



TC05254

Appeal number: TC/2014/04045

**EXCISE DUTY – wrongdoing penalty – application for reinstatement of appeal
after striking out**

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RESPED TRANSPORT D.O.O

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE TONY BEARE

**Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL
on 13 July 2016.**

The Appellant did not appear and was not represented

**Ms Marika Lemos, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The Appellant did not attend and was not represented at the hearing. Nevertheless,
5 I was satisfied that the Appellant had been notified of the hearing and that it was in
the interests of justice to proceed with the hearing because the Appellant had been
given ample opportunity to state its case and attend the hearing. In particular, notice
of the hearing had been sent by post and e-mail to the same addresses as the letter of 5
February 2016, notifying the Appellant of the striking off of the appeal, to which the
10 Appellant responded on 2 March 2016 by applying for the appeal to be reinstated.

2. This is an application by Resped Transport D.O.O for the re-instatement of its
appeal dated 24 July 2014 in respect of an Excise Duty wrongdoing penalty. The
Respondents oppose the application to reinstate the appeal.

Background

3. The background to this appeal is that, after a series of failures by the Appellant to
15 engage in the process of its appeal, the most recent of which was a failure by the
Appellant to comply with a direction of the Tribunal on 8 January 2016, the
Appellant's appeal was struck out. Upon notification of the striking out, the
Appellant applied for its appeal to be reinstated.

The law

4. In considering whether or not to reinstate the appeal, I am bound in the first
instance to apply the overriding objective set out in Rule 2 of the Tribunal Procedure
(First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). This requires
the Tribunal to deal with cases fairly and justly. I am also bound by the recent Court
25 of Appeal decision in *BPP Holdings v The Commissioners for Her Majesty's Revenue
and Customs* [2016] EWCA Civ 121 ("*BPP*"), where it was held that the strict
approach to compliance with rules and directions taken in *Mitchell v News Group
Newspapers Limited* [2014] 1 WLR 795 ("*Mitchell*") and *Denton v TH White Limited*
[2014] 1 WLR 3296 ("*Denton*") should also be applied in the context of hearings
30 before the Tribunal.

5. Each of the *Mitchell* case and the *Denton* case concerned the application of CPR
3.9 in the case of an application for relief from any sanction imposed for a failure to
comply with any rule, practice direction or court order. It follows from the decision
in the *BPP* case that the principles set out in the *Mitchell* case and the *Denton* case
35 should be applied equally in a case such as this one.

6. CPR 3.9 requires that, on an application for relief from any sanction imposed for a
failure to comply with any rule, practice direction or court order, "the court will
consider all the circumstances of the case, so as to enable it to deal justly with the application,
including the need –

40 (a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.”

7. In giving the judgment of the court in *Mitchell*, the Master of the Rolls stated at paragraph 36 that the requirements set out in paragraphs (a) and (b) above “should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule”. He went on to note that, whilst it was true that the reference to “all the circumstances of the case” meant that a broad approach should be adopted in such circumstances, “the other circumstances should be given less weight than the two considerations which are specifically mentioned”.

8. In the *Denton* case, the Court of Appeal agreed with the principles set out in the *Mitchell* case and went on to say that an application for relief from sanctions should be addressed in three stages. “The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]”.

Discussion

9. Turning now to the facts which are relevant to this application and adopting the three-stage process suggested by the Court of Appeal in the *Denton* case, I would make the following observations.

The first stage – seriousness of breaches

10. In the period between lodging its appeal and the striking out of its appeal, the Appellant repeatedly failed to engage in the process of the litigation. In particular:-

- (a) The Appellant failed to acknowledge a letter dated 13 November 2015 sent to it by the Tribunal;
- (b) After requesting an extension from the original deadline of 3 July 2015, the Appellant failed to comply with a direction of the Tribunal dated 20 August 2015 that it should provide witness statements by 27 November 2015;
- (c) The Appellant failed to acknowledge or respond to the letter from the Tribunal dated 10 December 2015;
- (d) The Appellant has still not served its witness statements, 9 months after the date on which it was directed to do so and 4 months after the date on which it requested the reinstatement of its appeal;
- (e) The Appellant failed to comply with the unless order of the Tribunal dated 8 January 2016 to the effect that, unless it confirmed in writing that it intended to proceed with the appeal and served upon HMRC and the Tribunal any witness statements on which it sought to rely, the

proceedings could be struck out without further reference to the parties;
and

- (f) The Appellant has failed to provide any explanation for the above failures, even in its letter of 2 March 2016 applying for the reinstatement of its appeal.

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11. Consistent with the above approach, despite being given notice of the hearing to reinstate its appeal, the Appellant did not attend the hearing and did not notify the Respondents in advance of the hearing that it did not propose to attend the hearing.

12. It is therefore clear that the Appellant has repeatedly failed to engage in the process of this appeal.

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The second stage – reasons for default

13. As noted in paragraph 10(f) above, the Appellant has at no stage provided any explanation for its failure to engage in the process of the appeal.

The third stage – all the circumstances

14. As the Appellant has not provided any explanation for its past failures, and did not attend the hearing, it is hard to discern any circumstances which would justify the reinstatement of its appeal. It is clear from the case law cited above that, in determining whether or not to reinstate the appeal, I should give particular weight to the need for the litigation to be conducted efficiently and the need for compliance with the rules of the Tribunal. The Appellant's approach to date has made it impossible to conduct and progress the litigation.

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15. I accordingly hold that the appeal should not be reinstated.

Costs

16. The Respondents have hitherto made no application for their costs in opposing the reinstatement of the Appellant's appeal but I would be willing consider an application to that effect should they wish to do so.

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17. 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. 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.

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TONY BEARE

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TRIBUNAL JUDGE
RELEASE DATE: 18 JULY 2016