[2019] UKFTT 184 (TC)

TC07034

Appeal number: TC/2013/02558

PROCEDURE – original appeal against VAT assessments struck out in September 2015 – appellant applied for that appeal to be reinstated – those reinstatement proceedings struck out in November 2012 – Appellants further application to have those reinstatement proceedings reinstated – Rules 8(5) and 5(2) considered – jurisdiction of Tribunal – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOSEPH THOMAS RENO **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in chambers at Taylor House, London on 7th February 2019

Having considered the written submissions of Stewart Smith of SKS (GB) Ltd for the Appellant and the notice of objection submitted by the Respondents

Introduction

1. This decision has its roots in an appeal by the appellant which was made on 10 April 2013. The appellant had made supplies of food which he contended were zero rated. The respondents (or "**HMRC**") assessed the appellant to VAT on the basis that the supplies were standard rated. The amount of tax in dispute is £27,837.

2. However the decision itself concerns a point which I believe to be a novel one, and concerns the application of rules 8(5) and 5(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**", each a "**Rule**"). Broadly speaking, what has happened in this appeal is that the original proceedings were struck out. The appellant then applied for those proceedings to be reinstated, and those reinstatement proceedings were then struck out.

3. The appellant then applied to have those struck out reinstatement proceedings reinstated and that is the issue before me. The question arises as to whether Rule 8(5) or Rule 5(2) can apply to those struck out reinstatement proceedings and allow me to consider the appellants application; or whether I have no jurisdiction to consider his application. For reasons given later in this decision, I think that they can and so I do have jurisdiction. However, I have then gone on to dismiss the application on the merits.

Relevant legislation

4. Rule 8 provides

> "8. Striking out a party's case
>
> (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.
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-
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> > (a) does not have jurisdiction in relation to the proceedings or that part of them; and
> >
> > (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or Tribunal) in relation to the proceedings or that part of them.
>
> (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;

(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.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an 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

(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.

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

5. Rule 5 provides(as far as is relevant):

"5.— Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

Background facts

6. From the court file and written representations of the parties I find the following facts:

(1) On 10 April 2013 the appellant appealed against HMRC's decision of 18 March 2013 to assess him to VAT of £27,837 (the "**substantive appeal**").

(2) In his notice of appeal, the appellant identified his representative as Stewart Smith of SKS (GB) Ltd ("**Mr Smith**").

(3) On 14 May 2013, the Tribunal wrote to the appellant explaining that in order for the Tribunal to be able to communicate with his representative and for that representative to be able to act on his behalf in the appeal, the appellant needed to provide the Tribunal with written notice of the identity of his representative. Until the form which had been included with that letter, had been completed and signed and returned to the Tribunal, the Tribunal would only communicate directly with the appellant, and his representative would not be able to act on his behalf in the appeal.

(4) On 14 July 2015, the Tribunal wrote to the appellant, requesting it to confirm, in the light of the Court of Appeal's decision in Sub One Limited, whether or not he intended to pursue his appeal. In the event that the appellant did intend to pursue his appeal, the Tribunal asked the appellant to write to the Tribunal within 14 days to confirm this and, at the same time, to inform the Tribunal of what its grounds of appeal now were, in view of the Court of Appeal's decision.

(5) On 19 August 2015, Judge Mosedale directed that, unless the appellant notified the Tribunal no later than 4pm on 2 September 2015 that he intended to pursue his appeal, then, the appeal WILL be STRUCK OUT, without further reference to the parties, and, UNLESS the appellant, at the same time, notified the Tribunal and the respondents of his revised grounds of appeal, following the Court of Appeal's decision in Sub One Limited, then, the appeal MAY be STRUCK OUT without further reference to the parties.

(6) On 27 August 2015, the Tribunal received an e-mail response from Mr Smith to the Tribunal's Direction dated 19 August 2015. In that email, Mr Smith stated that until the issue of quantum is resolved "we" require the appeal to remain extant.

(7) On 9 October 2015, the Tribunal wrote to the appellant, stating that, as there had been no response to its Direction dated 19 August 2015 from the appellant, or from a representative for whom the Tribunal held the appellant's authorisation, by 2 September 2015, the appeal had been automatically struck out on 3 September 2015 (my emphasis). That letter also enclosed another form for the appellant to sign to provide written notification to the Tribunal that Mr Smith was his representative. The

appellant had not provided a signed return to this effect to the Tribunal as requested by the Tribunal in its letter of 14 May 2015.

(8) On 9 October 2015 Mr Smith wrote to the Tribunal. I suspect this was intended to be for his client, and he mis-addressed the email. In it he states that "we should have no problem re-instating the appeal- I'm sure I can expand the quantum argument"

(9) On 19 October 2015, Mr Smith wrote to the Tribunal, stating that it had not been appropriate to strike out the appellant's appeal and requesting that the appeal remain extant. Mr Smith stated it was their contention that the issue of the quantum of the assessment in dispute remained to be resolved. He stated that they were currently in discussion with the respondents regarding this matter and were hopeful agreement would be reached and the matter resolved without recourse to the Tribunal. This letter was treated by the Tribunal as an application under Rule 8(5) that the substantive appeal should be reinstated (the "**first reinstatement application**").

(10) On 16 November 2015, the Tribunal wrote to the parties, confirming it was in receipt of the appellant's letter of 19 October 2015. The Tribunal stated it considered the most expedient way to deal with these proceedings was to stay the first reinstatement application pending the conclusion of the appellant's negotiations with the respondents. The Tribunal stated that if either party objected to this course of action they should write to the Tribunal with reasons within 14 days. The Tribunal confirmed the first reinstatement application was, therefore, stayed for 6 months, at the expiry of which both parties were required to notify the Tribunal of the outcome of the negotiations.

(11) On 10 May 2017, the Tribunal wrote to the parties confirming that the stay of the first reinstatement application had expired and requesting the parties to provide an update on negotiations within 14 days.

(12) On 24 May 2017, the respondents applied to the Tribunal for an extension of time up to and including 21 June 2017 to respond to the Tribunal's correspondence dated 10 May 2017 on the grounds that they were actively seeking advice in relation to this appeal from other colleagues within their Solicitor's Office and Legal Services.

(13) On 14 June 2017 the respondents wrote to the Tribunal confirming that their records indicated they were not currently in negotiations with the appellant and that they, therefore, considered the appellant should now notify the Tribunal how he wanted to proceed in relation to his appeal.

(14) On 10 July 2017, Mr Smith wrote to the Tribunal explaining that a settlement letter had been submitted to HMRC and that he was hopeful that agreement would be reached. Pending that the first reinstatement application should remain extant.

(15) On 9 August 2017 the Tribunal wrote to the parties stating that, unless the respondents objected within 14 days, it was prepared to stay consideration of the appellant's application for reinstatement until 6 September 2017 to give the respondents time to consider the appellant's offer of settlement (which had been submitted to the respondents on 10 July 2017). The Tribunal stated that, at the end of that time, if the matter had not been settled, the appellant would need to inform the Tribunal if he had anything to add to his grounds of application for reinstatement, in addition to that stated in his letter of 16 November 2015.

(16) On 24 October 2017, the Tribunal wrote to the parties, stating that there had been no reply to its letter dated 9 August 2017 and that Judge Mosedale had said that in these circumstances she would dismiss the first reinstatement application, unless the appellant notified the Tribunal within 14 days that he wished to pursue the application and the grounds on which it made the application.

(17) On 13 November 2017, Judge Mosedale directed as follows:

> "In view of the fact that there has been no reply to the Tribunal's letter of 24 October 2017 by the due date or at all, being a Letter in which the Tribunal stated that the appellant's application for reinstatement (the proceedings) would be dismissed UNLESS the appellant notified the Tribunal that it wished to pursue the application and stated its grounds on which it wished to do so, the proceedings (being the application for reinstatement) are hereby STRUCK OUT under Rule 8(1)."

(18) On 19 July 2018, Mr Smith sent the Tribunal a letter dated 16 July 2018. He asked the Tribunal to "accept this application to reinstate the above appeal". This was treated by the Tribunal as an application to reinstate the first reinstatement application (the "**second reinstatement application**").

(19) This letter included reasons as to why the appeal should be reinstated.

> (a) The original stay had been granted to provide time to finalise a negotiated settlement with HMRC.
>
> (b) An offer had been made to settle on 10 July 2017. Similar settlement offers had been made by over 20 other franchisees in very similar positions to that of the appellant.
>
> (c) It was anticipated that a settlement would be agreed and the matter resolved without recourse to the Tribunal.
>
> (d) The assessing officer had rejected the appellant's settlement offer. He rejected the appellant's explanation of how the appellant had calculated the figure in that settlement offer.

(e) In April 2018 that officer wrote to the appellant declining to treat the appellant in the same way as the others who had settled.

(f) The appellant has made a formal complaint about this discriminatory treatment to HMRC.

(g) It had become clear to the appellant by April 2018 that independent arbitration would be required to resolve the matter. The appellant and Mr Smith "also became aware that the Tribunal believing the matter to be resolved had struck out the appeal" (emphasis added).

(20) On 5 September 2018 HMRC submitted a notice of objection to the second reinstatement application. Their view was that the appellant had provided no real explanation why he failed to respond to the Tribunal's letter of 24 October 2017 which had led to the first reinstatement application being struck out.

(21) On 28 September 2018 Mr Smith made further representations in support of the second reinstatement application. They largely followed the representations made above but explained that the HMRC officer was prepared to settle at £22,794.

7. On 28 November 2018 I decided that the second reinstatement application should be struck out ("**my earlier decision**"). I did so on the basis that:

(1) Rule 8(5) did not apply to the second reinstatement application. But if I was wrong on that then

(2) The grounds given by the appellant in his letter of 16 July 2018 did not justify reinstatement.

8. The appellant wrote the Tribunal on 10 December 2018 explaining that one of the reasons I had given for declining to reinstate was based on an erroneous fact. I had said in my earlier decision that HMRC had indicated that they were not interested in negotiating a settlement and as such it was unlikely that HMRC would be prepared to enter into ADR. In his letter, Mr Smith stated that

> "We have spoken to the ADR team and they have confirmed that neither the case officer or the respondent's representative who submitted their Notice of Objection have any input whatsoever regarding the decision as to whether this matter is suitable to be subject to the ADR process.
>
> As it stands, if the appeal is re-instated, then the ADR team will consider the matter as the file remains extant".

9. In light of this I asked whether the appellant wanted to formally appeal against my earlier decision. He indicated that he did, and accordingly I have set out in this decision full findings of fact and reasons for my earlier decision so that I can then go

on to consider the appellant's application for permission to appeal to the Upper Tribunal.

Discussion

Rules 8 and 5

10. In my earlier decision, I expressed the view that Rule 8(5) was designed to provide a right to apply to reinstate a struck out appeal but only to the substantive appeal and not to the striking out of the first reinstatement application. My reasoning for this was (and is) as follows

> (1) Under Rule 20, a person who makes or notifies an appeal to the Tribunal must start proceedings by sending or delivering a notice of appeal to the Tribunal.
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> (2) The appellant did this in his notice of appeal dated 10 April 2013.
>
> (3) "Proceedings" is not defined in the Rules. However, in the House of Lords decision in *Herbert Berry Associates Ltd v IRC* [1977] I WLR 1437, Lord Simon, when considering the expression "…… Any action or proceeding……" in section 226 of the Companies Act 1948, said that "the primary sense of "action" as a term of legal art is the invocation of the jurisdiction of a court by writ, "proceeding" the invocation of the jurisdiction of a court by process other than writ."
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> (4) Rule 2, which sets out the overriding objective of, and the party's obligations to cooperate with, the Tribunal, speaks (in Rule 2(2)(b)) of "the proceedings" (and similarly does so in Rule 2(2)(c)).
>
> (5) Rule 8, which provides a code for striking a party's case refers to "the proceedings" in the automatic strike out provisions in Rules 8(1) and 8(2).
>
> (6) And then Rule 8(5) goes on to talk about "the" proceedings.
>
> (7) In the context of this case, the substantive proceedings are clearly "the" proceedings. But I am less sure about the status of those initiated by the first reinstatement application. They are clearly proceedings since they were started by a "process" (the appellant's letter of 19 October 2015) which invoked the jurisdiction of the Tribunal, but it was my initial view that these were not "the" proceedings referred to in Rule 8.

11. However, and upon further reflection, I am not convinced that my earlier decision is correct on this point. From what I have said above, it would seem that, at face value, Rule 8 permits striking out and relief therefrom only in respect of substantive proceedings (namely those started under Rule 20) and not in respect of any ancillary proceedings. This is a somewhat startling conclusion since it seems to cut down considerably the Tribunal's case management powers.

12. It also seems to cut across the Rule 2 "overriding objectives" provisions which must, of course, apply to ancillary proceedings as much as to substantive proceedings. Yet in Rule 2 "the" proceedings is used. So if I am right, there is no need for a Tribunal to consider the overriding objectives in relation to ancillary proceedings. That cannot be right.

13. And so I am less sure than I was that Rule 8(5) allows the appellant to apply for reinstatement only of the struck out substantive appeal and not in respect of any ancillary proceedings.

14. A second point has also occurred to me. If I am right that Rule 8 applies only to substantive proceedings, by what right did Judge Mosedale strike out the first reinstatement application? This cannot have been under Rule 8 even though she says in her direction that that is the case (see [6(17)]). But it could have been under Rule 5.

15. But Rule 5(2) also permits the Tribunal to give a direction in relation to the conduct or disposal of proceedings which includes a direction amending suspending or setting aside an earlier direction. And so, in this case, if the second reinstatement application could not be made under Rule 8(5), it could be made under Rule 5(2).

16. On balance, and given that Judge Mosedale struck out the first reinstatement application under Rule 8(5) it would seem odd if Rule 8(5) could not apply to that struck out application, and I think it probably does. But if I am wrong, I think that Rule 5(2) does give the Tribunal jurisdiction to consider the second reinstatement application contrary to the view expressed in my earlier decision.

Should I reinstate?

17. Given that I have now concluded that I have the power under either Rule 8(5) or Rule 5(2) to consider the second reinstatement application, I now turn to whether I should allow that application. I remind myself that I am considering only whether I should reinstate the first reinstatement application (namely the appellant's application to apply for reinstatement of the substantive proceedings, which he made in his letter to the Tribunal of 19 October 2015). I am not concerned about reinstating the substantive appeal which had been automatically struck out on 3 September 2015. And so when considering the merits of the appellant's position, I am looking only at those in respect of the first reinstatement application and not those in respect of the struck out substantive appeal. Those matters will be considered if I grant the appellants application, as he could then pursue the application to set aside the substantive appeal.

18. In his decision in the case of Jumbogate Ltd v HMRC [2015] UKFTT 0064 ("*Jumbogate*") Judge Sinfield commented as follows.

> "40. In relation to the approach that I should take when considering whether an appeal should be reinstated, both parties referred me to the decision of the Upper Tribunal in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321 (TCC). Although that case concerned an application under rule 17(3) of the FTT Rules to reinstate an appeal that had been withdrawn, the parties accepted

that the same principles applied to this application. At [21], Proudman J observed:

> "There is no guidance in the rules as to how such a decision is to be reached other than the application of the overriding objective."

41. Having then set out the overriding objective in rule 2, Proudman J continued at [23]:

> "Although, as I have said, there is no guidance in the rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9(1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56]-[57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were,
>
> - The reasons for the delay, that is to say, whether there is a good reason for it.
> - Whether HMRC would be prejudiced by reinstatement.
> - Loss to the appellant if reinstatement were refused.
> - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
> - Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained."

45. I gratefully adopt the approach described by Proudman J in *Pierhead Purchasing*. In deciding whether to grant the application to set aside the Strike Out and reinstate, I bear in mind that I must give effect to the overriding objective of the FTT Rules to deal with cases fairly and justly. *North Wiltshire* concerned an application for an extension of time in which to appeal and so the relevant criteria were necessarily rather different. In this case, I consider that the relevant factors that I should take into account when considering whether to set aside the Strike Out are:

(1) whether the appeal is arguable and has a reasonable prospect of success;

(2) the reasons for the Strike Out;

(3) whether there has been any material change since the Strike Out;

(4) whether HMRC would be prejudiced if the Strike Out were set aside;

(5) what prejudice would Jumbogate suffer if the Strike Out were not set aside; and

(6) the conduct of the parties."

19. I am conscious that Judge Sinfield's approach in *Jumbogate* predated the Supreme Court's decision in BPP Holdings Ltd v Revenue and Customs Commissioners [2017] UKSC 55, ("*BPP*") and the Upper Tribunal decision in William Martland v HMRC [2018] UKUT 178 ("*Martland*"). In *Martland* the Upper Tribunal considered the approach that the First-tier Tribunal should adopt when considering relief from sanctions (in the case of *Martland*, the issue concerned an application to make an appeal out of time, but it is clear that the same principles apply when considering any relief from sanctions, including the situation in this appeal where I am being asked to reinstate the first reinstatement application). In *Martland* the Upper Tribunal stated;

"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]):

"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)]"."

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. In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in Aberdeen and Data Select; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was preceded by the general injunction to "consider all the circumstances"). The

> question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). 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". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case"

20. And so when considering the six relevant factors identified by Judge Sinfield in *Jumbogate* I do so bearing in mind the "clear message" referred to in the extract from *Martland* above.

Prospects of success

21. I consider that the prospects of the appellant succeeding in the first reinstatement application are slim. Consider the history. The appellant was told by the Tribunal that the Tribunal could not deal with his representative, Mr Smith, until the appellant had completed and signed the relevant form (see [6(3)] above). These instructions were clear and he failed to comply with them. He was then asked on 14 July 2015 to confirm whether he wanted to pursue his appeal. Neither he nor Mr Smith responded. He was told on 19 August 2015 that his appeal would be struck out unless he told the Tribunal before 2 September 2015 that he wanted to pursue his appeal. Although Mr Smith sent the Tribunal an email on 27 August 2015, the Tribunal could not take anything said by Mr Smith into account given that Mr Smith was not the appellant's representative. And so the appeal was automatically struck out on 3 September 2015. The only chink of light that I can see which might assist the appellant is a misunderstanding about the role of Mr Smith and that he had to be formally authorised as a representative. But given that the appellant was professionally represented by Mr Smith, I would have expected any correspondence relating to the appeal to have been discussed with Mr Smith, including the Tribunal's request that the appellant submit the appropriate form authorising Mr Smith as the appellant's representative as set out in its letter of 14 May 2013. The terms of that letter are very clear. I would also have expected Mr Smith to have ensured that he was

on the record and so representations made by him could be taken into account by the Tribunal. In my view the appellant has no one to blame but himself and Mr Smith for failing to comply with the clear instructions in the letter of 14 May 2015 and subsequently with the clear instructions contained in the letter of 14 July 2015 and the directions of 19 August 2015 (the latter making expressly clear that failure to comply with that direction would (not might) result in the appellant's appeal being struck out without further reference to him). He is the author of his own misfortune. His prospects of successfully setting aside the automatic strikeout of his substantive appeal of 3 September 2015 are bleak.

Reasons for the strike out

22. I am considering here the strikeout of the first reinstatement application. That application was made on 19 October 2015 and the strikeout was made on 13 November 2017. In between those dates that had been an agreed stand over to enable the appellant to explore a negotiated settlement with HMRC. In May/June 2017 things came back on track. And on 10 July 2017 the appellant explained that he had hoped a negotiated settlement would be reached.

23. A month later, on 9 August 2017, the Tribunal gave the appellant more time to allow HMRC to consider a settlement offer made by the appellant. Time was extended until 6 September 2017. If nothing had happened by that date, the Tribunal asked the appellant to communicate with the Tribunal if it wished to amend the grounds of his first reinstatement application. Neither the appellant nor Mr Smith replied. Some 6 weeks later, on 24 October 2017, the Tribunal wrote the parties explaining that Judge Mosedale had said that unless the appellant notify the Tribunal within 14 days that he wished to pursue its application and the grounds of that application, she would dismiss the appellant's first reinstatement application.

24. Nothing was heard from the appellant or Mr Smith and so, on 13 November 2017, Judge Mosedale directed that the first reinstatement proceedings should be struck out.

25. It was not until 19 July 2018, some eight months later, that anything further was heard from the appellant. On that date, Mr Smith wrote the Tribunal and in the accompanying letter dated 16 July set out grounds for the second reinstatement application. In it he suggested that the reason that the Tribunal had struck out the first reinstatement application was that the Tribunal believed the matter to be resolved. I cannot understand the basis of this assertion. The reasons for the striking out of the first reinstatement application are clearly set out in Judge Mosedale's direction of 13 November 2017. It was basically because the appellant had not cooperated with the Tribunal and had failed to respond to requests for information from the Tribunal.

26. In view of the very clear message that parties should pay proper attention to the conduct of litigation and that the Tribunal should enforce compliance with directions, I can see nothing from the foregoing history which favours the appellant. He is professionally represented. He and Mr Smith were clearly told of the consequences of failing to provide the information requested by the Tribunal in its letter of 24 October

2017. The appellant has put forward no cogent reasons why he failed to comply with that request. Whilst the Tribunal was aware of the negotiations between the appellant and HMRC, it had agreed a stand over to cater for these. Once that stand over came to an end, the appellant then failed to communicate, as requested, with the Tribunal. Indeed the Tribunal received no communication from the appellant for over a year, between 10 July 2017 and 19 July 2018. That is simply not good enough. The reasons given by Judge Mosedale in her striking out direction of 13 November 2007 justify the striking out of the first reinstatement application.

Material change since the strike out?

27. The second reinstatement application of 19 July 2017 supplemented by the expanded grounds of 28 September 2017 deal almost exclusively with the history of negotiations between HMRC and the appellant, and observations about the unfairness of HMRC's treatment towards the appellant (as to which this Tribunal has no jurisdiction)

28. It is clear that HMRC, having engaged in settlement discussions, had decided not to conclude a deal with the appellant (see [6(18)(4-7)] above). This was communicated to the appellant on 18 October 2017 in the letter from HMRC, i.e. about the time of the Tribunal's warning letter of 19 October 2017. So why didn't the appellant explain this to the Tribunal? The appellant seeks to justify his non-compliance by explaining that nothing was heard from HMRC to follow up their letter of 18 October 2017, until April 2018. And that no "appeal" could be submitted until HMRC had provided certain VAT forms. But the substantive appeal had already been made (and automatically struck out) and the failure to resolve matters by a negotiated settlement does not excuse non-compliance with requests or directions of the Tribunal.

29. I cannot see that the appellant's circumstances have materially changed since the strike out of the first reinstatement application. Around that time, the appellant had attempted (unsuccessfully) to negotiate a settlement with HMRC. The same is true today. I am told that HMRC's ADR unit is prepared to accept this case for ADR. Yet a bald statement to this effect by Mr Smith is insufficient evidence in my mind that this is indeed the case, especially given the background to a negotiated settlement set out in the appellant's grounds supporting its second reinstatement application. If I am to take this into account, I would expect corroborating evidence (perhaps by way of a letter from HMRC confirming what the appellant has suggested). The appellant has submitted that he needs an extant appeal in order for HMRC to consider settling via ADR. Again if this is indeed the case I would expect the appellant to provide evidence of that to the Tribunal. In the absence of any such evidence, it is very difficult for me to say that there is any greater likelihood of resolving this matter by way of ADR then there is of settling it by a negotiated settlement.

30. I can see, therefore, no material change to the situation since the strike out of 13 November 2017.

Prejudice to HMRC

31. If I reinstate the first reinstatement application, HMRC will need to incur time and cost in considering (and I suspect opposing) the first reinstatement application. They could justifiably expect this matter which has now been going on for nearly 6 years, to have been brought to a conclusion by now. HMRC are entitled to consider that they should benefit from the principal that there should be finality in litigation, and to expect the appellant to have complied with directions made by the Tribunal. Because he has failed to do so, HMRC has already been put to additional cost in time and financial terms. If I were to allow this application, further cost and time would be incurred.

Prejudice to the appellant

32. If I do not reinstate the first reinstatement application, the appellant will be left with the remedies of making an application to appeal to the Upper Tribunal (which he has already made) or applying for my decision to be set aside. He will be prejudiced in that there will be time and financial costs of adopting either course, but, as I think I have made clear in this decision, I have little sympathy with the appellant given that he has been professionally represented throughout and has, in my view, no one else to blame other than himself and Mr Smith for getting himself into the procedural tangle he is presently in.

Conduct of the parties

33. HMRC have done nothing wrong in relation to the substantive appeal nor in respect of the first and second reinstatement applications. This is in stark contrast to the conduct of the appellant which I have set out above at some length. The procedural tangle to which I refer above has been caused exclusively by the appellant's serial failure to comply with simple directions or requests made by the Tribunal on any number of occasions.

Conclusion

34. In conclusion it is my view that the appellant has little chance in succeeding in his first reinstatement application. If I were to reinstate it then there would be material prejudice in terms of time and cost to HMRC who have conducted themselves wholly properly throughout this matter. The appellant is able to continue his appeal by making an application for permission to appeal to the Upper Tribunal or to apply to set aside my decision. I have been provided with no cogent evidence that there has been a material change to the appellant's position since the strike out of the first reinstatement application on 13 November 2017. That strikeout was made for wholly justifiable reasons. The appellant has been professionally represented throughout. He and Mr Smith could have readily complied with directions given by the Tribunal. By failing to do so, and by failing, in my mind, to provide justifiable reasons for those persistent failures, I can give them little sympathy. I apply a strict approach to compliance with rules and directions given by the Tribunal. The appellant has been serially non-compliant. In my view it would not be fair or just in the circumstances of this case to allow the second reinstatement application.

Decision

35. For the reasons given above I dismiss the appellant's application (namely that the strike out of 13 November 2017 be set aside and that the first reinstatement application be reinstated). And so the first reinstatement application and proceedings pursuant to it remains struck out.

Appeal rights

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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 11 MARCH 2019