[2017] UKFTT 0185 (TC)

TC05673

Appeal number: TC/2016/01802 and TC/2016/01623

REINSTATEMENT – applications for closure and permission to make late appeals against information notices and penalties withdrawn by appellant when postponement of hearing refused – reinstatement would subvert refusal of postponement, and applications were without real prospect of success – reinstatement refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

EUROBAY HOMECARE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Fox Court, Brook Street, London on 15 February 2017

Mr Koonjah, of Noviscom Ltd, for the Appellant

Ms H Jones, presenting officer, for the Respondents

DECISION

1. On 15 March 2016 the appellant lodged various applications with the Tribunal. They were as follows:

(1) an application for the enquiry opened on 6 December 2013 into its year end 31/12/11 and the enquiry opened on 14 April 2014 into its year end 31/12/12 to be closed;

(2) An application for permission to bring a late appeal against:

(a) the issue of two information notices on 14 April 2014 which asked for information relating to the tax year ending on 31/12/11 and 31/12/12;

(b) the assessment on 8/6/15 of two penalties, each for £2,070, representing daily penalties for failing to comply with the above information notices

(3) An application relating to two penalties, each of £910, imposed on 13/11/14, representing daily penalties for failing to comply with the above information notices. The parties were not, however, agreed on what the application was. The appellant's position was that it was an application for permission to bring a late appeal (under s 49A(2)(c)) against them to the Tribunal; HMRC's position was that it was an application under s 49(2)(b) TMA 70 for the Tribunal's permission to notify a late appeal against them to HMRC. I do not need to resolve the nature of the application in relation to these two penalties in order to resolve the reinstatement application, and so, as I had no evidence on it, I leave it outstanding.

The test for reinstatement

2. It seems to me that when considering whether to reinstate an appeal or application, the Tribunal must consider all relevant factors. In *Pierhead Purchasing Ltd* [2014] UKUT 0321 (TCC) where the appellant made a late application for reinstatement, the factors which Mrs Justice Proudman considered relevant were:

> [23] .....
>
> - The reasons for the delay, that is to say, whether there is a good reason for it.
> - Whether HMRC would be prejudiced by reinstatement
> - Loss to the appellant if reinstatement were refused
> - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration
> - Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained

3. The first and penultimate of these 'grounds' don't read across into a case such as this one where there was no delay in making the application for reinstatement.

However, while obviously the extent and reasons for the delay are clearly relevant in a late application for reinstatement, Mrs Justice Proudman was not suggesting, even implicity, that the reason for the original withdrawal or the issue of legal certainty were not relevant to a timely (or indeed, out of time) application.

4. So far as the relevance of the reason for the withdrawal is concerned, Mrs Justice Proudman clearly considered it relevant. It was the subject of the discussion at §§25-36. She considered it a relevant factor but one which had been properly considered by the FTT not to justify reinstatement.

5. So far as the question of legal certainty is concerned, reinstating an appeal, at least as much if not more than extending the time for compliance, threatens legal certainty. So legal certainty is relevant to the question of reinstatement as much as to a late reinstatement and this is reflected in Mrs Justice Proudman's decision at [41] bullet 4.

6. Therefore, in summary, I consider that, while all relevant factors must be considered on a reinstatement application, those factors include:

(a) The reasons why the appeal was withdrawn, and why it is now sought to reinstate it;

(b) The effect on legal certainty and the good administration of justice if the appeal is reinstated.

(c) The prejudice to the appellant if the appeal is not reinstated

(d) The prejudice to HMRC if the appeal is reinstated;

(e) The merits of the appeal.

Background

7. The only evidence in front of the Tribunal of the reasons for the withdrawal was what the appellant had said in letters to HMRC and the Tribunal. Neither the director nor ex-director attended the hearing. In any event, the background recorded below was not in dispute and is apparent from the Tribunal's file and from the email exchanges. I find as follows.

8. In response to a chasing letter from the Tribunal dated 24 May 2016, the appellant (acting by a Mr Sony Cherian) wrote to the Tribunal on 6 June 2016 giving its dates to avoid for a hearing in the period 12/6/16 to 12/9/16. None of the dates to avoid included 12/9/16.

9. On 27 June 2016, the Tribunal wrote to both parties notifying them that the hearing was listed for 12 September 2016.

10. On 22 July 2016, HMRC copied in the Tribunal on an email sent to Mr Sony Cherian, using a corporate email address. That letter mentioned the hearing on 12 September 2016.

11. On 12 August 2016, HMRC sent by email to the Tribunal and Mr Sony Cherian their skeleton argument and witness statement for the forthcoming hearing, and again the letter expressly mentioned the hearing being on 12 September 2016. While not apparent from the Tribunal's file, HMRC also posted the skeleton and witness statement to the appellant at its notified address.

12. Having heard nothing, HMRC contacted Mr Koonjah directly by email on 6 September 2016 and the next day Mr Koonjah informed HMRC that he had been instructed to act by the appellant, and instructed to apply for a postponement of the hearing. Mr Koonjah sought HMRC's consent to the postponement which was not forthcoming. He then made an application to the Tribunal.

13. The reasons given by the appellant to the Tribunal for its application for postponement were that the appellant had a newly appointed director (Mr Mapsekar) who was (a) currently on leave and (b) not sufficiently familiar with the issues in the dispute and in consequence would find it impossible to produce a witness statement in time for the hearing on 12th; the appellant was also stated to be in the process of taking legal advice in relation to the dispute. In its earlier application to HMRC, the appellant also mentioned that the hearing had been scheduled without taking into account Mr Mapsekar's dates to avoid (by implication because he was not in post at the time the dates to avoid were provided).

14. On 8 September, Judge Raghavan refused the application:

> '...because the appellant has provided no adequate explanation as to why any difficulties in putting together the witness statements it seeks to rely on, and in seeking timely legal advice could not have been addressed sooner.....If the appellant wishes to renew its application to postpone that will be heard as a preliminary matter at the Tribunal hearing on Monday."

15. In other words, Judge Raghavan refused the application on the basis that the information in front of him did not justify a postponement, but he left open the possibility of postponement if the appellant came to the hearing and gave a more in-depth justification for its postponement application.

16. Instead, however, on the same day the appellant withdrew all its applications as summarised at §1 above.

17. On 22 September 2016, the appellant applied for all the applications to be reinstated. The reasons it gave were that this litigation and the need to prepare for the hearing had been unintentionally overlooked because of the transition between the outgoing and new directors; moreover, the new director had only become aware of the hearing when HMRC contacted Mr Koonjah in early September and that had left insufficient time to prepare properly for the hearing.

The appellant's directors

18. From the evidence from the Register of Companies, I find in March 2016 the appellant filed notification that Mr Mapsekar had been appointed a director of it on 1 January 2016; and on 29 June the appellant filed notification that Mr Sony Cherian had resigned as director on 1 June 2016.

19. I find that this information is not consistent with the appellant's case that Mr Mapsekar was newly appointed in September 2016; a further inconsistency was that Mr Cherian was the author of the dates to avoid letter on 6 June although had apparently resigned as a director 6 days' earlier.

20. The Tribunal had no evidence to explain the discrepancies: the appellant's case put by Mr Koonjah was that in practice Mr Cherian had stayed in post until the end of July and Mr Mapsekar had not taken up his duties until August. HMRC's position was that even if that was the position, nevertheless it did not explain why the appellant had been unprepared for the hearing in September.

Conclusions on the reasons for the withdrawal

21. What evidence there is points to the reason for the withdrawal being that the appellant decided it preferable to withdraw its appeals rather than proceed to the hearing without being, in its view, fully prepared for it and in the absence of evidence from Mr Mapsekar. However, I have no real explanation, let alone an adequate explanation, of the reason why it was unprepared for the hearing.

22. The appellant does not suggest that the various letters and emails above were not received by it; it appears to me more likely than not that they were received as they were properly addressed. It is clear Mr Cherian was well aware of the litigation and the appellant accepts Mr Mapsekar was aware of it too. At best, the appellant's case is that both the outgoing and incoming directors overlooked the need to prepare for the hearing. Whatever the date on which Mr Cherian actually resigned and whatever date on which Mr Mapsekar did or should have taken up his duties, the fault for its lack of preparation lies squarely with the appellant.

23. Moreover, I had no explanation of why the appeals were withdrawn on 8 September when it had been made clear to the appellant that it could make a renewed application for postponement at the start of the hearing on the 12th. Even accepting that it had overlooked the imminence of the hearing, the director was clearly aware of it by 7 September when he instructed Mr Koonjah. The arguments, summarised below, which it wishes to put to the Tribunal should the appeals be reinstated, are the same as or very similar to those put by other companies with which it accepts it has links, and which have also been represented by Mr Koonjah. So the appellant may have been able to prepare its legal arguments in the 4 days before the hearing. And so far as its factual case was concerned, while it may have been difficult for Mr Mapsekar to produce a witness statement while on leave, I do not see that it was necessary. In particular, Mr Mapsekar was appointed after the events the subject of the appeal so it is difficult to see how he could have given relevant evidence in any event, and moreover Mr Koonjah was unable to explain to me why Mr Mapsekar's

evidence was considered to be so essential to the appellant's case. And while a witness statement from Mr Cherian may have been more relevant, as he was director of the appellant at the time of the events in question, Mr Koonjah indicated to me that even today no decision had been taken by the appellant whether Mr Cherian would be asked to give evidence, again indicating that his evidence was not essential to the appellant's case.

24. In conclusion, the appellant gave no good explanation of why it overlooked the need to prepare for the hearing of its appeal in between the notice of hearing letter in late June and early September when it clearly became aware of the imminence of the hearing. Moreover, it gave no good explanation of why it did not then attempt to prepare for the hearing in the short time it had left rather than withdraw the applications.

The reasons for the reinstatement application

25. There is no evidence that any new factor came to light in between the withdrawal and reinstatement application: the appellant's position is that it was not prepared for the hearing on 12 September, but it wishes the applications to be reinstated as it will now be prepared for the hearing of its applications. It wishes to have the hearing that it was earlier denied by its own withdrawal consequent on its failure to prepare for the previous hearing date.

Legal certainty and considerations of justice

26. Mr Koonjah's case was that justice required the appellant to be given a fair hearing; Mr Koonjah's position was that the European Convention on Human Rights guaranteed the appellant's right to a fair hearing, and requirements for which were particularly strict in respect of its appeal against penalties as they were criminal in nature.

27. He referred me to numerous cases on the ECHR but none of them in my view were on point. The Tribunal accepts that the appellant had a right to a fair hearing: it chose to exercise that right in making its applications, and it chose to bring its right to a fair hearing to an end when it voluntarily withdrew its applications. Nothing in any of the cases referred to by Mr Koonjah give even a defendant in a criminal trial an automatic right to a *second* chance of a fair hearing. There is nothing inherently unfair in not giving a defendant a second chance to have a hearing.

28. On the contrary, legal certainty in justice is an important consideration. People would cease to respect the legal system if it did not give them finality in dispute resolution.

29. Therefore, reinstatement of legal proceedings by the party which chose to withdraw them should be resisted if it undermines legal certainty. However, I accept that that finality is not an especially significant concern in this case where the application for reinstatement was made only two weeks after the withdrawal.

30. But legal certainty also means that a judicial decision during dispute resolution in courts and tribunals is final unless itself challenged within the judicial process. It would undermine respect for the legal system if it was possible to subvert a judicial decision other than by a challenge to it within the judicial process itself (such as an appeal to a higher judicial body).

31. In this case, Judge Raghavan gave a decision refusing postponement of the hearing on the grounds that the appellant had failed to justify its application for postponement. The appellant does not suggest that that decision was erroneous in law or arrived at after a procedural irregularity, and has not applied to appeal it or for it to be set-aside. And while, even without error of law or procedural irregularity, it is open to a party to apply for a case management decision to be re-considered on the grounds of change in circumstances, there are none here. Here the Judge himself left open the possibility of reconsideration of the application if the appellant were to give a further explanation of its position, but I find that, while the Tribunal may now know a little bit more about the background to the postponement application than was known to Judge Raghavan, there has still been no real explanation provided of why the appellant failed to prepare for the original hearing.

32. Therefore, it seems to me, that were I to allow the appellant's application for reinstatement, I would be undermining Judge Raghavan's decision because it would give the appellant in effect the postponement refused by Judge Raghavan. Had further evidence become available, known to the Tribunal now but not to Judge Raghavan, then allowing the reinstatement might not undermine Judge Raghavan's decision. It may be appropriate in some situations to reverse a case management decision where there is new and compelling evidence, and Judge Raghavan clearly left open to the appellant the opportunity to produce such evidence as he invited them to renew their postponement application at the hearing. But the appellant ignored that invitation and has not even now produced any evidence, certainly not new, let alone compelling, that could have justified the postponement. Allowing the reinstatement would undermine Judge Raghavan's decision in circumstances where there has been no application to set it aside, no application to appeal it, no application to reconsider it, and, so far as I can see, absolutely no grounds on which any such application could have been made.

33. To me, this factor is decisively against allowing the application.

34. I note that the appellant's case (albeit without evidence) is that it made its withdrawal in good faith and only became aware of its right to make a reinstatement application when notified by the Tribunal of this in the letter acknowledging the withdrawal. Even if I were to accept its case on this (which I am in no position to do in the absence of evidence) it makes no difference: whether or not the appellant intended to subvert Judge Raghavan's decision by withdrawing and then applying to reinstate its appeal, the effect of allowing the reinstatement would be to subvert it. And to me that is a factor decisively against allowing the application.

35. Nevertheless, I go on to consider all relevant factors in case any of them are strongly in favour of reinstatement.

The prejudice to the appellant if reinstatement is refused

36. Mr Koonjah accepted that there was little prejudice to the appellant if the Tribunal refused to reinstate its closure applications: there was nothing to prevent the appellant simply re-lodging the applications with the Tribunal. He suggested it would save costs if the original applications were reinstated, but I don't even accept that. I consider, had the original proceedings only concerned closure notices, the most cost efficient method of pursuing the applications following a withdrawal of them would be to re-lodge them. the application for reinstatement has resulted in an extra hearing that would not have been necessary if the applications had merely been re-lodged. I find that there is no prejudice to the appellant if reinstatement of its closure applications is refused.

37. The applications for permission to make a late appeal against the information notices and penalties are a different matter. If the Tribunal refuses to reinstate the applications, they cannot be re-lodged. The information notice would have to be obeyed and the penalties would be enforceable. The penalties at stake amount to about £6,000. Prima facie there is actual prejudice to the appellant in a refusal to reinstate as it makes the appellant's liability to the information notice and penalties final.

38. Nevertheless, I do not consider that a refusal to reinstate even the application to make a late appeal against the information notices and penalties gives rise to any real prejudice to the appellant because, for the reasons explained below, I do not consider that the applications would have any real chance of success. It is unlikely reinstatement would do more than delay the inevitable.

The prejudice to HMRC if reinstatement is allowed

39. So far as the closure applications are concerned, because they can be re-lodged, I do not see much prejudice to HMRC in them being reinstated: however, I comment in passing that had the closure applications been stand-alone, I would consider reinstatement to be prejudicial in costs because, as I have said, applying for the original applications to be reinstated rather than simply re-lodging new applications, could result in an extra and unnecessary hearing.

40. Again, I consider reinstatement of the application for permission to make late appeals against the information notice and penalties procedurally prejudicial to HMRC because, for the reasons given below, I do not consider that the appellant has any real chance of success. In other words, reinstating the applications would result in HMRC defending applications which have no real prospect of success.

The merits of the applications

41. Mr Koonjah explained that the appellant wanted the opportunity to put its case that:

(1) The enquiries should be closed because

(a) no reasons had been given for opening them and/or they were just fishing expeditions;

(b) they were opened in order to discover information about other companies rather than the appellant;

(c) HMRC had no reason to suspect that the appellant had not paid its tax.

(2) The information notices should be cancelled because the information sought was not reasonably required for the purpose of checking the appellant's tax position because:

(a) HMRC had given no reason for requiring the information

(b) HMRC was using the information notices to discover information about other companies

(c) HMRC already had enough information to be satisfied that the appellant had paid the tax it owed.

(3) The penalties should be cancelled because the information notices ought not to have been issued for the reasons given above and/or the appellant had a reasonable excuse for default for those reasons.

42. Strictly, in order to puts its case on the information notices and penalties it first needed leave to bring its appeals against them out of time. HMRC accepted that the appeals were not very late, a reason for the lateness had been given, and that HMRC were unlikely to oppose the appeals being brought late if the matter was reinstated. I therefore proceed on the basis that the appellant would have a real prospect of succeeding in its application to be allowed to appeal the information notice and penalties out of time. So the real issue is whether the underlying appeals against the information notice and penalties themselves have a real prospect of success and that is what I will consider.

No reasons given for opening the enquiry and/or its just a fishing expedition

43. HMRC accepted they gave no reasons for opening the enquiries; their position was that they did not have to. Their position was that they were entitled to open enquiries into any taxpayer at random, although they accepted that the enquiries were not random in this case.

44. Mr Koonjah's view seemed to be that the taxpayer was entitled to know the reasons why HMRC was looking into its tax affairs.

45. The right to enquire into company tax returns is under §24 of Schedule 18 of Finance Act 1998 ('Sch 18'). These provisions do not require HMRC to give any reasons for opening of an enquiry. In the absence of any express provision, it would be difficult to read into them any obligation on HMRC to give reasons. This is all the more so when the logic of the scheme of self-assessment is that HMRC may make random enquiries to double-check the accuracy of any self-assessment return.

46. In *Morgan Grenfell* [2001] EWCA Civ 329, in respect of information notices, the Court of Appeal explained that Parliament did not intend HMRC to be constrained by the need to explain why it was enquiring into a taxpayer's tax affairs. The same logic that applies to the issue of information notices must apply to the opening of enquiries.

47. The FTT has already rejected the case that HMRC must give reasons for opening an enquiry: *Spring Capital* [2015] UKFTT 8. While that decision is not binding, I do not consider the appellant has any real prospect of making out a case that it is wrong.

48. In my view, this ground of appeal has no reasonable prospect of success.

The enquiry was opened in order to discover information about other companies:

49. HMRC accepts that they have open enquiries into other companies which are linked to the appellant, and that their concerns with the appellant may have arisen from concerns with those other companies. They do not accept that the enquiries into the appellant were opened for any purpose other than to check the correctness of the appellant's tax returns.

50. I accept that if HMRC opened the enquiry for any purpose other than to check the correctness of the appellant's tax returns it would be an invalid purpose and good reason to order the closure of the enquiry. Nevertheless, it seems to me that here is a prima facie case that these enquiries were opened to seek information about the appellant's accounting affairs because HMRC have issued information notices seeking information about the appellant's accounting affairs. It would be for the appellant to rebut this prima facie case yet Mr Koonjah did not point to a single item on the information notices that did not relate to the appellant. Moreover, Mr Koonjah did not explain to me any evidence which the appellant intended to put forward which would rebut this prima facie case apparent on the face of the documents. In particular, as I have said, he was not able to explain why Mr Mapsekar could give any relevant evidence and admitted that the appellant had not even decided if it wanted to rely on any evidence from Mr Cherian.

HMRC had no reason to suspect that appellant had not paid tax

51. Mr Koonjah said that the appellant had filed its self-assessment returns and had been the subject of some VAT inspections: that was sufficient information and could give HMRC no reason to suspect that the appellant had not paid tax.

52. This is a hopeless line of argument. A self-assessment is no more than a self-assessment. It does not include the information to check whether the self-assessment is correct. And while Mr Koonjah did not take me through what information had been provided to HMRC during the alleged VAT inspections, he did accept that the appellant had not provided any of the information requested by the information notices. A failure to provide the information requested in information notices will

mean that the appellant's application for closure has virtually no prospect of success. I accept that that may well not be the case if the appellant can show the information was not reasonably required for the purpose of checking its tax position but as explained below its case on that also has no real prospect of success.

HMRC had given no reason for requiring the information in the information notices

53. HMRC accepts that it had not really explained what its concerns are with the appellant's tax returns under enquiry. But while information notices can only be issued where the information sought is reasonably required for the purpose of checking the appellant's tax position, HMRC are not required to disclose *why* they are investigating the appellant's tax position. This is explained by the Court of appeal in *Morgan Grenfell.*

54. I do not consider that the appellant has a real prospect of success of challenging the information notices on the grounds that HMRC have not informed it of why it is being investigated.

55. In so far as it is merely suggesting that the information isn't *reasonably* required in order to check its self-assessment returns, Mr Koonjah did not suggest that the information would not enable HMRC to check the appellant's tax returns.

HMRC was using the information notices to discover information about other companies

56. I have already dealt with this: using a taxpayer party information notice to discover information about a third party would be an unlawful purpose but factually the appellant does not appear able to raise any kind of a case that that is what had happened. In particular, the information sought all appeared to relate to the appellant.

57. Its ground of appeal on this seemed without prospect of success.

HMRC already had enough information to be satisfied that the appellant had paid the tax it owed.

58. For reasons I have already given, this ground that HMRC already had sufficient information appeared to be without prospect of success. And so far as a challenge to any individual item being more than was reasonably required, Mr Koonjah did not attempt to explain why any individual item on the information notices was not reasonably required for the purpose of checking its tax position.

59. Mr Koonjah did not satisfy me that the appellant had a real prospect of making out a case that all or any of the information in the information notices was not reasonably required for the purpose of checking the appellant's tax position.

Reasonable excuse

60. Mr Koonjah accepted that at least some of the information required by the information notices were statutory records and there was no appeal against the information notices to that extent. Nevertheless, its case was that it should be excused the penalties for non-compliance on the basis its belief in the unlawfulness of the enquiry and information notices amounted to a reasonable excuse for non-compliance.

61. I do not consider that it has a reasonable prospect of succeeding on this: firstly, it does not appear to have any evidence of such a belief. Mr Mapsekar was not in post at the time in question so cannot give relevant evidence of the appellant's beliefs at the time of original non-compliance; the appellant has not yet even decided to rely on Mr Cherian's evidence, whatever it might be.

62. And, as a matter of law, an unreasonable belief cannot amount to a reasonable excuse, and I consider if it did have such beliefs, it would have no real prospect of persuading a Tribunal that they were reasonable on its case as it stands.

Conclusion on merits

63. For the above reasons, I do not consider that any of its applications listed at §1 above have a reasonable prospect of success. This is a second and independent reason why it is right to refuse reinstatement. It would be wrong to reinstate an appeal where it has no real prospect of success. It would also be wrong to reinstate this appeal for the independent reason that it would offend against legal certainty by permitting the unchallenged decision refusing postponement to be subverted.

64. The application for reinstatement is refused. That does not prevent the appellant re-lodging an application for closure of the two enquiries.

65. 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.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 20 FEBRUARY 2017