



TC05675

Appeal number: TC/2014/06261

PROCEDURE – application to reinstate appeal struck out for failure to comply with an “unless order” – rule 8(1) The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 – whether circumstances justify reinstatement – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**TOPHAYAT LIMITED
(FORMERLY KNOWN AS JEMIX ENTERPRISES LIMITED)**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Fox Court, Brooke Street, London on 6 February 2017

The Appellant did not appear and was not represented

Mr Stephen Goulding, officer of HM Revenue and Customs, for the Respondents

DECISION ON PRELIMINARY ISSUE

Introduction

5 1. This decision relates to an application made by the Appellant to reinstate its appeal against assessments to corporation tax and related interest and penalties for the accounting periods ended 30 June 2010, 31 July 2010 and 31 July 2011.

2. As I mention at [18] below, the Appellant changed its name from Jemix Enterprises Limited to Tophayat Limited on 22 April 2016. I have referred to the Appellant as “Tophayat” in this decision.

10 3. The appeal was automatically struck out under rule 8(1) The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) for failure to comply with a direction issued by the Tribunal on 13 August 2016 (the “Unless Order”) that stated that failure by Tophayat to comply with the direction would lead to the striking out of the proceedings.

15 The hearing

4. Topyhayat was not represented.

5. I decided to proceed with the hearing in the absence of any representation for Tophayat.

20 (1) The Tribunal staff had made attempts to contact Tophayat, without success.

(2) From the materials on the Tribunal file, I was satisfied that reasonable steps had been taken to notify Tophayat of the hearing.

25 (3) There was sufficient evidence of the conduct of the appeals from the correspondence on the Tribunal file and the documentary evidence provided to the Tribunal by HMRC.

(4) If the hearing were to be postponed, the resolution of the issues before the Tribunal would be delayed and HMRC and the Tribunal would be put to further cost and expense.

6. For these reasons, I took the view that it was in the interests of justice to proceed.

30 Evidence

7. HMRC produced a bundle of documents and authorities for the hearing. HMRC confirmed that the bundle had been provided to Tophayat.

Facts

8. Tophayat is a property management and rental company.

9. Following enquiries into Tophayat's returns for the accounting periods ended 30 June 2010, 31 July 2010 and 31 July 2011, HMRC issued amendments to the company tax returns for those periods under paragraph 32 Schedule 18 Finance Act 1998 on 6 June 2013.
- 5 10. During the enquiries, HMRC had also issued various notices under Schedule 36 Finance Act 2008 and penalty notices for failure to comply with the Schedule 36 notices.
11. Tophayat did not request a statutory review of the amendments to the company tax returns or give notice of its intention to appeal within the specified 30 day period.
- 10 12. On 21 June 2014, Tophayat's then accountants wrote to HMRC to request a review of HMRC's decision and to appeal against the amendments that had been made to the company's tax returns.
13. There followed a chain of correspondence between HMRC and, in the first instance, the company's accountants and subsequently Tophayat itself in which
15 information was requested by HMRC and some of that information was provided.
14. The matter was listed for hearing of the application for a late appeal on several occasions but, for various reasons, the hearings were postponed.
15. At some point in this process, the HMRC officer in charge of the case changed. Mr Goulding took over the matter. On 29 March 2016, HMRC wrote to the Tribunal
20 and to Tophayat to state that HMRC no longer wished to oppose the late appeal and that HMRC would conduct a review of the case. Mr Goulding explained that this decision was take because in the correspondence between HMRC and Tophayat's advisers HMRC had indicated a willingness to review documents provided by Tophayat. It was considered inconsistent for HMRC to do so and to continue to
25 oppose the late appeal.
16. On 18 April 2016, HMRC wrote to the Tribunal to request a stay of the proceedings for 90 days in order to conduct a review under section 49B TMA 1970. The Tribunal agreed to the stay. It notified the parties by letter on 9 May 2016.
17. The letter of 9 May 2016 sent to Tophayat was returned undelivered. On 18 June
30 2016, the Tribunal wrote to HMRC concerning the undelivered notice. It asked HMRC whether or not HMRC had any other address for correspondence with Tophayat.
18. On 27 June 2016, HMRC wrote to the Tribunal. In that letter, HMRC notified the
35 Tribunal that the company had changed its name from Jemix Enterprises Limited to Tophayat Limited with effect from 22 April 2016. The company had not informed HMRC or the Tribunal of the change in name. HMRC also confirmed that it had correspondence returned as undelivered from the address to which the Tribunal had written. It gave details of changes in the directors of Tophayat.

19. On 11 July 2016, the Tribunal wrote to Tophayat. It noted that from the details at Companies House that the company had changed its name on 22 April 2016. The letter also noted that company had not corresponded with the Tribunal since August 2015. The letter asked Tophayat to confirm, within 14 days, whether it wished to proceed with the appeal.

20. The Tribunal did not receive a response to its letter of 11 July 2016.

21. On 13 August 2016 the Tribunal (Judge Mosedale) issued a direction to Tophayat. The direction stated as follows:

“The Appellant having failed to reply to the letter from the Tribunal dated 11 July 2016 within the time stipulated therein or at all, the Tribunal DIRECTS that UNLESS the Appellant no later than 5pm on 29 August 2016 confirms in writing to the Tribunal that [it] intends to proceed with the appeal then these proceedings WILL be STRUCK OUT without further reference to the parties.”

22. Tophayat did not respond to the direction on or before 29 August 2016.

23. On 16 September 2016, the Tribunal wrote to Tophayat to confirm that the proceedings had been automatically struck out under rule 8(1) of the Tribunal Rules. The letter informed Tophayat that it had the right to apply for the proceedings to be reinstated but that such an application had to be made in writing and received by the Tribunal within 28 days of its letter.

24. On 7 October 2016, Tophayat wrote to the Tribunal. In that letter, Tophayat applied for the proceedings to be reinstated. The reason that Tophayat gave for its failure to comply with the direction was that it had not received the letter from the Tribunal dated 11 July 2016. Tophayat requested a copy of the letter and a period of a further 28 days from the date of the receipt of that copy to comply with the direction.

25. On 18 October 2016, HMRC wrote to the Tribunal to contest the application for the proceedings to be reinstated.

The parties' arguments

Tophayat's arguments

26. Tophayat's arguments are set out in its letter of 7 October 2016. In summary, Tophayat says that it did not receive the letter of 11 July 2016 and so was unable to comply with the direction.

HMRC's arguments

27. Mr Goulding makes the following points for HMRC:

(1) Tophayat had not cooperated with HMRC throughout the enquiry. HMRC had issued several notices under Schedule 36 Finance Act 2008

in an attempt to obtain information. Penalties had been issued because Tophayat failed to comply with those notices.

5 (2) Tophayat had failed to progress the appeal. The initial application to appeal had been made late. The only reason that HMRC had withdrawn its objection to the late appeal was in order to allow for a review of the case. Tophayat had not corresponded with the Tribunal between August 2015 and October 2016.

10 (3) The only reason that Tophayat had given in support of its application for reinstatement was that it did not receive the letter from the Tribunal dated 11 July 2016. Tophayat did not contend that it did not receive the direction. There was no need for Tophayat to see the letter of 11 July 2016 in order to comply with the direction. Tophayat was only required to indicate its intention to progress the appeal.

15 28. Mr Goulding also referred to various decisions setting out the approach that the Tribunal should take in determining whether or not to permit a reinstatement. He referred in particular to the decision of the Upper Tribunal in *Data Select Limited v HMRC* [2012] UKUT 187.

20 29. Mr Goulding also referred to the decision of the Upper Tribunal in *Clear Plc v Director of Border Revenue* [2014] UKUT 85 and the decisions of the First-tier Tribunal in *Sikander Hayat, Matloob Hussain* [2015] UKFTT 471 and *Maltavini Limited* [2016] UKFTT 267. On the basis of the decisions in those cases, he argued that:

25 (1) the failure of Tophayat to progress the appeal diligently before the issue of the Unless Order was a relevant factor that the Tribunal should take into account;

(2) the fact that Tophayat acted diligently after receipt of the notice from the Tribunal that the proceedings had been struck out should not prevent the Tribunal from refusing to reinstate the proceedings;

30 (3) the Tribunal should take into account the need to deal with litigation efficiently and the public interest in the finality of litigation;

(4) the Tribunal should have regard to the merits of the case, and in this case, Tophayat had not presented any material evidence in support of its grounds for appeal.

The law

35 30. Rule 8(1) of the Tribunal Rules provides:

(1) “The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.”

40 31. When proceedings have been automatically struck out under rule 8(1), rule 8(5) provides that the appellant may apply for the proceedings to be reinstated.

32. Under rule 8(6) of the Tribunal Rules, any application for reinstatement under rule 8(5) must be made in writing and be received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to the appellant.

5 33. The Tribunal Rules do not set out any criteria which the Tribunal must take into account on any application for reinstatement. The Tribunal should therefore exercise its discretion to reinstate an appeal which has been struck out under rule 8(1) in a manner which gives effect to the overriding objective in rule 2(1) of the Tribunal Rules “to deal with cases fairly and justly”.

10 34. In the context of applications for relief from sanctions, there have been several relatively recent cases from which guidance can be drawn. Those cases include *Leeds City Council v HMRC* [2013] UKUT 596, *McCarthy & Stone (Developments) Limited v HMRC* [2014] UKUT 196 and most recently *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121. Those cases consider, in particular, whether the Tribunal should
15 adopt the stricter approach to compliance with rules and directions that has been applied in the civil courts resulting from the changes to the Civil Procedure Rules, and in particular, the changes to rule 3.9 of the Civil Procedure Rules (as discussed in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 and *Denton v TH White Limited* [2014] EWCA Civ 906).

35. The Civil Procedure Rules currently provide in rule 3.9:

20 **“Relief from sanctions**

(1) On an application for relief from any sanction imposed for a failure to
25 comply with any rule, practice, direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need:

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

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

30 (2) An application for relief must be supported by evidence.”

36. An application for reinstatement of proceedings following the striking out of an appeal is an application for relief from sanctions. So the approach in these cases should be followed.

35 37. I do not intend to embark upon a lengthy review of those cases in this decision. However, the conclusion that I draw from those cases is that, although there is no equivalent provision to rule 3.9 of the Civil Procedure Rules in the Tribunal Rules, following the decision of the Court of Appeal in *BPP Holdings*, the stricter approach should be followed. In that case, the Senior President of Tribunals (with whom the other judges agreed) said at paragraph [37]:

40 “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 UTT to compliance or the efficient conduct of litigation at 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*.”

5 38. So, in considering whether or not to grant the reinstatement, in pursuit of the
overriding objective dealing with cases fairly and justly, the Tribunal must conduct a
balancing exercise taking into account all the facts and circumstances of the case.
This exercise should also include the matters listed in rule 3.9 of the Civil Procedure
Rules (and so the requirement for litigation to be conducted efficiently and at a
10 proportionate cost and to enforce compliance with the rules, practice directions and
orders).

Discussion

39. If I apply the approach that I have set out above, I first consider the reason for the rule.

15 40. Rule 8(1) is straightforward. It requires proceedings to be struck out
automatically where the Tribunal issues a direction that specifies that the sanction for
failure to comply with the direction will be the striking out of proceedings. These
directions are commonly known as “unless orders”.

20 41. In this case, Judge Mosedale issued the Unless Order on 13 August 2016. I do not
have any record of the reasons that Judge Mosedale had for the issue of the order. In
the absence of any evidence to the contrary, I must assume that there were good
reasons. From my review of the file, I infer that she did so as a result of the failure of
Tophayat to progress the appeal expeditiously over some considerable period of time.

25 42. I then need to consider the seriousness of the breach. The Unless Order was
issued on 13 August 2016. It specified that Tophayat must confirm to the Tribunal
that it intended to proceed with the appeal no later than 5pm on 29 August 2016.
Tophayat did nothing. The time period elapsed and the proceedings were
automatically struck out under rule 8(1).

30 43. It was not until Tophayat received the notice from the Tribunal stating that the
proceedings had been struck out on 16 September 2016 that Tophayat took any action.
At that point, Tophayat acted promptly, and within the 28 day period allowed under
rule 8(5), to apply for reinstatement. I take that into account. However, I also take
into account that that was the only point at which Tophayat has acted promptly and
diligently to progress these proceedings. It was the failure of Tophayat to progress
the proceedings that had led to the issue of the Unless Order on 13 August 2016. The
35 Appellant’s failure to attend the hearing despite being given adequate notice and
being sent the bundle by HMRC, is also indicative of Tophayat’s approach to this
appeal.

40 44. I also take into account the reasons for the breach. Tophayat says that the reason
that it did not comply with the Unless Order is that it did not receive the letter from
the Tribunal dated 11 July 2016. That is not a good reason for the failure to comply
with the Unless Order. As Mr Goulding points out, the direction did not require

Tophayat to refer to the letter of 11 July. It simply required Tophayat to confirm on or before 29 August 2016 that Tophayat intended to proceed with the appeal.

45. I should also take into account the potential prejudice to Tophayat if I do not allow the reinstatement of the proceedings. In that case, Tophayat will lose its right to appeal against the amendments to the company tax returns. The amounts involved are significant. This factor is a strong one in favour of reinstatement.

46. Mr Goulding suggested that I should also take into account the merits of the appeal. He says that Tophayat has failed to produce any material evidence to support its appeal and the Tribunal should be less inclined to reinstate an unmeritorious appeal.

47. I have no evidence of the facts of this case other than those which are apparent from the Tribunal file. It was not the nature of the hearing that the Tribunal would perform any sort of fact finding exercise. In the absence of such evidence, I have to assume that Tophayat has at least an arguable case. However, I regard that point as neutral in the balance of factors that I must take into account.

48. I must also take into account the potential prejudice to HMRC if the appeal is restored. It might be said that there is no serious injustice to HMRC in having to incur the costs and expense of a meritorious appeal. There is, however, a strong public interest in the finality of litigation.

20 **Decision**

49. I have taken all of these factors into account. In my view, it would not be in the interest of justice to reinstate this appeal.

(1) Tophayat has failed to comply with an unless order. It knew the consequences of failing to do so.

25 (2) Tophayat has generally failed to progress this appeal. Its failure to attend the hearing is indicative of its overall approach.

30 (3) Rule 8(5) allows Tophayat to apply for reinstatement. There must therefore be cases in which it would be appropriate to restore the proceedings. However, the burden is on the applicant to show good reasons for the reinstatement of proceedings. No good reason has been shown by Tophayat.

(4) It is consistent with the stricter approach of the courts and tribunals to failures to comply with rules and directions that the appropriate sanction should be applied unless there are good reasons not to do so.

35 50. I refuse this application.

Rights to appeal

51. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

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**ASHLEY GREENBANK
TRIBUNAL JUDGE**

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RELEASE DATE: 17 FEBRUARY 2017