



TC06148

Appeal number: TC/2016/02255

PROCEDURE – HMRC application for extension of time to service Statement of Case – Appellant application that HMRC be debarred from proceedings – Extension of time GRANTED – HMRC not barred from proceedings

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR NIKOLAY DANGOV

Appellant

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on
13 September 2017.**

No one appearing for the Appellant

**Mr Christopher Fleming presenting officer of HM Revenue and Customs, for the
Respondents**

DECISION

1. The Appellant appeals:

- 5 (1) a closure notice issued under s28A Taxes Management Act 1970 (“TMA”) for the tax year 2013/14;
- (2) the outcome of an assessment issued under s29 TMA for the tax years 2010/11, 2011/12 and 2012/13; and
- (3) penalties issued under Schedule 24 Finance Act 2007.

2. The Applications to be determined by the Tribunal at the present hearing were:

- 10 (1) An application by HM Revenue & Customs (“HMRC”) for an extension of time for service of the statement of case; and
- (2) An application by the Appellant that HMRC be debarred from further involvement in the proceedings as a consequence of their failure to comply with directions of the Tribunal.

15 **Non-appearance by the Appellant**

3. The Appellant did not attend the hearing. It was apparent that he had received the notice of hearing as there had been correspondence with the Tribunal subsequent to its issue and in which it was acknowledged.

20 4. As the issue for consideration was centred on HMRC’s conduct, for which the onus was on them to justify, the Tribunal concluded pursuant to rule 33 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 (“Tribunal Rules”) to proceed in the Appellant’s absence.

25 5. Subsequent to the hearing the Appellant notified the Tribunal that his non-attendance was due to traffic. The Tribunal has considered the email but concluded to issue the decision on the applications in the interests of justice.

History

6. The Appellant was issued assessments for tax years 2010/11 – 2012/13 on 13 October 2015 and the closure notice for 2013/14 on 14 October 2015.

30 7. In accordance with the time limits prescribed for appealing these decisions the Appellant made his appeal to HMRC on 2 November 2015. The offer of a review was accepted on 9 February 2016 and HMRC issued varied decisions on 23 March 2016.

35 8. On 18 April 2016 (again in accordance with the relevant statutory time limits) the Appellant notified the Tribunal of his appeal and applied for alternative dispute resolution (“ADR”). Pending the outcome of the ADR HMRC applied for an extension of time in which to serve their statement of case (which would have been

due under rule 25(1)(c) Tribunal Rules on or before 17 June 2016) to 4 November 2016. That extension was granted by the Tribunal.

9. On 27 October 2016 HMRC applied for a further extension to 1 February 2017. This application was notified to the Appellant on 16 November 2016 inviting
5 objection within 14 days of notification. On the same date the Tribunal notified HMRC that the application will be allowed unless there was an objection from the Appellant. Unfortunately, the letter to the Appellant did not make clear that the application would be granted in default of an objection.

10. No statement of case was received from HMRC by 1 February 2017. On 25
10 March 2017 the Tribunal wrote to HMRC in the following terms: “Your statement of case was due to be served on 1 February 2017 but the Tribunal has not received it. Please let the Tribunal know whether you wish to continue being a party to this appeal. If you do, please file a statement of case within 14 days from the date of this letter together with an application (with explanation) for it to be admitted late for the
15 Tribunal to consider. Extensions of time will not be automatically granted”.

11. The Appellant contacted the Tribunal on 27 March 2017, 6, 7 and 10 April 2017 seeking confirmation of progress and submitting his own statement of case and list of documents.

12. No statement of case was received from HMRC within the specified 14 days.
20 On 24 April 2017 the Tribunal contacted HMRC seeking an explanation. The HMRC officer spoken to at that time agreed to revert on 24 April 2017 but did not do so. On 25 April 2017 the Tribunal spoke again with HMRC at which time HMRC promised an update “shortly”.

13. Still no explanation was provided and on 28 April 2017 the Tribunal issued the
25 following direction:

“The Respondents [HMRC] having failed to comply with the Directions issued on 16 June 2016 and having failed to reply to letter [*sic*] from the Tribunal dated 25 March 2017 the Tribunal DIRECTS that UNLESS the Respondents no later than 5pm on 12 May 2017 confirm in writing to the Tribunal that they intend to
30 proceed with their defence of this appeal, then without further reference they may be BARRED from taking any part in the proceedings”

14. Under cover of an email timed at 16:00 on 12 May 2017 HMRC served their statement of case and an application for extension of time for late service of the statement of case. In short the grounds for their application were that the original
35 officer responsible for the Appeal had been suffering from a stress related illness and had failed to comply with the original direction for service of the statement of case and subsequent correspondence.

15. By letter (sent by email) dated 1 June 2017 the Tribunal notified the Appellant of the service of the statement of case and the application for extension of time
40 inviting that he object within 14 days should he wish to make any objection.

Unfortunately it is not obvious that this letter and email enclosed the statement of case received from HMRC.

16. By email dated 6 June 2017 the Appellant notified the Tribunal that he had not, as at that date, received the statement of case. On 11 June 2017, having then obtained
5 a copy of the statement of case, the Appellant raised an objection to the extension of time and requested that HMRC be barred from taking part in the proceedings in accordance with the Tribunal's direction of 28 April 2017.

Legislation

17. The Tribunal Rules provide as follows:
- 10 2 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- 7 (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.
- 15 (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include: (a) waiving the requirement; ... (c) exercising its power under rule 8 (striking out a party's case); (d) restricting a party's participation in proceedings; ...
- 20 8 (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.
- ...
- 25 (3) The Tribunal may strike out the whole or a part of the proceedings if:
- (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
- 30 (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
- (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
- 35 (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs ... (3)(b) or (c) without first giving the

appellant an opportunity to make representations in relation to the proposed striking out.

(7) This rule applies to a respondent as it applies to an appellant except that:

5 (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

10 (b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

HMRC's submissions

18. HMRC acknowledged the recent Supreme Court judgment in *BPP Holdings v HMRC* [2017] UKSC 55 and its endorsement of the approach taken by the Upper Tribunal in the matter of *Data Select Ltd v HMRC* [2010] UKUT 187 which provides:

15 “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
20 of the answers to those questions.

19. In connection with those questions HMRC contended as follows:

(1) Purpose of the time limit

25 HMRC contend that the purpose of the time limit for service of HMRC's statement of case is “to enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion” *Manowar Hussain v HMRC* [2017] UKFTT 77

(2) Length of the delay

30 HMRC accepted that a delay of 100 days was a serious and significant breach of the requirement to serve its statement of case on time (*Romasave v HMRC* [2015] UKUT 254)

(3) Explanation for the delay

35 HMRC amplified their explanation for the reason for the delay. They reiterated that the relevant case worker had been suffering from a stress related illness that had caused him to fall behind on his work and miss important deadlines. It was stated that he did not inform his manager of the issue. However, it was also contended that there had been a series of management changes which, combined with technical difficulties had resulted in there being no effective monitoring of

obligations to meet tribunal time limits. It was not until receipt of the Tribunal's direction dated 28 April 2017 that HMRC were even aware that there had been non-compliance on their behalf.

(4) Consequences of an extension

5 HMRC contended that granting them the extension would not substantially prejudice the Appellant nor interfere with his right to a fair trial as the Appellant had been fully aware as to the basis on which the assessments and closure notice had been issued.

(5) Consequence of refusal

10 HMRC made no formal submission as to the consequences of refusal but suggested that there would be extreme prejudice to HMRC if they were, as a consequence of the refusal to extend, thereby barred from taking further part in the proceedings.

Appellant's submission

15 20. By email dated 11 June 2017 the Appellant stated:

20 "Yes I have an objection as the respondent HMRC did not reply on time and broke the law.. The respondent did not reply to the Tribunal on time before 5pm on 12 May 2017, they should be barred without further reference from taking part in the proceedings. I would like to ask you to follow the law and stop them from taking part in the proceedings. The Tribunal represents the law and should always do their best to follow the law. The Tribunal, as a supreme legal institution, should enforce the law in every situation. I have your email dated 28 April 2017 and signed by the tribunal judge. By not stopping the respondents from taking part in the proceedings the Tribunal violates my human rights and deliberately gives an advantage to the respondents. I can give many examples if small clients like me are late with their reply and overdue the deadline, they are punished immediately with all the severity of the law but when large institutions are late and pass the deadline, there are usually compromises by the law in their interests."

30 **Discussion**

21. The approach to be adopted by the Tribunal is clearly set out in the judgement of Morgan J in *Data Select* as approved by the Supreme Court in *BPP*.

22. The Tribunal must determine two applications before it: (1) HMRC's extension of time for service of their statement of case and (2) the Appellant's application that
35 HMRC be barred.

23. At the outset it is worth fully articulating that the Appeal is one brought by the Appellant against assessments and closure notices raised by HMRC in connection with income received and expenditure concerning the Appellant's activities as a building contractor. There is a dispute between the parties concerning what records
40 have been provided to HMRC by the Appellant but the closure notices and

assessments seek to adjust the Appellant's returned tax figures largely in respect of expenditure which HMRC consider has not been adequately evidenced.

24. In an appeal of this type the burden of proof rests with the Appellant to satisfy the Tribunal that the expenditure for which he claims deduction was incurred by him. Unless he can do so his appeal will fail and this will be so whether or not HMRC participate in the proceedings. It strikes the Tribunal that given that the Appellant contends that he has provided all of the relevant evidence to HMRC their participation in the proceedings may in fact assist him as he will be in a position to seek discovery of documents from them and further pursue such lines of enquiry as he may have with them concerning the substantiation of his case. What is clear however, is that the non-participation of HMRC will not absolve the Appellant of fully making out his case and satisfying the Tribunal that the expenditure claimed is evidenced and thereby deductible.

25. Turning therefore to the Appellant's application that HMRC be barred from proceedings.

26. Rule 8(2)(a) (as interpreted through rule 8(7) as it applies to HMRC) provides that the Tribunal may bar HMRC from participating in the proceedings where they fail to comply with a direction which states that non-compliance could lead to being so barred. That is not the position here. HMRC did, in fact, comply with the direction of 28 April 2017 as they served their notification of an intention to participate, the statement of case and the extension of time application before 5pm on 12 May 2017. HMRC assert that the documents were served on the Appellant, the Appellant challenges that but it is absolutely clear that the relevant documents were served on the Tribunal within the time directed. There was no explicit direction to serve them on the Appellant and thus there was no failure to comply with a direction which warned that HMRC could be barred as a consequence of their failure.

27. Given HMRC's compliance with the only direction which could have given rise to a determination that they be barred from further proceedings the Tribunal can only bar them under rule 8(2)(b) if they have failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. There is no question that HMRC failed to co-operate with the Tribunal. They made no application for extension prior to 1 February 2017, they did not respond to the Tribunal's letter of 25 March 2017 and then despite two telephone calls on 24 and 25 April 2017 still failed to adequately engage or co-operate with the Tribunal.

28. The critical question therefore is whether that failure to co-operate is so extreme that the Tribunal cannot deal with the proceedings fairly and justly. As indicated in paragraph 23 this is an appeal where the Appellant must satisfy the Tribunal of his entitlement to make the deductions. It is almost a case in which HMRC's involvement, having ensured that the Appellant has a clear view of the basis of their decision, is somewhat limited. In the Tribunal's view, and somewhat reluctantly given the level of non-compliance and the reason for it (which amounts only to unacceptable inefficiency of a large government department), it cannot be concluded that such non-compliance prevents the Tribunal from dealing with the proceedings

fairly and justly. This is not a case where the Appellant would simply succeed as a consequence of HMRC's failure. As an unrepresented Appellant it is the Tribunal's view that it is likely that the best interests of the Appellant are served by HMRC being involved in the proceedings.

5 29. Turning then to consider the extension of time application. The Tribunal agrees that the purpose of the time limit for service of HMRC's statement of case is to ensure the speedy and fair progression of the litigation; the statement of case represents the principal pleading for HMRC to articulate the basis of the decision taken by them
10 in a timely fashion. The Appellant had, at all times, complied with all statutory and procedural deadlines imposed on him and had the right to expect HMRC to do the same. HMRC failed persistently from 1 February 2017 to comply with the requirement to produce this critical document in the proceedings.

15 30. As HMRC accept, the period from 1 February 2017 through to 12 May 2017 was a substantial and significant delay.

20 31. The reasons given by HMRC were, in the Tribunal's view simply astonishing. The Tribunal reflects on the position HMRC take against taxpayers who seek to bring appeals which are out of time and the consternation with which they approach any taxpayers' failure to have proper systems to ensure compliance with statutory
25 deadlines. Any attempt by a taxpayer to assert that they should be permitted to bring an appeal 100 days out of time because the person dealing with the matter was suffering from a stress related illness, there were frequent management changes and no system to ensure compliance would be met with derision. As is clear from the *BPP* judgment, whilst no higher expectation should be set of a government department certainly no lower standard should be expected of them.

30 32. The reasons offered would not naturally lead the Tribunal to grant the extension requested. However, considering the consequences of granting or refusing the extension leads the Tribunal to conclude that no purpose is served in refusing to grant it. The statement of case represents a clear summary of the basis for HMRC's decision which provides both the Tribunal and the Appellant with an appropriate starting point when considering what evidence is available from the Appellant in substantiating its case.

35 33. Given the Tribunal has determined that there is no basis on which to exclude HMRC from future participation in the proceeding to refuse to grant the extension would mean simply that the statement of case would be unavailable in the proceedings. The Appellant will still have to make out its case in full but absent a statement of case would have to do so by reference to a series of decisions communicated by letter and in the closure notice rather than by reference to a clear and concise recitation of HMRC's position on the application of the facts to the
40 relevant law.

34. It is the Tribunal's view that in light of the analysis above refusing the extension and excluding the statement of case would not take the parties anywhere. The

5 Tribunal is acutely aware of the Appellant's stated concerns that failure by a taxpayer
to comply with time limits carry penalties which feel, to small taxpayers, very
draconian whereas HMRC appear to be able, without significant consequence, ignore
time limits. The Appellant is unrepresented and, in those circumstances, convention
10 requires that HMRC provide him with all reasonable assistance at the hearing, they
are obliged to identify weaknesses in their own case. But as stated above this is a case
which it is for the Appellant to prove. Applying the overriding objective to act fairly
and justly it is the Tribunal's view that there is no basis to exclude HMRC and it is
fairer (despite his view to the contrary) that HMRC's statement of case be accepted as
15 it will assist the Tribunal in fairly hearing the Appellant's appeal. Had that not been
the case the Tribunal would have refused the extension as the length of the delay and
the inadequacy of the reason for it would not have justified any prejudice to the
Appellant however small. HMRC's actions were inexcusable.

Decision

15 35. For the reasons set out above the application for an extension of time for service
of HMRC's statement of case is granted and the Appellant's application for HMRC to
be barred is denied.

20 36. 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.

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**AMANDA BROWN
TRIBUNAL JUDGE**

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