[2017] UKFTT 699 (TC)

TC06118

Appeal number: TC/2015/06218

REINSTATEMENT – factors to be considered – whether reasonable prospect of success – yes - appeal reinstated and stayed behind **Raftopoulou**

FIRST-TIER TRIBUNAL
TAX CHAMBER

DANIEL KASIMALLA PRASANNA **Appellant**

- and -

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

Sitting in public at Taylor House, Rosebery Avenue, London on 15 August 2017

Mr Pinto, of Actar Ellis-Brown & Co, Chartered Accountants, for the Appellant

Mr Bradley, HMRC officer, for the Respondents

DECISION
ON AN APPLICATION FOR REINSTATEMENT

The hearing

1. The appeal had been struck out automatically under Rule 8(1) of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules for failure to comply with an unless order. This hearing was called to:

(a) Determine the appellant's application for reinstatement;

(b) Determine HMRC's long-outstanding application for the appeal to be struck out (assuming it was reinstated);

(c) If reinstated and not struck out, to determine if it should be stayed pending the outcome of *Raftopoulou* in the Court of Appeal; and

(d) If not stayed, issue case management directions.

Background to reinstatement application

2. On 6 October 2015, Actar Ellis Brown & Co submitted an appeal to the Tribunal on behalf of the appellant against a decision of HMRC refusing the appellant's claim to Overpayment Relief (under Sch 1AB Taxes Management Act 1970 ('TMA').

3. On 26 October 2015, after the appeal was notified to HMRC, HMRC applied for the appeal to be struck out on the basis that it had no reasonable prospect of success as the Sch 1AB claim had been (they alleged) made late and in any event, even if made in time, was, in HMRC's view, clearly not within the terms of Sch 1AB.

4. On 26 November 2015, the Tribunal wrote to the appellant's representative giving the appellant 14 days in which to give his reasons for opposing the strike out application (if he did). As no reply was received on 8 January 2016, the Tribunal issued an order which stated that, unless by 22 January 2016 the appellant notified the Tribunal that he intended to pursue his appeal, it would be automatically struck out. The order also required the appellant by the same date to explain his grounds for opposing the strike out application.

5. No reply was received by the due date but, on 25 January 2016, Actar Ellis called the Tribunal to ask about progress on the appeal. The caller was informed that the Tribunal had written to Actar Ellis on 26 November and 8 January but no replies had been received; the caller said that Actar Ellis had not received the Tribunal's letters and asked for them to be re-sent.

6. On 2 February 2016, the Tribunal wrote to Actar Ellis, enclosing the Tribunal's earlier letters and pointing out that the effect of Rule 8(1) was that the appeal had been automatically struck out on 23 January 2016 because there had been no compliance with the unless order of 8 January 2017. It explained the possibility of applying for reinstatement of the appeal.

7. The appellant applied for reinstatement on 10 February 2016. His grounds were that Actar Ellis had not received the Tribunal's letters of 26 November and 8 January, although, as he accepted that the Tribunal had sent them to the correct email address, he was unable to explain why Actar Ellis had not received them.

8. On 25 February 2017, the Tribunal responded, giving the appellant an opportunity to reply to the Tribunal's letter of 26 November (which he had failed to do in his application for reinstatement) and in particular explain why he thought that his appeal should not be struck out for the reasons given in HMRC's application. The appellant replied with his reasons on 10 March 2016.

9. While on 5 April 2016 the Tribunal gave HMRC an opportunity to object to the reinstatement application, on 18 April 2016 HMRC replied to point out that the appellant had been made bankrupt on 9 February 2016 and did not have standing to make the application for reinstatement or pursue the appeal.

10. On 22 April 2017, Actar Ellis notified the Tribunal that they were applying for the bankruptcy to be annulled. Subsequently the appeal was stayed pending that application.

11. The bankruptcy order was annulled on 7 December 2016. On 25 January 2017 the Tribunal asked HMRC to confirm their position; their reply was that they did not oppose reinstatement, but did consider the appeal should be struck out as lacking a reasonable prospect of success, and if not struck out, considered it should be stayed behind *Raftopoulou*.

12. The Tribunal listed for hearing (a) whether the appeal should be reinstated (b) whether, if reinstated, it should be struck out and (c) whether if reinstated and not struck out it should be stayed and (d) if not, appropriate case management directions.

The law on reinstatement applications

13. I was not really addressed on the applicable law on reinstatement applications at the hearing as both parties considered that the appeal should be reinstated. However, reinstatements are not automatic, even when both parties support reinstatement and so I do consider the law.

14. A reinstatement application is an application to be relieved from sanctions: it is an application to be relieved from the sanction of the appeal being struck out for non-compliance with a Tribunal order. The leading case in the courts on cases involving relief from sanction is *Denton* [2014] EWCA Civ 906. At [24] the court said:

> .....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" which engages rule 3.9(1). 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)]".

15. While the practice and procedure in the courts does not apply in Tribunals, such as this tribunal, nevertheless in many situations it is appropriate to have a similar approach. As the Supreme Court said in *BPP* [2017] UKSC 55

> [26]....In a nutshell, the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach.

16. And indeed recent decisions of the Upper Tribunal indicate that this Tribunal should apply, by and large, a similar approach to reinstatement applications (or other applications to lift sanctions) as applied by the Court of Appeal in *Denton.* So I will do so.

The seriousness of the failure to comply

17. The appellant failed to comply with an unless order which required the appellant within 14 days to do no more than notify an intention to pursue the appeal and explain why he did not consider his appeal should be struck out.

18. This was not a trivial breach, although it was not of the most serious kind either. While the appellant failed to notify an intent to pursue the appeal by the compliance date of 22 January, three days later (when Actar Ellis phoned the Tribunal), it was clear that the appellant did intend to pursue the appeal. Nevertheless, the unless order was not fully complied with until 10 March when the appellant explained his grounds for opposing the strike out.

Why the default occurred?

19. The appellant's position is that there was no wilful default at all: Actar Ellis simply never received the relevant emails from the Tribunal. Actar Ellis has not, however, been able to establish any reason for this because, as it accepts, the tribunal used the correct email address and all other emails from the tribunal to the same email address have been received.

20. Actar Ellis points out that there was no reason why it should have wilfully ignored emails from the Tribunal: the appellant has, he says, always sought to pursue this appeal. The appellant's bankruptcy is a serious matter to him and he would not choose to let the related tax litigation fail due to inertia on his part.

21. It seems to me that as it is the appellant who applies for reinstatement, it is for the appellant to satisfy me of the cause of the default. And in the absence of any real explanation, I have not been satisfied that the appellant (or at least its adviser) was not to blame for the default: at the same time I am satisfied that any default was not deliberate as I accept that pursing this appeal has always been important to the appellant.

All other relevant factors

22. Apart from the seriousness and the cause of the default, I need to consider all other relevant factors. The only other relevant factors in this case appear to be (a) the importance of the case to the appellant (b) the prejudice of the default to HMRC and (c) the prospects of success of the appeal.

23. I accept that the case is extremely important to the appellant. If his appeal is struck out, it almost inevitably follows that he will be made bankrupt: the bankruptcy proceedings are, I understand, stayed pending the outcome of this appeal.

24. I do not consider that the default has caused any prejudice to HMRC. They do not claim to have suffered prejudice and do not object to the reinstatement. Moreover, I cannot see any prejudice to HMRC in the appellant's long delay in replying to the Tribunal's letter of 26 November 2017 because, even if Actar Ellis had responded when they should have done, the appeal would have up stayed behind the application to rescind the bankruptcy in any event. Delay was inevitable even without the default.

25. If those were the only factors to take into account, I would reinstate the appeal. While the default is not trivial and the appellant and/or his advisor cannot give a full explanation for the default, I am satisfied it was not deliberate and the default did not prejudice HMRC. Taking into account that HMRC do not oppose reinstatement and the importance of the case to the appellant, I would reinstate it.

26. However, another very relevant matter to reinstatement is whether the appeal, if reinstated, would have a reasonable prospect of success. HMRC's position is that the case does not have a reasonable prospect of success and applied for it to be struck out shortly after it was lodged with the tribunal (§3). I consider that an appeal should not be reinstated merely to be struck out: therefore I will consider whether it has a reasonable prospect of success. If it does not, I will not reinstate it, even if my conclusion otherwise would have been to reinstate it.

27. So to decide whether the reinstate the appeal, I must consider the prospects of success of the underlying appeal.

The background to the tax dispute

28. Actar Ellis submitted the appellant's tax return for 09/10 to HMRC on his behalf. I was not told when, but there was no suggestion it was late. The only income shown in the return was £62,432.00, less expenses leaving £55,326.00 of net profit.

29. It was the appellant's case that, on 23 September 2013, Actar Ellis on his behalf posted to HMRC a claim for overpayment relief under Sch 1AB TMA. That was a claim for full relief from the liability to tax on the figure shown on his 2009/10 tax return, and was the claim the subject of this appeal.

30. It seems not to be in dispute that the appellant did not pay the tax (£15,227.51) declared on his 09/10 tax return and in June 2014, he received a statutory demand for

it, and his failure to comply with that led to the bankruptcy proceedings. Before that, on 16 July 2014, Actar Ellis wrote to HMRC in response, referring to having already made a claim for relief in respect of that tax liability.

31. That letter was treated as a claim to relief and that claim was rejected (as I have said at §2) by HMRC on 21 August 2014. The grounds of rejection was that the last day on which an overpayment relief claim for tax year 2009/10 could have been made was 5 April 2014: HMRC denied receiving the letter of 23 September 2013. HMRC also questioned whether the appellant was entitled to the claimed relief even if it was made in time.

The law

32. The Income Tax (Trading and Other Income) Act 2005 ('ITOIA') at s 25(1) requires:

> 'the profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes'

33. S 35 of ITOIA states that no deduction is permitted to profits of the trade for debts other than where:

(a) The debt is bad;

(b) The debt is estimated to be bad, or

(c) [not relevant]

34. Sch 1AB of TMA '*Recovery of overpaid tax*' permits a claim to be made where a person believes that an assessment to tax is excessive. Claims cannot be made more than 4 years after the end of the relevant tax year: so a claim relating to 09/10 could not be made after 6 April 2014

The factual case

35. Evidence relating to the tax dispute was not given at the hearing: nevertheless, the appellant and his adviser explained to me what their evidence would be. So I set out the factual case which the appellant says he would be able to prove, and it is as follows but the following paragraphs §§37-39 do not constitute findings of fact.

36. The appellant was in employment with a company which installed CCTV systems. In tax year 2009/10 he decided to set up in business by himself, and entered into a contract with a person (whom I shall refer to as Mr X). The contract was to install a security system at Mr X's new nightclub. The work was carried out by the appellant over a period of 6 months in tax year 2009/10. The appellant bought in and installed metal detectors and CCTV equipment: these totalled the expenses figure shown in his 9/10 tax return. The gross figure declared in his tax return of £62,432.00 was the amount invoiced to Mr X.

37. Mr X had promised to pay monthly but did not do so; he told the appellant that his money had been used up in legal fees sorting out problems with the council and police relating to the nightclub; he promised he would pay the appellant when the nightclub opened in 2011 and started generating revenue. The appellant finished the installation, but had still not received any payment. At some point in 2010 the appellant decided that he had to give up working on his own account and get a job, which he did.

38. The nightclub did not open in 2011 or ever: in 2013, Mr X went to the USA where he was arrested and imprisoned for a number of years (for what offence the appellant was uncertain). The appellant has no expectation of ever being paid.

The parties' respective positions

39. The appellant's case is that there was an error in the 9/10 tax return. It should have omitted the income shown on the invoices to Mr X because, says Actar Ellis, the accounts should have (but did not) show the debt as bad in 2009/10.

40. HMRC's position was that, even if the appellant could prove the facts as outlined above at §§37-39, he would still not be entitled to Sch 1AB relief. And that is because, Mr Bradley said, the documents show that the appellant did not treat the debt as bad until 2013; it may be that the appellant ought to have treated it as bad right from the start in 09/10, but he did not do so. If an error was made, it was an error in the appellant's accounts and not an error in the tax return, which reflected the accounts. The return showed a debt which had not at that point be treated as bad. The return was therefore correct. The error, if there was an error, was an accounting error in 09/10 in failing to treat as bad a debt that (on the appellant's case) was bad.

Decision

41. For the reasons outlined above at §25, I would reinstate this appeal if I considered that it had a reasonable prospect of success. I would not reinstate it if I was not so satisfied because, contrary to what HMRC suggest, it would not be appropriate to reinstate an appeal only to strike it out.

42. There are two elements to the appellant's case, both of which must be found in his favour if he is to win the appeal:

(1) he must show that the claim for relief was made in time;

(2) he must show that he was entitled to the relief claimed.

43. Subject to one point I discuss below, there is no dispute between the parties on the law applicable to the question of whether the claim to relief was made in time. That dispute turns on the facts. And at §29 I have outlined the appellant's factual case on whether the claim was made in time: I consider his case on this has a reasonable prospect of success as it is plausible. HMRC do not suggest otherwise. Whether it is ultimately successful depends on the findings of the hearing judge having heard and seen the evidence.

44. The one caveat on the law is that, even if the appellant's factual case on whether the claim was made in time were to fail, there is the possibility that the law allows an extension of time for making the claim where the appellant had a reasonable excuse for making the claim late. Whether the law does permit such an extension is the subject of an appeal going before the Court of Appeal in *Raftopoulou*. So far as the appellant's factual case on whether he had a reasonable excuse is concerned (that case being that the appellant's representative posted the letter to HMRC), I consider it has a reasonable prospect of success.

45. In so far as the question of reinstatement is concerned, this caveat is not really relevant as, whatever the outcome of *Raftopoulou,* I am satisfied that the case on whether the claim was made in time is arguable and should go to hearing. It has a bearing, however, on the proper case management of the appeal and I address this below at §§54-55.

46. The second limb of the appellant's case, which must also have a reasonable prospect of success if this appeal is to be reinstated, is the question of whether the tax return for 09/10 did incorrectly overstate the appellant's liability to tax.

47. His factual case on this, outlined above at §§37-39, is that the debt was bad or estimated to be bad in 09/10. And I consider that this case has a reasonable prospect of success. The real issue for this Tribunal is whether his legal case has a reasonable prospect of success.

48. I can understand HMRCs position that, if the appellant is right to say that the debt was bad or estimated to be bad in 09/10, then the appellant's accounts are wrong, as they make no provision for it as a bad debt.

49. But I do not accept that Mr Bradley is necessarily right to say that if the error is in the accounts then it follows that the tax return, which merely reflects the accounts, is correct. On the contrary, s 25 ITOIA (see §32) does not require the tax return to reflect the accounts: it requires the profits of the trade to be calculated in accordance with GAAP.

50. It seems to me at least arguable, contrary to Mr Bradley's position, that if the debt was either bad or estimated to be bad in 2009/10, then the accounts were not in accordance with GAAP because they failed to make a provision for the bad debt. So it is at least an arguable case that, if the accounts were wrong, then that would then make the tax return wrong too (subject to the exceptions provided for in s 25).

51. To succeed on such a case, of course, the appellant would not only have to show that the debt was bad or estimated to be bad in 2009/10, he would also have to show that the accounts were not in accordance with GAAP. But it seems to me that it must be at least arguable that he could do so because accounts are intended to show a true and fair view, and if the debt was bad or doubtful in 2009/10 it would seem arguable the accounts did not show a true and fair view of the company's finances because they did not contain a bad debt provision.

52. In conclusion, I am satisfied that the appellant has an arguable legal case on this point too. Therefore, the appeal should be reinstated. And I reinstate it. The matter will go to a full hearing: that does not mean that the appellant's case will succeed, only that he will get the opportunity to argue his full case. It will be for the hearing judge to decide the rights and wrongs of it.

(b) Should the appeal be stuck out?

53. It follows from what I have said above that the appeal should not be struck out: I consider that it has reasonable prospect of success.

(c) Should the appeal be stayed behind *Raftopoulou?*

54. Whilst it is potentially possible for the appellant to either win or lose this appeal without the *Raftopoulou* decision being critical, that is not necessarily the case and it therefore seems sensible to me for this appeal to be stayed until the Court of Appeal issues its decision. The stay should not be long as the hearing in *Raftopoulou* appears to have been fixed to take place on 6 December 2017.

55. I consider that during the stay the parties might best employ their time in negotiation. As HMRC have pointed out to the appellant, but not necessarily pursued, if the appellant is unable to make a Sch 1AB relief claim, he may be entitled to make (or should be treated as having made) a post cessation expenses claim under s 96(1)(b) Income Tax Act 2007. If either by application of Sch 1AB or s 96 ITA the net result is that tax is not owing, then the parties ought to be able to negotiate a settlement of this dispute and perhaps the bankruptcy proceedings without involving the Tribunal further. If the parties are able to settle the matter, they should notify the Tribunal.

(d) case management directions

56. As I have decided to stay the appeal, other case management directions are not needed yet. They will be issued following the outcome of *Raftopoulou,* unless the parties notify the Tribunal that they have been able to settle the dispute.

57. I direct as follows:

(1) Appeal TC/15/6218 is reinstated

(2) Appeal TC/15/6218 is stayed until after issue of the Court of Appeal's decision in *Raftopoulou*

(3) Either party may apply at any time for further or different directions

58. 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 SEPTEMBER 2017