have a reasonable prospect of making out his case. I also take into account that he is appealing a penalty based on an allegation of dishonesty, although it is a civil penalty.

44. The question which then arises is whether the Appellant had a good reason for not attending the hearing.

45. The Appellant gave his email address to the Tribunal when submitting his Notice of Appeal. Having done so it was plainly unreasonable for him not to properly monitor his emails for communications from the Tribunal.

46. Even if the Tribunal's letter dated 19 May 2015 was not received in the ordinary course of post, I am satisfied that by 19 May 2015 it must have appeared to the Appellant that he had not been receiving documentation. He had received the Respondents' application dated 15 April 2015. That application stated in terms that he had not complied with the Tribunal directions dated 20 January 2015. In particular he had not served a list of documents or any listing information. It would therefore have appeared to the Appellant that he had not received documents sent by the Tribunal. His response was not to check with the Tribunal what had been sent or why documents had not been received. He did not ask for a copy of the directions or enquire about the listing of the appeal, knowing from the Respondents' application that he had been expected to provide listing information by 27 February 2015. He had plainly read the Respondents' application because the documents were sent so as to arrive at the Tribunal on 8 May 2015, the date by which the Respondents were applying for them to be served if the appeal was not to be struck out.

47. The fact that the Appellant is acting in person does not provide any justification for the casual attitude which he has shown to these proceedings. I say casual attitude in the sense that he failed to check his emails, he failed to provide up to date telephone details, he failed to ask for a copy of the directions released on 20 January 2015 and he failed to make any enquiries in relation to the listing of the appeal.

48. There is an obligation on parties to assist the Tribunal in dealing with appeals fairly and justly. That obligation applies equally to litigants in person as it applies to the Respondents. In *BPP Holdings Limited v Commissioners for HM Revenue & Customs [2016] EWCA Civ 121* the Court of Appeal was concerned with the Tax Tribunal's approach to non-compliance with Tribunal Rules and directions. The Senior President of Tribunals said as follows:

> "*38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.*
>
> *39. I found the approach of HMRC to compliance to be disturbing. At times it came close to arguing that HMRC, as a State agency, should be treated like a litigant in person and that the constraints of austerity on an agency like the HMRC should in some way excuse unacceptable behaviour. I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that it has some preferred status – it does not.*"

49. That was said in relation to the appropriate sanction for breach of a direction, but it seems to me that it is at least relevant to an application to set aside a decision under Rule 38. I consider that I ought to take into account in this application that it is desirable for litigation in this Tribunal to be conducted efficiently and at a proportionate cost. Where it is not I should take into account the impact on the efficient administration of the Tribunal as a whole and the interests of other litigants. In the present context that includes the fact that the Tribunal had to take steps to secure compliance by the Appellant with the directions given on 20 January 2015 and the waste of Tribunal resources occasioned by the Appellant's failures, not least in having to hear this application and, if it were successful, in conducting the original hearing.

50. It is clear that the Appellant would suffer prejudice if the Decision is not set aside. He will lose the opportunity to put forward his case that he was not dishonestly evading duty and should not have been subject to a civil penalty. He is unemployed, although he is now a qualified plumber. I accept that £1,371 is a significant sum which he may well have difficulty paying.

51. There is also clearly prejudice to the Respondents. They have been put to the expense of instructing counsel to attend the hearing on 3 June 2015. They had also arranged for Mr Haigh and Mr Dawson to attend that hearing as witnesses, no doubt

taking them off other duties. It would be a significant inconvenience and waste of public funds for the Respondents to have to attend a further hearing of the appeal if the Decision were to be set aside. They have also incurred the inconvenience and expense of attending the hearing of this application to set aside the Decision.

52. I must weigh all these factors in deciding whether it is in the interests of justice to set aside the Decision. In particular the Appellant did not have a good reason for not attending the hearing. I take into account nature of his failure, both in failing to monitor his emails and in failing to engage with the Tribunal when he received the Respondents' application for an unless order. I take into account the prejudice he will suffer and the prejudice which would be suffered by the Respondents. In the light of all the circumstances it seems to me that the interests of justice lie in not setting aside the Decision.

Conclusion

53. For the reasons given above the Appellant's application to set aside the Decision is refused. The Decision released on 3 June 2015 will therefore stand.

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 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2016