[2016] UKFTT 0710 (TC)

TC05439

Appeal number: TC/2009/15807

PROCEDURE– whether struck out appeal should be reinstated-whether appropriate to extend time in all the circumstances-yes- appeal reinstated

FIRST-TIER TRIBUNAL
TAX CHAMBER

HATTONS (SOUTHPORT) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Application decided on the basis of written submissions

DECISION

Introduction

1. This decision relates to the application of the Appellant dated 28 April 2016 to reinstate an appeal that was struck out by the Tribunal on 22 February 2010. The appeal was struck out following an application made by HMRC on 18 January 2010 which was made on the grounds that the appellant was dissolved and was no longer competent to pursue its appeal.

2. The parties have asked that this application be dealt with on the basis of their written submissions only. As I have received very little documentary evidence, I have had to determine the application on the basis of what the parties say in their written submissions are the facts as to what has happened. I am content to take that course because neither party has challenged what the other party has had to say about the facts in their respective submissions and the explanations given by each of them as to what happened are consistent with each other.

Facts

3. On 6 October 2009, HMRC wrote to the appellant's representative, The VAT People, advising them that a voluntary disclosure claim made by the appellant in respect of overpaid output tax had been refused as the appellant had been dissolved and there was no current legal entity in existence. The evidence shows that the appellant was dissolved on 13 May 2008. According to the appellant's representative, the voluntary disclosure claim was made prior to the date that the appellant was dissolved.

4. On 12 October 2009 The VAT People lodged a notice of appeal with the Tribunal against HMRC's decision to refuse the voluntary disclosure claim. The notice included an application to stand the appeal behind a lead case on the same issue. The Tribunal granted the stay on 19 November 2009. The VAT People say that at the time the notice of appeal was submitted it was intended that an application should be made to restore the appellant to the companies register because there were a number of outstanding VAT claims in its favour.

5. On 18 January 2010 HMRC made the application to strike out the appeal described at [1] above. The application wrongly stated that the appellant was dissolved on 22 May 2009.

6. On 10 February 2010 HMRC wrote to the Tribunal requesting an update on the application. On 16 February 2010, the Tribunal wrote to HMRC advising that having provided the appellant with the opportunity to respond to the application, the file had been referred to a judge for consideration and on 22 February 2010 the appeal was struck out.

7. The VAT People has no record of receiving either the application to strike out the appeal or the subsequent strike-out direction released by the Tribunal. They say that if either of these documents had been received then they would have contested the application on the grounds that it was intended to restore the company to the register. It is of course quite possible that the Tribunal had written to the wrong address (possibly to the appellant itself which by that time had been dissolved) rather than to the appellant's representative and therefore I accept that neither HMRC's application or the strikeout direction were received.

8. The appellant was not restored to the register of companies until 5 December 2011. I accept the appellant's submission that the effect of the order of the court made in respect of the restoration is that the appellant is deemed to have continued in existence as if it had not been dissolved with the effect that the notice of appeal can now be treated as valid notwithstanding the fact that it was made at a time when the company was not in existence.

9. However, the appellant does not appear to have taken any steps in terms of informing HMRC or the Tribunal that the appellant had been restored to the register. The VAT People say there was no reason for there to be any contact with the Tribunal for an update on the progress of the appeal during the six-year period following the strike-out of the appeal. As far as the appellant was aware, the appeal was stood over pending the lead case. Indeed, towards the end of the six-year period, The VAT People entered into discussions with HMRC with a view to negotiating a settlement in relation to all the cases stood behind the lead case, on behalf of all the clients for whom they were acting (including the appellant). Once an agreement in principle had been reached with HMRC in respect of its clients The VAT People submitted an amended claim on behalf of the appellant and it was only at this point that HMRC informed The VAT People that the appeal had been struck out. The appellant then made a prompt application to reinstate the appeal.

10. It therefore appears, and I so find, that neither the appellant nor its representative was aware until HMRC told them, that the appeal had been struck out.

11. The appellant is now in voluntary liquidation; a liquidator having been appointed on 6 April 2016.

12. HMRC oppose the reinstatement application. Their view is that to reinstate the appeal now, some six years after it was struck out would be of clear prejudice to them. They also say that the appellant has provided no good reason for such a lengthy delay in applying to reinstate the appeal. Even if the appellant was not notified of the striking out of the appeal, there has been no explanation as to why neither the appellant, nor its representative, contacted the tribunal over a six-year period in order to seek an update as to the progress of the appeal. HMRC's submissions were all directed to the question as to whether time should be extended. They made no submissions on the merits as to whether if time were extended the appeal should be reinstated.

The Law

13. Pursuant to Rule 8 (5) and (6) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), an appellant may apply for proceedings which have been struck out to be reinstated but such application must be received within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

14. In this case the application was made on 28 April 2016, over six years out of time. Accordingly, I may not admit the application unless I extend time. If I do to extend time, I must then consider, applying the overriding objective in Rule 2 of the Rules, whether it is in the interests of justice to reinstate the appeal.

15. In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well. That debate was initiated by changes to the Civil Procedure Rules (CPR) in 2013. Although those rules do not apply directly to the tribunals, the impact of judgments of the courts in that regard, such as *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 and *Denton v TH White Ltd* (and related appeals) [2014] EWCA Civ 906, have been considered by the Upper Tribunal first in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and, post-*Denton*, in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC).

16. Prior to the introduction of a new CPR 3.9 in 2013, which was designed to ensure that time limits and similar requirements were enforced more strictly in the courts, the practice of this Tribunal and the Upper Tribunal had been to follow the approach described by Morgan J, sitting in the Upper Tribunal, in *Data Select Limited v Revenue and Customs Commissioners* [2012] STC 2195, a case concerning whether a late appeal in relation to VAT could be made to this Tribunal. Morgan J described the approach in the following way:

> "[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. 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.
>
> …
>
> [37] in my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3. 9, is the correct

> approach to adopt in relation to an application to extend time pursuant to s 83G (6) of the VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerned an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeal against a judicial decision."

17. The reference by Morgan J to CPR r 3. 9 was to the version of the rule as in force prior to 2013. In *Leeds City Council* the Upper Tribunal recognised that the changes to CPR r 3.9, which specifically required the court, in considering all the circumstances of the case, to consider the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, were made with the express purpose of ensuring that time limits and similar requirements were enforced more strictly in the courts, as recognised in *Mitchell* and *Durrant*. However, the Upper Tribunal (taking a different view from that taken by that tribunal in *McCarthy & Stone*) held that until a change was made to the relevant tribunal rules which reflected the terms of the new CPR 3 r. 9, the prevailing practice in relation to extensions of time (that is the approach set out in *Data Select*) should continue to apply.

18. This difference of view was resolved by the Court of Appeal in *BPP Holdings v Revenue and Customs Commissioners* [2016] EWCA Civ 121. The Senior President of Tribunals said at [37] of his judgment:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it."

19. The Court of Appeal therefore held that with the tax tribunal rules being silent on the question, it was appropriate that the tribunal accord the efficient conduct of litigation at a proportionate cost and compliance with rules, practice directions and orders significant weight as part of its consideration of the overriding objective set out in Rule 2 of the Tribunal Rules, which in this case requires the Tribunal to consider whether in all the circumstances it is fair and just to extend time.

20. The Court of Appeal specifically declined to analyse the decision in *Data Select,* which in *BPP* the Upper Tribunal had relied on in making its decision. The

Court did, however, observe that the question in *Data Select* was the principle to be applied to an application to extend time when there had been no history of non-compliance, that also being the situation in this case. The Court also observed that the approach of Morgan J in Data Select had been to apply the provisions of CPR r 3. 9 as then in force by analogy, which is the approach that the Court of Appeal in *BPP* found to be appropriate.

21. In my view, the principles laid down in *Data Select* should continue to apply to applications of this kind but in applying those principles I should have regard to the fact that CPR r 3.9 has changed since that case was decided and accordingly I should take into account the provisions of the new rules, as interpreted in *Mitchell* and *Denton.*

22. CPR r 3. 9 now provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rules, 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 –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

23. I am proceeding on the basis that the appellant's application to extend time should be treated as an application for relief from sanctions.

24. In *Denton*, the Court of Appeal laid down the following three-stage test at [24] of its judgment:

> "We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions 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 to 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 [the matters set out in sub- paragraphs (a) and (b) of rule 3. 9 (1)]" …"

25. It is important to note that the application of this test does not require the matters set out in sub-paragraphs (a) and (b) of CPR r 3. 9 (1) to be given "paramount importance", as was stated in *Mitchell*, over other relevant factors. In clarifying the position at [32] of its judgment in *Denton*, the Court of Appeal said that although these matters may not be of paramount importance, they were of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. Whilst I must take a stricter approach than

might have been the case before the new rule was implemented, it is still the case that a consideration of all of the circumstances may lead to the conclusion that relief should be granted. As the Court of Appeal said at [35] of *Denton*, the more serious or significant the breach (as assessed at stage one) the less likely it is that relief will be granted unless there is a good reason for it (as ascertained at stage two). Nevertheless, the Court also said at [31] that even if there is a serious or significant breach and no good reason for it, the application for relief from sanctions will not automatically fail, but in those circumstances, when considering all the circumstances at stage three particular weight must be given to the matters specifically referred to in CPR r 3. 9 (1).

26. So where does this leave the earlier guidance in *Data Select*? Aside from the need to give "particular weight" to the matters specifically referred to in CPR r 3.9 (1), it seems to me that the approach set out in *Denton* is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been a factor of relevance in the Tribunal's determination and is reflected in the reference in *Data Select* to the purpose of the time limit and the length of the delay before relief was sought. The reason for the delay is a common factor in both *Denton* and *Data Select*; at [30] of *Denton* the Court of Appeal made it clear that the question to be posed at the second stage is whether there is a good or bad reason for the failure to comply with the time limit. The need to evaluate all the circumstances of the case so as to enable the Tribunal to deal with the matter justly as required by the overriding objective is clearly a factor common to both approaches.

27. I shall therefore make my decision by reference to the three stage approach laid down in *Denton*, taking account as one of the relevant circumstances the consequences for either party of a decision to allow or not to allow an extension of time, as provided for in the guidance given in *Data Select*.

Discussion

28. The purpose of the time limit for the making of an application for the reinstatement of an appeal is clearly to ensure finality of litigation. The other party is generally entitled to expect that a matter will be closed and he can put away his file should an application to reinstate not be made expeditiously. A delay of over six years in making an application that should have been made within 28 days from the date of the decision to strike out the appeal cannot be described as anything but serious. It would be very unusual to reinstate an appeal after such a long period of time. However, in my view in this case the delay was of limited significance, as that term was used in *Denton*, because it appears that the proceedings in any event would have been stayed throughout the period of the delay behind the lead case and because of the ongoing discussions with HMRC.

29. The reason for the delay was that the appellant was unaware that the appeal had been struck out. No blame is to be attached to the appellant or is representative for the fact that it was not notified of the striking out. However, in my view a diligent appellant would have taken steps earlier to have restored the company to the register and have notified the tribunal of that fact. The appellant should have been aware when

it made its notice of appeal that the appeal could not progress unless the company was restored to the register. As I have observed, no explanation has been given as to why the company was not restored to the register until 2011 and the tribunal not notified of that fact. I do, however, accept that aside from that point there would have been no reason for The VAT People to have made any specific enquiries as to the progress of the appeal bearing in mind the appeal was one of a number being dealt with together by The VAT People.

30. In my view therefore the delay in making the application is understandable. There was an error of judgment in not keeping the Tribunal informed and restoring the company to the register earlier, but in my view these mistakes are not serious when considered against a background of the proceedings having been stayed in the meantime. The appellant acted promptly once it was aware of the proceedings having been struck out.

31. I turn therefore to the other circumstances of the case.

32. On the question of prejudice to the parties, the appellant will be significantly prejudiced if the appeal is not reinstated because it will be unable to pursue its appeal, at a time when it appears that negotiations with HMRC have reached the point at which a settlement may be made. As far as HMRC are concerned, there is clearly some prejudice to them in having to reopen a file that they say has long been closed and there is a strong presumption in favour of the finality of litigation in circumstances when they are asked to deal with a matter six years after they thought it had been closed.

33. However, in my view the prejudice to HMRC if the appeal is reinstated is clearly outweighed in this case by the prejudice to the appellant if the appeal was not reinstated because HMRC are continuing to deal with the same matters in relation to the other cases which have been stayed behind the lead case. It is not clear that there is any particular prejudice that cannot be addressed by the appellant now providing the material that is specific to its case in the context of the negotiations that have been carried on commonly across a number of similar cases which are stood behind the lead case.

Conclusion

34. I have reached the conclusion that the circumstances are such that I should grant the extension of time sought and I conclude that it is in the interests of justice to do so for the following reasons.

35. Although the period of delay is a very long one and the interests of finality of litigation normally prevail in such circumstances, in this case because the proceedings would have been stayed throughout the period in any event these factors are not as strong as would normally be the case. Despite some criticism of the manner in which matters are been handled since the proceedings were struck out, I find that on balance there is a good reason for the delay. Since because of the circumstances of the stay on proceedings and the continuing negotiations on behalf of the other cases stayed

behind the lead case, the prejudice to HMRC that would arise if the proceedings are reinstated are outweighed by the prejudice to the appellant if they are not. Accordingly, I extend time and admit the application.

36. As far as the merits of the application are concerned, as I have observed above, HMRC do not argue that it is without merit. In my view the circumstances that I have relied on in deciding to extend time are equally applicable to the question as to whether the proceedings should be reinstated. I find that the reason the proceedings were originally struck out was because of the appellant not having been notified of HMRC's strike out application. In those circumstances, it is in the interests of justice that the appeal should be reinstated and I so direct.

37. As far as the future conduct of the appeal is concerned, it would appear that proceedings should remain stayed pending the resolution of the lead case and those stayed behind it. I therefore continue the stay on the proceedings, although either party has liberty to apply to lift the stay. I also direct that the appellant provides to HMRC such documents as they reasonably request as regards the grounds for the appeal and the claim which underlies it.

38. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016