[2021] UKFTT 0331 (TC)

TC08265

APPLICATION – rule 8 debarring of HMRC – rule 5(3) extension of time in which to serve a statement of case – debarring application REFUSED – extension of time ALLOWED

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/04180

BETWEEN

GALLDRIS LLP **Appellant**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN QC

Determined on the papers

DECISION

INTRODUCTION

1. This is an application by Galldris LLP ("**Galldris**") made pursuant to rule 8 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**FTT Rules**") that HM Revenue & Customs ("**HMRC**") be debarred from further involvement in the proceedings.

CHRONOLOGY

2. On 27 November 2020 Galldris made its in time appeal to this Tribunal in respect of a closure notice issued on 14 August 2020 pursuant to section 28B(1B) and (2) Taxes Management Act 1970 ("**TMA**") pursuant to which the allocation of profit from trade figures was amended for the partners. Galldris had appealed the closure notice (as required in s31A TMA) to HMRC on 11 September 2020. HMRC issued their view of the matter letter on 28 October 2020.

3. The Tribunal acknowledged the appeal by letter dated 18 January 2021, allocating it to the standard category and inviting the parties to confirm an electronic address for communication within 14 days of the date of the letter. HMRC were also notified that their statement of case was due within 60 days for the date of the letter. Accordingly, HMRC were

due to notify their communication address by 1 February 2021 and their statement of case was required to be served by 20 March 2021.

4. No communication was received from HMRC as required and on 7 April 2021 the Tribunal wrote to HMRC in the following terms:

> "Your statement of case was due to be served on 20 March 2021, but the Tribunal has not received it. Please let the Tribunal know whether you wish to continue to be party to the 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 Tribunal to consider. Extensions of time will not be automatically granted."

5. By letter dated 12 May 2021 Galldris' representatives wrote to HMRC noting that HMRC had failed to comply with the directions of the Tribunal and raising a complaint more generally regarding HMRC's conduct of the enquiry. The Tribunal was copied into the correspondence.

6. With no response to that correspondence, on 1 June 2021 Galldris made the present application: namely that pursuant to rule 8(3) and (7) FTT rules that HMRC be debarred from the proceedings on the grounds of "an absolute failure by [HMRC] to engage in the appeal, despite the attempts by both the Tribunal and [Galldris]". In the alternative Galldris required that HMRC serve a statement of case within 7 days of the date of the order so directing together with detailed statement of reasons for lateness.

7. The application was served on HMRC on 17 June 2021 with a requirement that HMRC respond "with 14 days from the date of the letter". The time limit for response was therefore 30 June 2021.

8. On 1 July 2021, thereby outside the 14 days permitted, HMRC submitted their response. HMRC apologised for their failure to previously comply. They offered no explanation other than an "error in administration" for the failure to allocate the appeal on receipt and that the second direction was not actioned as a consequence of "an unexpected illness" and that it was "subsequently overlooked". HMRC invites the Tribunal to bifurcate the actions of HMRC during the enquiry phase from those of the solicitor's office on the appeal. HMRC sought a further 30 days in which to submit their statement of case.

9. HMRC's statement of case was finally submitted on 31 July 2021 (the final day of their requested extension of time)

RELEVANT FTT RULES

10. Rule 5(3) FTT Rules grants the Tribunal a broad power to extend time limits where it is in accordance with the overriding objective to deal justly and fairly with an appeal.

11. So far as relevant rule 8 FTT Rules provides:

> (3) The Tribunal may strike out the whole or part of the proceedings if:
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> …
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly or justly
>
> …
>
> (7) This rule applies to the respondent as it applies to the appellant except that:
>
> (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

…

> (8) If a respondent has been barred from taking further part in proceedings under this rule and that has not been lifted, the Tribunal need not consider any response or other submissions made by the respondent, and may, summarily determine any or all issues against the respondent.

TEST TO BE APPLIED

12. HMRC did not respond to the Tribunal's direction to provide the electronic correspondence address and, did not serve a statement of case until 4 months and 11 days after it was due. The competing applications in the present matter are ultimately whether HMRC should be relieved of the ultimate sanction of being debarred from the present proceedings.

13. The test to be applied by the Tribunal is as provided by the Upper Tribunal ("**UT**") in the case of *Martland v HM Revenue and Customs* [2018] UKUT 178 (TCC) ("**Martland**"). Martland concerned the question as to whether the Tribunal should allow the taxpayer's application in that case to bring an appeal out of time.

14. The UT considered the relevant authorities of the Court of Appeal and Supreme Court and the appropriate test when considering a breach of the FTT Rules and relief from the associated sanction. The UT summarised the approach taken in the authorities:

> "[40] In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
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> > "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' ... If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in Rule 3.9(1)]"
>
> [41] In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.
>
> [42] The Supreme Court in BPP implicitly endorsed the approach set out in Denton. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT
>
> [43] … The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". …"

15. The UT then concluded that a similar approach should apply to the Tribunal.

APPLYING MARTLAND

16. In the context of the present application it is to be noted that:

(1) HMRC failed to comply with a direction to provide an electronic contact address or otherwise engage with the Tribunal for a period of 149 days.

(2) HMRC failed to comply with a direction for provide a statement of case, the period of the delay being 133 days.

17. In connection with an application for the admission of a late appeal the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 considered that a delay of 3 months against a 30-day appeal window could not be described as "anything but serious and significant".

18. The requirement on HMRC to serve a statement of case is 60 days (rather than the 30 days applied in connection with a taxpayer brining an appeal). However, the Tribunal is satisfied that 133 days for the statement of case, particularly coupled with the compete and abject failure to engage with the Tribunal at all for a period of 149 days despite 2 letters from the Tribunal and one from the Galldris cannot be described as anything other than serious and significant. In accordance with the binding direction of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 the Tribunal places no higher or lower standard on HMRC than HMRC regularly invite the Tribunal to impose on taxpayers.

19. The second stage is to consider the reason for non-compliance/delay. In this regard HMRC's explanation, as noted by Galldris, is no real explanation at all. They contend that they can provide no explanation as to why the case was not allocated to a litigator upon receipt of the emailed letter of 18 January 2021. The reason given for a failure to action the letter of 7 April 2021 is that it was due to "unexpected illness, and subsequently overlooked". No mention is made of the failure to respond to the letter from Galldris of 12 May 2021 or why when, over a month later, they were formally served with the application it then needed a further 6 weeks to produce a statement of case.

20. This Tribunal hears application after application for the refusal of out of time appeals by taxpayers similarly failing to offer any substantive or meaningful explanation for a delay the majority of such applications vehemently opposed by HMRC who frequently seek "evidence" of illness, systems in place to prevent administrative failure etc etc. And yet when HMRC seek the exercise of the Tribunal's discretion in their favour on similar grounds they do so on no evidence and with no particularisation. There is therefore no satisfactory explanation for the delay and thus the Tribunal must move on to consider "all the circumstances" with particular emphasis is placed on the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders.

In all of the circumstances …?

21. In this regard it is to be noted that HMRC are not in breach of an unless order issued by the Tribunal. The Tribunal must therefore consider all the circumstances to determine if HMRC 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. However, in all the circumstances should HMRC be debarred from the proceedings?

22. HMRC apologise for their failure but, wrongly indicate that there is not a "considerable history" of non-compliance in this appeal. The latter indication is plainly incorrect. HMRC persistently failed to comply with the Tribunal throughout the entire history of the appeal, this is irrespective of the conduct of the compliance team. No direction or communication from the Tribunal was actioned prior to 1 July 2021. HMRC are correct that the complaint regarding the conduct of the enquiry is not relevant to the present application.

23. HMRC further note that debarring in accordance with rule 8(3)(b) requires the Tribunal to be satisfied that it cannot deal with the matter fairly and justly. HMRC assert that now a litigator has been allocated further non-compliance us "highly unlikely". Whilst the assurances of the current litigator are appreciated, it is implicit from the application that the matter had been allocated on a previous occasion but that the litigator so allocated was ill and there was no management process to prevent that litigator's case load not then being "overlooked".

24. Through the lens of enforcing compliance with statutory time limits/finality/efficient conduct it is to be noted that the requirement to serve a statement of case is a statutory on, with the time limit set by law (making it equivalent to the brining of an appeal by a taxpayer). The emailed letters from the Tribunal of 18 January 2021, 7 April 2021 and 17 June 2021 were not statutory directions but their objective, the effective management of litigation, was clear and yet they were not complied with.

25. The material difference between the approach taken by the Tribunal in connection with a late appeal/conduct of an appellant and that of HMRC lies in a critical feature of the Tribunal system in respect of most appeals – where the burden of proof lies. By their statement of case HMRC rightly note that the burden of proving the validity of the closure lies with them. However, Galldris' appeal (rightly on the face of the notice of appeal and associated chronology) does not challenge the validity of the closure notice, the challenge is in respect of the conclusions reached and the amounts thereby assessed.

26. The burden of proof rests with the Galldris to establish that the amounts paid for labour sourcing were incurred wholly and exclusively for the purposes of the trade (and that they are reasonable in amount) and, as regards the mixed member partnership rules, that the allocated profits are an appropriate notional rate of return on the capital contributed by Galldris Construction Ltd. These are matters which will need to be proven in evidence and submission by Galldris whether or not HMRC participate further in the proceedings. Unlike a late appeal, which if refused, brings finality, excluding HMRC in a matter where the taxpayer bears the burden of proof, has the potential to inhibit the Tribunal in performing its ultimate duty – identifying the correct taxing outcome.

27. 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. It is therefore important that the Tribunal properly evaluates the arguments on both sides in order to reach a decision which is right and thus one that is just and fair.

28. Turning to consider the extension of time in which to serve the statement of case. The purpose of the purpose of the time limit for services of HMRC's statement of case is to ensure the speedy and fair progression of the litigation (see in this regard *Manowar Hussain v HMRC* [2017] UKFTT 77); the statement of case is the principal pleading for HMRC to articulate the basis of the decision taken by them against Galldris. Without a statement of case the litigation cannot be progressed in a timely fashion. However, and pursuant to Galldris's alternative application, the statement of case has now been served and the appeal can and should now progress. Galldris is now in a position to consider the pleaded basis on which the closure notices will be defended in this litigation and the evidence which will need to be called and as such it is appropriate to grant the extension of time.

DECISION

29. For the reasons given the application to debar is refused. HMRC's for an extension of time, now to 31 July 2021, for services of their statement of case is granted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

30. 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.

AMANDA BROWNQC
TRIBUNAL JUDGE

RELEASE DATE: 09 SEPTEMBER 2021