[2014] UKFTT 922 (TC)

# TC04036

**Appeal number: TC/2010/07530**

*Procedure – application for extension of time to apply for set-aside of Tribunal's decision, some two and a half years after its date of issue – set aside application weak – Data Select principles applied – application for extension of time refused*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ASSUNTINO PALMIERO** **Appellant**

**-and-**

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

**TRIBUNAL**: **JUDGE KEVIN POOLE**

**Sitting in Chambers in Birmingham on 5 September 2014**

DECISION

## Introduction

1. This decision concerns an application for permission to apply, out of time, to set aside an earlier decision of the Tribunal on the Appellant's substantive appeal. It also considers the set-aside application itself.

2. I have considered the application without a hearing on the basis of the written submissions received as they were reasonably comprehensive (insofar as they addressed the relevant issues) and I did not consider it necessary to put the parties to the time and expense of an oral hearing on what I consider to be a straightforward application.

## The facts

3. The Appellant appealed against various closure notices and assessments whereby HMRC sought to impose extra income tax liabilities on him for the years 1998-99 to 2005-06 inclusive. His appeal was heard in the First-tier Tribunal in September 2011 and a full decision of the Tribunal issued on 21 November 2011 dismissed his appeal.

4. The Tribunal's file was destroyed some time later under its normal document retention policies.

5. The appeal mainly concerned underdeclarations of takings from the Appellant's café/restaurant business.

6. It appears that the Appellant has carried out further work and obtained further evidence since that time, in an attempt to demonstrate that the evidence obtained from his cash register was unreliable. The Appellant applied for permission to appeal against the decision of the Tribunal, and his application was refused, both by the Tribunal (in early 2012) and, at an unknown later date, by the Upper Tribunal. As much of the material which the Appellant has submitted in support of this application relates to the supposed unreliability of till readings and a key part of it is a letter from Cash Register Services (London) Limited dated 10 April 2012, I infer that the Appellant's application to the Upper Tribunal was based on the availability of new evidence to support his case. He states that the Upper Tribunal refused permission to appeal, on the basis that there was no error of law in the First-tier Tribunal's decision, he simply now wished to adduce new evidence to displace that decision.

7. No detail is given of when the application to the Upper Tribunal is supposed to have been made, but as it is now well over two years since the First-tier Tribunal refused permission to appeal, I infer that the decision of the Upper Tribunal to refuse permission was not particularly recent. The Appellant states that his delay in applying to the First-tier Tribunal for an out of time set-aside of the 21 November 2011 decision "arose not from a lack of promptness on my part but from a misunderstanding of the procedure of this Honourable Tribunal in that I, in error,

instead of making this application at first instance, sought to raise these grounds before the Upper Tribunal who have no jurisdiction to entertain fresh evidence."

**Discussion and decision**

8. In considering whether to grant an extension of time for an application such as this, it is clear that the Tribunal's discretion is "at large", but it must act judicially in the exercise of that discretion. The Upper Tribunal, in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) has recently considered the question of extensions of time in such situations, and confirmed that the Tribunal should follow the approach set out in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC), as summarised in the following passage:

> "[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 5 questions.
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> [35] The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.
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> [36] I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
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> [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 section 83G(6) of 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 concerns 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 appeals against a judicial decision.
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> [38] As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach."

9. In the present case, there is a time limit of "28 days after the date on which the Tribunal sent notice of the decision to the party" (rule 38(3) of the Tribunal's Procedure Rules) – in this case, that 28 day time limit expired on 19 December 2011. The application for set aside was actually received at the Tribunal on 2 July 2014, over two and a half years after the expiry of the time limit.

10. The purpose of the time limit is so that all parties can be assured of finality of the litigation after a particular period of time. Clearly the delay in this case was very long, though some part of that period of delay might be explicable (if not excusable) by reason of the Appellant's unfamiliarity with the Tribunal's rules and procedures and his doomed attempt to obtain permission to appeal. I cannot find there to be any good reason for the delay. Even if some part of it could be explained by reference to the abortive attempt to appeal the November 2011 decision, the Appellant has not even come close to demonstrating a good reason for the vast majority of the two and a half years of delay. The consequences for both parties of this application being granted or refused are clear: if the application is refused, the Appellant will have to pay the liabilities which were adjudicated on by the Tribunal in November 2011 and HMRC will have finality; if on the other hand the application is granted, then the Tribunal will need to consider whether the set aside application itself should be granted. If it is, then the parties will be back to where they were before the 2011 hearing. HMRC will be required to reconstitute their case file and prepare from scratch once again for an appeal which they had considered long closed.

11. It is established that when considering whether to exercise a discretion to extend time, a Tribunal is also entitled to take into account the merits of the underlying application. If it is extremely strong, that would militate in favour of granting the extension of time, and if it is extremely weak that would militate against.

12. I have therefore considered the merits of this application, assuming I were to consider it in detail.

13. The essence of the application is that the Appellant has obtained what he considers to be new and convincing evidence which, if it had been before the Tribunal at the original hearing, may well have resulted in the appeal being successful.

14. My consideration of the application under Rule 38 would require me to consider whether one or other of the specific conditions set out in Rule 38(2) of the Procedure Rules was satisfied, and whether it was "in the interests of justice" for the decision to be set aside.

15. As far as the conditions in Rule 38(2) are concerned, these are as follows:

> "(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
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> (c) there has been some other procedural irregularity in the proceedings; or
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> (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

16. The Appellant's representative argues that condition (a) or (b) above is satisfied, on the basis that new documentary evidence has come to light which the Appellant wishes to put forward, and such evidence was not received at an appropriate time by a party (or their representative) or was not sent to the Tribunal at an appropriate time.

17. The representative also cites a comment of the First-tier Tribunal in *Rosenbaum's Executor v HMRC (No. 2)* [2013] UKFTT 495 (TC), when it was refusing an application by HMRC to set aside a decision in a situation where HMRC had not delivered all the evidence that, in retrospect, it wished it had. In refusing HMRC's application, the Tribunal said that "[t]he position might, of course, be different if there had been a good reason for the failure." In the present case, the representative argues that there is a good reason – namely that "through no fault of his own, he was not in possession of the evidence at the relevant time".

18. What the representative has not referred to, of course, was the following passage from that same decision:

> "Rule 38(2)(b) was considered in *Daksha Fraser (as representative partner for Starlight Therapy Equipment Partnership) v Revenue & Customs* [2012] UKFTT 189 (TC) by Judge Poole who said:
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> > "35. The conditions in Rule 38 (2) which might most obviously be said to be satisfied in this case are those contained in Rule 38 (2)(a) or (b) – on the basis that "a document" (i.e. the new evidence which the appellant now seeks to put forward) "was "not sent to a party" [i.e. HMRC]" or "was not sent to the Tribunal at an appropriate time" (i.e. before the Tribunal was making its decision on the appeal).
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> > 36. However, I consider that a failure to send the new evidence would need to be in the nature of a "procedural irregularity" before it can satisfy the condition in (2)(a) or (b), because of the wording of

> paragraph (2)(c), which refers to "some **other** procedural irregularity" in a way which implies that (2)(a) and (2)(b) are considered to be specific examples of procedural irregularity.
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> 37. It follows that the condition in Rule 38 (2)(a) or (b) is only satisfied if the representative's failure to submit full evidence in support of the original appeal can be regarded as a "procedural irregularity". Whilst his failure to submit full evidence at the correct time might certainly be considered procedurally inadequate, I do not consider it to have been a procedural irregularity – the question of what evidence should be submitted in support of an appeal is a matter for each party to decide for himself in conjunction with his advisers, and I do not see how a decision to submit what turns out to be inadequate evidence could be regarded as giving rise to a "procedural irregularity"."

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> 18. I respectfully agree with the views of Judge Poole and in this case I see no element of procedural irregularity in the simple fact that HMRC failed to produce the evidence that they required in order to prove their case. I therefore conclude that the conditions of Rule 38 (2) are not satisfied in this case."

19. In addition, when considering the merits of an application to set aside, based on the availability of new evidence, the decision in *Fraser* went on to say this about the "interests of justice" requirement in Rule 38(1)(a):

> "40. The requirement in rule 38(1)(a) of the TPRs (that it must be "in the interests of justice" to set a decision aside) requires a broad balancing of the various factors involved.
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> 41. It might be said that it will always be in the interests of justice to consider new evidence before reaching a final decision, and that argument has some force. It is however only half the story. It could not be right that a party should be permitted to re-litigate the same dispute repeatedly simply on the basis of bringing forward some new evidence every time the result went against him.
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> 42. The function of the Tribunal is to provide efficient resolution of disputes between taxpayers and HMRC. Whilst some latitude may be allowed for taxpayers who are inexperienced in presenting their case, it would completely undermine the Tribunal's function if it were routinely to allow losing parties (whether taxpayers or HMRC) to re-litigate appeals on the basis that they did not feel they had put sufficient evidence before the Tribunal when it first heard the appeal. Parties should be well aware that an appeal offers a one-off opportunity to put their case as best they can, not an opportunity to hope for a successful outcome on the basis of minimal effort and then make a better second attempt if the first fails, possibly followed by an even better third attempt, and so on. To put it in layman's terms, an appellant must realise that the appeals system gives him one bite at the cherry unless a very good reason can be shown why he should have a second."

20. I therefore conclude that even if I were to consider the application on its merits, I would not grant it because I do not consider that any of the required

conditions in Procedure Rule 38(2) are satisfied nor do I consider that it would be in the interests of justice to grant it.

21. In the case of an application for an extension of time which is, on any view, extremely weak when considered on the basis of the *Data Select* principles, I see nothing in the merits of the underlying application which would militate in favour of granting the application.

22. The application for an extension of time for making the set-aside application is therefore REFUSED.

23. 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.

**KEVIN POOLE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 29 SEPTEMBER 2014**