[2016] UKFTT 0653 (TC)

TC05396

Appeal number: TC/2015/03300

PROCEDURE – income tax appeal – application for reinstatement – one part of directions complied with but rest not – consideration of factors by reference to Data Select and other cases – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEVIN REED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 15 September 2016

Colin Peacock of Lawrence & Company, Chartered Certified Accountants, for the Appellant

Catherine Douglas, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Reed, applied for reinstatement of his appeal following a direction that, so far as it related to assessments for 2011-12, it should be struck out for failure to comply with Directions issued on 16 February 2016.

Background to the application

2. On 17 May 2015, Mr Reed gave Notice of Appeal to HM Courts & Tribunals Service ("HMCTS") against a decision of the Respondents ("HMRC") dated 22 January 2015.

3. I set out the background to the reinstatement application. This background should not be taken as formal findings of fact.

4. I was not provided with copies of any of the correspondence between Mr Reed and HMRC prior to a letter to him dated 20 April 2015 from an HMRC Review Officer. No copy of the final page of that letter was included, so that the identity of that Review Officer is not apparent.

5. From the copy of HMRC's Statement of Case produced for the appeal proceedings, it appears that there had been an enquiry into Mr Reed's taxable profits for 2010-11 as declared in his self-assessment return for that year. It had eventually been agreed that for 2010-11 additions were appropriate, leading to a total addition to taxable profits of £19,025. The enquiry had been closed on 22 January 2015 by the issue of a closure notice for that year and a revenue assessment for the following year, 2011-12. The addition for the latter year had been £17,131.

6. Penalty assessments for both years had been issued on 23 January 2015 based on deliberate behaviour and a penalty issued of 56 per cent of the potential lost revenue.

7. Mr Reed had accepted the 2010-11 amendment, but had lodged an appeal with HMRC against the revenue assessment for 2011-12, and against the penalty assessments for both years.

8. As a result of the HMRC review, the addition for 2011-12 was varied from £17,131 to £15,650. This was the result of removing the addition for wife's wages, which it had been established at the meeting would not apply for that year, and because it could not be presumed that the non-business expenses disallowed in 2010-11 would also have been claimed in the 2011-12 return. The resultant figure had been adjusted by using the Retail Price Index. The result was that the further notice of assessment issued to Mr Reed on 22 January 2015 needed to be varied from £4,967.99 to £4,538.50.

9. The Review Officer varied the penalty charge to split the additions into deliberate and careless. The careless proportion of the penalty charge was subject to suspension and the relevant conditions subsequently accepted by Mr Reed.

10. Although Mr Reed indicated that his appeal was against the HMRC decision dated 22 January 2015, it appears that it should be taken as having been made against HMRC's decision as varied as a result of the review.

11. Following correspondence between the parties and HMCTS in preparation for the hearing of Mr Reed's appeal, the hearing was listed for 12 February 2016. As a result of what happened at that hearing, the Tribunal (Judge Charles Hellier and Duncan McBride) issued Directions on 16 February 2016.

12. The Directions were as follows:

> "1. Mr Reed shall procure that on or before 26 February 2016 the tribunal receives, and HMRC receive (in the case of HMRC at the address given to Mr Reed at the hearing by HMRC's representatives) the following in relation to the year 2011/12:
>
> (1) Copies of all invoices despatched by him;
>
> (2) Copies of all bank statements for that year;
>
> (3) A statement prepared by him or his accountant showing the source of all credits to his bank account(s) during the year, and noting any discrepancies or omissions;
>
> (4) Legible Copies of all invoices or receipts for expenses incurred the year [*sic*], annotated if at all unclear from the invoice to explain the nature of the expense;
>
> (5) A statement prepared by him or his accountant showing in relation to such invoice or receipt what it was for and when it was paid and showing where on the bank account its payment is evidenced, or it paid in cash the source of the cash;
>
> (6) A statement prepared by him or his accountant showing how the different classes of expenditure in his accounts for the year are derived from the invoices, and any discrepancies or omissions.
>
> 2. UNLESS Mr Reed complies with Direction 1 above his appeals in relation to *both* the assessments for 2011111/12 (that is to say the assessment to tax and the assessment to a penalty) shall be **STRUCK OUT**.
>
> 3. On or before 26 March 2016 HMRC shall write to the tribunal indicating whether or not they wish to maintain hteir resistances to the appeals.
>
> 4. If after 26 March 2016 Mr Reed wishes to continue his resistances to the appeals and HMRC continue to resist them a new date shall be set for the tribunal to hear the appeals.
>
> 5. Mr Reed's appeal against the 2010/11 penalty shall be adjourned until after 26 March 2016.

Reasons

The reasons for this direction are:

> (i) that unless the taxpayer provides evidence to the tribunal to show that the assessment to tax is wrong the tribunal must confirm the 2011/12 tax assessment,
>
> (ii) Mr Reed and Mr Peacock brought no evidence with them in relation to that assessment,
>
> (iii) Mr Reed said that he had prepared a reconciliation of the invoices he had sent out in that year and his bank receipts, and had copies of invoices for his expenses in the year, which supported a lower figure,
>
> (iv) Mr Reed and Mr Peacock said that they did not realise that it was the job of the tribunal to determine the proper amount of the assessment on the basis of evidence given to it.
>
> (v) We were surprised that they had misunderstood our function but on balance considered it just and reasonable to allow them to present information, but unless such information was before the tribunal, the appeal would have no hope of any success.
>
> (vi) If the appeal against the assessment had no hope of success, the appeal against the penalty assessment would also fail:
>
> (vii) Finally, if the information was also provided to HMRC either HMRC might be satisfied with it, in which case there would be no need for the appeal to continue, or they and Mr Reed might agree a figure for the assessment and any penalty, again avoiding the need for a hearing, or if they could not agree a hearing would be held to determine the matter.
>
> (viii) We have held over consideration of the appeal against the 2010/11 penalty until we have further information about 2011/12. It is possible that such information may shed light on Mr Reed's accounting practices and indicate whether it was likely or not that his errors and omissions in 2010/11 were careless or deliberate."

13. The position since that hearing and the issue of those directions is that with one exception Mr Reed did not comply with the terms of the six points listed in the directions.

14. At no time did Mr Reed send anything to the Tribunal as specified in the directions.

15. In a letter to HMRC erroneously dated 21 February 2015 rather than 2016, Mr Reed's accountants Lawrence & Company explained that, following the hearing on 12 February 2016 they now presented their evidence. They believed that Mr Reed's accounts for the year ended 31 October 2011 which formed the basis for the tax year 2011-12 in respect of his income were not £12,000 incorrect. They enclosed a spreadsheet which had a summary of his invoices on the left and a summary of the bankings into his business bank account on the right. The explained the details of the entries. They considered that the only cheques which were "un-invoiced" were those

listed in the letter, totalling £999.64, and argued that this was the amount which should be added to Mr Reed's income for the year and taxed accordingly, not £12,000. They expected penalties to be reviewed and reduced accordingly. They maintained that all errors or omissions were purely accidental and not intentional on Mr Reed's part. They enclosed a letter from Mr Reed's mother, Mrs S Reed, which declared that she had made payments to her son on several occasions, notably at the beginning of the year when her grand-daughter was born. No details of amounts or dates were mentioned in her letter.

16. No other information as specified in the Directions was provided to HMRC.

17. In the absence of compliance with the Directions, a further direction striking out the appeal so far as it related to 2011-12 was released by the Tribunal on 27 April 2016. This direction referred to Mr Reed's right to apply to the Tribunal within 28 days for the proceedings to be reinstated. The covering letter from HMCTS stated that Mr Reed's appeal against the 2010-11 penalty remained extant. They asked him to let them know within 21 days whether or not he wished to maintain that appeal. They warned him that if he did not respond the matter would be referred to a judge who might direct that that appeal also should be struck out.

18. On 4 May 2016, HMRC wrote to HMCTS stating that they had not received the information from Mr Reed as directed by the Tribunal on 16 February 2016. Accordingly it was HMRC's understanding that the 2011-12 assessment and penalty were both struck out. HMRC asked for clarification as to whether any further information was now required from them. They had not been provided with the directed information, nor had they received any indication from Mr Reed that he wished to continue with the appeal. Should he do so, HMRC confirmed that they would wish to maintain their resistance to the appeals.

19. On 12 May 2016 Lawrence & Company wrote to HMCTS, explaining that a copy of the HMCTS letter to Mr Reed dated 27 April 2016 had been passed to them. They were very surprised at the contents. They had sent all necessary paperwork in a reply to HMRC on 21 February following the hearing on 12 February, and had proof of posting. They could not see why the appeal had been struck out, nor why HMRC had not replied. They applied for reinstatement of the proceedings on the ground that they had fully complied with the Direction.

20. On 25 May 2016, HMRC wrote to HMCTS referring to the correspondence from Mr Reed's advisers requesting reinstatement on the grounds that they had fully complied with the Directions. HMRC stated that they disagreed with this submission as the only item provided on Mr Reed's behalf was item 1(3), a statement from his accountant following a review of bank statements. HMRC referred to the other items required pursuant to Direction 1. Mr Reed had not provided these. Accordingly, it was HMRC's view that as Mr Reed had failed to comply with the Directions, the appeal should be struck out.

21. Included in the bundle for the hearing before me was a memorandum to Mrs Douglas dated 13 September 2016 from Mrs Balbir Gilroy, an officer in HMRC's

Cambridge office, confirming that HMRC had received nothing apart from the letter and enclosures from Lawrence & Company. This note also contained comments on the information provided in that letter, and indicated that Mrs Gilroy was not satisfied with the evidence provided. Nor was she satisfied, in the absence of the full records that the Tribunal had directed Mr Reed to provide, that the adjustment suggested by Lawrence & Company was the full extent of the omission. She expressed views concerning the relationship between the errors in 2011-12 and those in 2010-11, which had been agreed by Mr Reed and had been used as a basis for the 2011-12 additions. Mrs Gilroy was satisfied that the latter were reasonable.

Arguments for Mr Reed

22. It appeared that Mr Reed and Mr Peacock had been expecting that the hearing would enable them to resolve Mr Reed's dispute with HMRC. I therefore made clear at the beginning of the hearing that the purpose of the hearing was solely to consider Mr Reed's application for reinstatement of his appeal in relation to the assessments for 2011-12, and that if reinstatement was not granted, the assessments for that year would stand.

23. Mr Peacock argued that as a result of the 21 February 2016 letter from his firm, Mr Reed had complied with the requirements as expressed by the Tribunal at the hearing on 12 February 2016. I asked Mr Peacock whether a copy of this letter had been sent to HMCTS; he accepted that this had not happened. He referred to what the Tribunal had stated at that hearing.

24. I also asked Mr Peacock whether he had received a copy of the Directions. He stated that he had not. After checking the copy of Mr Reed's Notice of Appeal, I noted that Mr Reed had not specified any details under the heading "Appellant's representative's details (if applicable)". I explained to Mr Peacock that if HMCTS did not have details of a representative, they could not be expected to be aware of that representative's existence, and would not be able to provide copies of documents to the representative. He said that he had assumed that he would be provided with copies, because of the form 64-8 arrangement made with HMRC. I pointed out that this did not apply to HMCTS or the Tribunal. He also commented that he had been present at the hearing in February, so that the Tribunal would have been aware of his existence. I explained that the question whether an appellant was represented at a hearing was separate from the question whether that appellant had a representative to deal with the steps required to be taken in order to prepare the appeal for eventual hearing.

25. Mr Reed added his submission that he and Mr Peacock had done exactly what the Tribunal had ordered them to do, namely to prove that the assessment should not be as made by HMRC.

Arguments for HMRC

26. Mrs Douglas stated that HMRC opposed the application for reinstatement on the grounds that the Directions had not been complied with. At the February 2016

hearing, Judge Hellier had set out what information Mr Reed had to provide. That information had not been provided within the time frame specified in the Directions. Mrs Douglas referred to the details specified in paragraph 1(1) to (6) of those Directions. In HMRC's view, the letter from Lawrence & Company had only complied with paragraph 1(3).

27. Mr Peacock intervened to say that he and Mr Reed could easily supply that information.

28. Mrs Douglas submitted that the information required was quite clear from the reasons given by the Tribunal explaining why it had made the Directions. The requirements were quite prescriptive, and what had been asked for had not been provided. All that had been provided was the spreadsheet. This was not sufficient for HMRC to be satisfied.

29. HMRC suggested that opportunities had been provided in the course of the investigation for information to be provided. The onus of proof fell on Mr Reed as the Appellant.

30. Mrs Douglas submitted that it had been quite clear from the previous hearing what the requirement was. It should have been clear from the covering email attaching the Directions who had been copied into it.

31. It was Mr Reed's appeal; it was reasonable to assume that he would forward a copy to his agent. Mrs Douglas emphasised that the obligation to provide the information fell on Mr Reed, and not on his agent. In HMRC's view, the position as to what the parties should do was quite clear.

Consideration and conclusions

32. At the hearing I indicated that I was not satisfied that Mr Reed's appeal against the 2011-12 assessments should be reinstated. As a result, there was nothing that I could do to enable Mr Reed and Mr Peacock to pursue their submissions that the assessments for that year should be reduced. I further indicated that I would produce a full reasoned decision setting out my reasons for refusing Mr Reed's application for reinstatement.

33. In another reinstatement application case in which I was involved, *Andrew Green v Revenue and Customs Commissioners* [2016] UKFTT 0421 (TC), TC05175, the Tribunal referred to another decision, *Bazaar Limited v Revenue and Customs Commissioners.* At that stage, the latter case had not been published on the Tribunal's website. The position has not changed since the decision in *Andrew Green* was released.

34. In *Bazaar Limited* at [62], the Tribunal referred to the decision of the Upper Tribunal (Morgan J) in *Data Select v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) at [34]:

> "As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

35. The question in *Data Select* was whether a time limit should be extended. However, as was done by the Tribunals in *Bazaar Limited* and *Andrew Green*, the approach taken in Data Select can be modified to fit the circumstances relevant to a reinstatement application.

36. Thus in Mr Reed's case, the questions are:

(1) What was the purpose of Direction 1 of the Tribunal's Directions issued on 16 February 2016?

(2) What was the delay in complying with that Direction?

(3) Is there a good explanation for Mr Reed's delay in complying with that Direction?

(4) What will be the consequences for the parties if I reinstate Mr Reed's appeal?

(5) What will be the consequences for the parties if I refuse Mr Reed's application for reinstatement?

37. The answer to question (1) is set out in the reasons given by the Tribunal for making the February 2016 Directions. The purpose was to establish whether there was sufficient evidence to show that the assessment to tax for 2011-12 was wrong. The burden of doing so fell on Mr Reed.

38. The answer to question (2) is that there has been only limited compliance with Direction 1. A form of statement within Direction 1(3) has been provided, but it appears from the comments made by Mrs Gilroy of HMRC that this may not be a sufficient explanation. Apart from this, none of the items specified in Direction 1 have been provided to HMRC. Further, there has been no compliance with Direction 1 so far as it specifies that copies of the items mention should be provided to the Tribunal.

39. As to question 3, the explanation for the lack of compliance is that Mr Reed took no action in relation to the Directions, apparently because he assumed that Mr Peacock and his firm knew what was going on and would take action on his behalf. At the same time, Mr Peacock had assumed, incorrectly, that his status as an agent for Mr Reed in relation to HMRC under the form 64-8 procedure would apply in the same way for the purpose of Mr Reed's appeal to the Tribunal.

40. Mr Reed's position is different from that of the appellant in *Andrew Green*, in that the latter had notified HMCTS of the details of his representative when giving notice of appeal. In *Andrew Green*, one question was whether appointing a

representative displaced the obligations falling on the appellant. The Tribunal held that it did not, and that the appellant remained responsible for pursuing his obligations in relation to the conduct of his appeal.

41. It is clear that the responsibility in the present case falls on Mr Reed. Although he received the Directions by email from HMCTS, there is nothing to suggest or indicate that he took any action to check with Mr Peacock or his firm whether they had any information concerning the Directions.

42. The action taken on his behalf by Mr Peacock was limited, resulting in compliance with only one element of Direction 1. Mrs Douglas stated that the Tribunal had set out at the February 2016 hearing the details of the information and evidence required. I note that Mrs Douglas was not present at that hearing, HMRC having been represented by her colleague Mr Bryan Morgan. However, on the basis of the Tribunal's reasons as set out as part of the Directions, I am persuaded that the Tribunal did state in detail at the hearing what was required in order for the appeal to be dealt with in such way as might prove appropriate. Both Mr Reed and Mr Peacock were at that hearing.

43. Question (4) concerns the consequences for the parties of reinstating Mr Reed's appeal. If the application were to be allowed, it is clear from the note from Mrs Gilroy that HMRC would be put to considerable further work to evaluate the status of the information provided by Lawrence & Company, and that this would also need to be done in relation to any other information provided by Mr Reed and his adviser pursuant to the other parts of Direction 1 remaining to be complied with. There would be no finality for HMRC in relation to the assessments for 2011-12. As mentioned in *Andrew Green* at [84] and [92], this would require HMRC to devote further resources in order to complete that additional work. The outcome would have to await either the end of the Tribunal appeal process or the negotiation of some form of settlement between Mr Reed and HMRC. As far as Mr Reed is concerned, he would be able to continue with his efforts to resolve the dispute, with the possibility that the outcome might be for the assessments to be reduced. He and his adviser would need to ensure full compliance with the Directions, and would also have to engage fully with the Tribunal process if the dispute with HMRC could not be settled without continuing to pursue that process to its conclusion.

44. Question (5) concerns the opposite; what would be the consequences for the parties if I were to refuse Mr Reed's reinstatement application? As far as HMRC are concerned, this would lead to finality in dealing with Mr Reed's assessments for 2011-12. For Mr Reed, the consequences would be that he would have to accept as final the determinations made by HMRC, as varied by the Review Officer, so far as the assessments for 2011-12 were concerned. He would have no further opportunity to question the amount of the adjustments made to his income tax self-assessment for that year, or the related penalty assessment. The amount of the penalty assessment for 2010-11 would continue to be within the appeal process, subject to any further steps taken in relation to that part of his appeal.

45. As in *Andrew Green*, it is also necessary to weigh all the factors in combination. The general approach taken in relation to the appeal process by Mr Reed and his adviser has not resulted in them engaging fully in that process in an appropriate way. This is clear from the comments of the Tribunal setting out its reasons for issuing the Directions. In the same way, Mr Reed did not take any steps when he received the Directions to check with Mr Peacock whether a copy had been sent to Lawrence & Company or to ask him whether all the items listed in Direction 1 were being provided both to HMRC and to the Tribunal. The position at this hearing was similar; Mr Peacock had expected to be dealing with the substantive dispute. His only argument in favour of reinstatement was that the Direction had been complied with, and the only explanation for the failure to provide the other items listed in the Direction was his assumption that he would be kept informed under the form 64-8 HMRC agency arrangement. He offered to produce the remaining items specified in the Direction. However, that offer failed to recognise that the obligation on Mr Reed under the Direction had been to produce that information by 26 February 2016. Further, he had been present at the 12 February 2016 hearing at which the Tribunal had given the details of the information and evidence required, as subsequently set out in the Directions.

46. I do not think it necessary to set out in this decision the full details of the arguments in the *Andrew Green* case. In its decision, the Tribunal referred at [95] to the judgement of the Court of Appeal in *BPP Holdings Limited v Revenue and Customs Commissioners* [2016] EWCA (Civ) 121:

> "[95] In Mr Green's case, what is under review is whether his consolidated appeal, struck out on the basis of non-compliance with the Tribunal's Directions and subsequent correspondence, should be reinstated. His application is thus one seeking relief from the sanction of striking out his appeal. In that context, the judgment of the Court of Appeal in *BPP* shows that the parties to an appeal before the Tribunal are within the stricter approach to rules and directions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and related cases."

47. Thus the Tribunal needs to take a strict approach when considering non-compliance with directions. I accept that Mr Reed and Mr Peacock may not have been fully aware of the various procedural steps which it was necessary to take in relation to Mr Reed's appeal, but there is a considerable amount of information available in the public domain to assist parties with the process of taking an appeal to the Tribunal, including guidance on the website to deal with such matters as completing the Notice of Appeal form. It is reasonable to expect those involved in Tribunal proceedings to provide themselves with relevant information about the proceedings in which they are engaged.

48. I take into account the effect on Mr Reed's position of refusing the application for reinstatement, but this needs to be weighed against the need to reach finality in the process of bringing the dispute between him and HMRC to an end so far as it relates to the assessments for 2011-12. It is not clear to me that the provision of the additional information through delayed compliance with the February 2016 Direction

would lead to early resolution of the dispute, either through some form of settlement agreement or by means of a full hearing of Mr Reed's appeal in the relatively near future. The limited compliance achieved by the letter from Lawrence & Company dated 21 February 2016 has apparently only increased the extent of HMRC's unwillingness to accept the arguments being put on Mr Reed's behalf.

49. Thus although the revised amounts of the assessment and penalty assessment for 2011-12 are known, it is far from clear that the whole liability would be eliminated as a result of continuing with the appeal process. Indeed, Mr Reed's adviser has accepted that there needs to be an increase in the tax assessment to take account of the additional £994.64 mentioned in the 21 February 2016 letter, although I accept that this is considerably less that the addition to income arrived at by HMRC's Review Officer.

50. Taking everything into account, and acknowledging the requirement to take into account the overriding objective in Rule 2 of the Tribunal Rules, which is to enable the Tribunal to deal with cases fairly and justly, I do not consider that I should exercise my discretion to grant Mr Reed's application for reinstatement of his appeal so far as it concerns the year 2011-12.

51. I have already issued Directions stating that Mr Reed's reinstatement application is refused. I have also directed that, in the event that no application for permission to appeal against the refusal of the reinstatement application is made within 56 days of the release of this decision, the question whether the part of the appeal relating to 2010-11 should also be struck out is to be referred to a Judge for determination. The purpose of the latter direction is to ensure that the latter element of Mr Reed's appeal is dealt with within a reasonable time.

Right to apply for permission to appeal

52. This document contains full reasons for the decision to refuse the reinstatement application. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2016