TC05469

Appeal number: TC/2016/1441

VAT – strike out on basis of no reasonable prospect of success

FIRST-TIER TRIBUNAL
TAX CHAMBER

DANGER MONEY RECORDS 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, the Strand, London on 11 October 2016

There was no appearance by or on behalf of the appellant

Mr B Sellers, HMRC officer, for the Respondents

DECISION

Non-attendance of appellant

1. Neither the appellant nor anyone on its behalf attended the hearing, although the Tribunal waited ten minutes beyond the notified time of the hearing, and even though the notice of hearing letter specifically instructed litigants to arrive half an hour before the advertised time of hearing.

2. The Tribunal then considered Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. This provides that the Tribunal may proceed with the hearing in the absence of a party if it is satisfied that the party was notified of the hearing or reasonable steps were taken to notify the party of the hearing and (in either case) it is in the interests of justice to proceed with the hearing.

3. I found that the Tribunal had sent the notice of hearing to the appellant by email to the address 'info@dangermoneyrecords.com' which was the email address on the notice of appeal form, and the email address from which the appellant sent the notice of appeal to the Tribunal, and the email address on the appellant's letterhead. The Tribunal had not been notified of any change of address and Mr Sellers from HMRC stated that HMRC were also unaware of any address change and I accepted that evidence.

4. In these circumstances, I was satisfied that the appellant had been notified of the hearing and that reasonable steps to notify the appellant of the hearing had been taken.

5. I also considered that the appeal was lodged by the appellant and it was therefore for the appellant to actively pursue it; in the absence of any explanation for the appellant's non-attendance, it appeared that it had chosen not to actively pursue this appeal and it was not in the interests of justice to postpone a hearing in the face of apparent apathy from the appellant. HMRC had the right to have their strike out application heard. It was in the interests of justice to proceed with the hearing and I decided to proceed with the hearing.

The appeal

6. Three decisions by HMRC were mentioned by the appellant in its notice of appeal. These were:

(a) an assessment for just over £10,000;

(b) a denial of input tax incurred in the period 3/15 for just over £5,000;

(c) a penalty assessment.

7. Only the figure for the assessment was mentioned on the appeal form itself but the appellant enclosed HMRC's review decision dated 9 September 2015 and I

considered that therefore proceedings had been properly lodged in respect of both the assessment and denial.

The penalty appeal

8. However, while a penalty assessment was mentioned in the notice of appeal, no details relating to it were mentioned on the appeal form and the decision imposing the penalty, or a review decision thereof, was not included with the notice of appeal.

9. Rule 20(3) requires an appellant to provide with his notice of appeal:

> A copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonable obtain

10. It appeared that the appellant may have failed to comply with this rule, but that this failure had not previously been drawn to its attention, so it had not had the opportunity to rectify it. While an appeal must be struck out where the Tribunal has no jurisdiction (rule 8(2)), the Tribunal must first give the appellant the opportunity to make representations on the proposed striking out.

11. The appellant had certainly been notified that today's hearing was to consider HMRC's application to strike out his appeal. HMRC's application was made on the grounds:

> (a) Lack of jurisdiction with respect to the assessment as the appellant had not paid the tax in advance of the appeal;
>
> (b) The appeal was 5 months late and HMRC opposed the appellant's application for an extension of time to lodge the appeal;
>
> (c) The grounds of appeal were outside the jurisdiction of the tribunal.

12. The first ground was withdrawn by HMRC as, since the proceedings were lodged, HMRC had accepted on the grounds of hardship the appellant's application for relief from the obligation to pay the tax while the appeal was on foot.

13. Neither of the other two grounds, which HMRC did pursue, related to the appellant's failure to provide the notice of penalty assessment, and therefore it did not seem to me that this part of the appeal could be struck out at the present time on that basis. I moved on to consider HMRC's two remaining bases for requesting the appeal to be struck out.

The appellant's application to extend time

14. The appeal was out of time. The review decision, which as I have said, related to the assessment and input tax denial, was dated 9 September 2015. As noted above, I did not have a copy of the penalty assessment. I accepted Mr Sellers' evidence which was that it was raised on 13 October 2015.

15. The notice of appeal was lodged on 7 March 2016. The time limit is 30 days from the date of the decisions: s 83G Value Added Tax Act 1994. So the proceedings in respect of the review decision (assessment and input tax denial) were lodged approximately 5 months' late and the proceedings in respect of the penalty 4 months' late.

16. Although this was a strike out application, it was made on the basis that the Tribunal should not extend time. The question was therefore whether the Tribunal should extend time and not whether the appellant had a reasonable prospect of persuading the Tribunal to extend time. If the Tribunal did not extend time, the appeal should be struck out on the basis the Tribunal had no jurisdiction to hear it.

17. Mr Sellers referred me to the case of *Romasave (Property Services) Ltd* [2015] UKUT 254 (TCC) where the Upper Tribunal said:

> "[96]....Time limits imposed by law should generally be respected...a delay of more than three months cannot be described as anything but serious and significant....one universal factor in this respect is the desirability of finality in litigation....permission to appeal out of time should only be granted exceptionally, meaning that is should be the exception rather than the rule and not granted routinely."

18. The appellant gave three reasons in its notice of appeal for its application for an extension of time:

> (a) 'I have been snowed under with work relating to my preparation for the official launch of my business'
>
> (b) 'I have been bogged down with fighting a legal battle with a German distributor that has breached my contract with them....'
>
> (c) 'I am still waiting for HMRC to respond to my letter of 9/2/16...' and, it seems, to send him information on review panels, adjudicators, and courts to which to appeal.

19. I consider whether any of these grounds would justify an extension of time in which to lodge the appeal.

The appellant's factual case

20. As the appellant did not appear at the hearing, its director's written evidence contained in his letters could not be challenged by HMRC, and for that reason, and for the purpose of its extension of time application only, I did not accept it. Indeed, I note that it was clear HMRC wished to challenge his evidence: for instance, it was HMRC's case that the appellant had claimed many times in the years since he was first VAT registered in 2004 that he was about to officially launch his business. His failure to appear denied HMRC the change to challenge it and I did not accept it.

21. The effect of not accepting the appellant's evidence is that the appellant has failed to make out its case factually and for that reason alone the extension of time should be refused.

22. Even if I am wrong to treat this as a hearing of the extension of time application, rather than a strike out of the extension of time application, the outcome would be the same. This is because, even though the Tribunal should not conduct a 'mini-trial' when considering the reasonable prospects of a case, it is appropriate to consider if the appellant's factual case is inconsistent or incredible. So far as his claims (a) and (b) are concerned, completing a notice of appeal form is a relatively short and straightforward matter and one of some importance: it is a somewhat incredible claim that the appellant could not find time to do it, however busy he was. So far as (c) was concerned, while HMRC accepted that the appellant had sent a letter on 9/2/16, a reply was clearly not needed in order to submit the notice of appeal form, as it was submitted, on the appellant's case, without a reply. The appellant's case on this was therefore inconsistent. In any event, the appellant's letter was written on 9 February, when the appeals were already approximately 4 months late (3 months in the case of the penalty appeal). The appellant's case on this was therefore also inconsistent for this reason. I would be satisfied for these reasons that the appellant's factual case would not have a reasonable prospect of success.

Appellant's legal case on an extension of time

23. In any event, I do not consider that in law the case justifies the extension of time requested. Being busy is not an excuse for not doing what needs to be done: if it were such an excuse, extensions of time would become the rule and not an exception. In any event, completing a notice of appeal form is not a time consuming task and would-be appellants need to make time to complete the form if they wish to lodge an appeal.

24. Waiting for a reply to a letter which was not even posted until the appeals were already 3 months or more late is not a ground for granting an extension as it clearly did not cause the late filing of the appeal: it is no explanation of why the appeals were not filed within the 30 days allowed.

25. The delay in lodging these appeals was serious and significant; none of the reasons given, even if they could be made out, would justify an extension of time to lodge the appeal. Time should not be extended.

26. If I am wrong to treat this hearing as one of the extension of time application, rather than merely an application to strike it on the basis it has no reasonable prospect of success, I would come to the same conclusion. The appellant's legal case, for the above reasons, would have no reasonable prospect of success.

Effect of time extension being refused

27. Where appeals are lodged late, and the Tribunal does not grant an extension of time, it has no jurisdiction to deal with the appeals (Rule 20(4)(b)). They must be

struck out under Rule 8(2)(a) for lack of jurisdiction. The appellant was made aware when HMRC sent to it their application, that the Tribunal would be considering the striking out of the appeals on this basis. By notifying the appellant of this hearing, the Tribunal gave the appellant the opportunity (under rule 8(4)) to make representations at the hearing to oppose the strike out.

28. I strike out the entire appeal under Rule 8(2)(a) on the basis that the Tribunal does not have jurisdiction in respect of it as time to lodge the appeal late has been refused.

Last ground of HMRC's application

29. For the sake of completeness, I consider HMRC's last ground for applying for the appeal to be struck out, although it is unnecessary for me to do so as the appeal has been struck out because I refused to extend time to lodge the appeal.

30. This third basis on which HMRC applied for strike out was that the Tribunal had no jurisdiction (Rule 8(2)(a)) over the various reasons put forward by the appellant as grounds on which the appeal should be allowed. As I pointed out, it is clear that the Tribunal does have jurisdiction over appeals against assessments, denials of input tax and VAT penalties. In my view, the application should have been for the appeal to be struck out under Rule 8(3)(c) on the basis that the appeal (allegedly) had no reasonable prospect of success because the grounds of the appeal were (allegedly) not grounds on which the appeal could succeed. Mr Sellers accepted this analysis.

31. I considered whether it was proper for me to consider this third basis because of the requirement for the appellant to be given an opportunity to make representations in respect of the proposed striking out: Rule 8(4). I considered that it was proper for me to consider it as the substance of the strike out application was that HMRC considered that the appellant's grounds of appeal could not succeed and the appellant was made well aware of this when it received, as it did, HMRC's application for strike out and it knew that this hearing was to consider that application. If there was a technical breach of the rules, in that HMRC made its application under the wrong sub-rule, it was appropriate to waive it under Rule 7(2)(a) as no one was compromised by it.

Did the appeal have a reasonable prospect of success?

32. To succeed on their third basis, HMRC would need to satisfy me that none of the appellant's grounds of appeal had a reasonable prospect of success in respect of any one of the three matters under appeal.

33. The appellant's grounds of appeal, as established by its very lengthy letters and grounds of appeal, can be shortly summarised as follows:

(a) Its (alleged) ignorance of the law

(b) HMRC's (alleged) lack of help and guidance provided to the appellant causing (allegedly) the mistakes leading to the assessment, denial of input tax, and penalty.

(c) The appellant was (allegedly) too busy to comply with the law/find time to familiarise itself with the applicable law

(d) The law was too complex

(e) The appellant (allegedly) had no money either to pay or to fund an adviser.

34. The factual case: As this was a strike out application on the basis of alleged lack of prospects, I made no findings of fact. As strike out hearings on the grounds of prospects of success should not be mini-trials, I take no view on, and indeed am in no position to take a view on, how reliable the appellant's evidence would be

35. I mention that HMRC vigorously denied the allegation that it had failed to offer proper help and guidance to the appellant. Apart from the guidance available on HMRC's website to all taxpayers, Mr Sellers' case was that HMRC had provided via letters and visits personal help and guidance to the appellant's director many times over the years since 2004. But in this hearing, I can take no view on the relative merits of the parties' opposing positions on this.

36. The legal case: However, even if the appellant could satisfy a Tribunal of the truth of his factual allegations, I accept HMRC's case that none of them amounted in law to a ground of appeal with a reasonable prospect of appeal. I explain this as follows:

37. Liability to the assessment and denial of input tax depend on whether the appellant was entitled to the input tax claimed. That entitlement depends on matters such as whether the supplies were made to the appellant for the purpose of its business, whether the appellant holds appropriate evidence of the supplies, and whether the supplies were subject to VAT. None of the appellant's grounds of appeal relate to its entitlement to the input tax credits claimed. The appellant appears to accept that it ought not to have claimed the input tax. All its grounds of appeal amount to excuses for claiming input tax to which it was not entitled.

38. The Tribunal has no discretion to allow an appeal against a tax assessment on the basis of excuses: the only question with which it is concerned is legal entitlement.

39. While it is theoretically possible for a taxpayer to launch a judicial review action of HMRC in the Administrative Division of the High Court claiming that HMRC in its discretion ought to forego collection of taxes (as unlike the Tribunal HMRC does have some discretion), it is quite clear that the Tribunal has no such jurisdiction. And I comment in passing that, even if the appellant could prove the facts alleged, it is virtually inconceivable that the High Court would consider HMRC ought to have exercised its discretion in the appellant's favour. All taxpayers are busy, faced with complex tax law, and many have shortage of funds: that does not entitle them to recover from HMRC input tax not due to them.

40. So far as the penalty is concerned, the position is a little different. Here the Tribunal is concerned with excuses. It would be a defence to the penalty if the Tribunal were satisfied that the appellant had a reasonable excuse for the incorrect

completion of its VAT returns. Have HMRC satisfied me that none of the grounds put forward have a reasonable prospect of establishing a reasonable excuse?

(a) ignorance of law: as a matter of public policy ignorance of the law should not be a reasonable excuse as, however complicated the law is, accepting such an excuse would reward taxpayers who did not seek to understand the law over those who tried to comply with their legal obligations.

In any event, the appellant has failed to identify what obligations he was ignorant of and why he considers it reasonable to be ignorant of them.

(b) While being misled by HMRC might amount to a reasonable excuse, the appellant does not allege this. The allegation is merely that HMRC could have helped it more than they did: this is no more than a claim that HMRC did not help ameliorate his claimed ignorance of the law. For the same reasons as above, in law that cannot be a reasonable excuse.

(c) Being too busy to comply with the law is not a reasonable excuse: if it were otherwise, virtually no one would be obliged to obey the law.

(d) A defence of complexity of the law amounts to no more than a claim of ignorance of law (in other words, the law was to complicated to understand). As a matter of policy, as I have said, in law this cannot amount to a reasonable excuse.

In any event the appellant has not identified any law which was too complex for it to understand.

(e) Lack of funds is also not a reasonable excuse. This is expressly provided for in the legislation; certainly lack of funds is no excuse for claiming input tax to which a taxpayer was not entitled. Nor is a lack of funds to instruct an adviser: that is no more than relying on ignorance of the law.

41. I am therefore satisfied that even in so far as the penalty is concerned, the appellant does not have a reasonable prospect of wining the proceedings. I would strike out the appeal on this ground too, save that it has already been struck out because I have refused an extension of time to bring the appeal late.

42. 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: 2 NOVEMBER 2016