[2014] UKUT 0321 (TCC)
Appeal number FTC/57/58/59/60/2011

Appeal of an order refusing an application under r.17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to reinstate an appeal. Did FTT Judge make an error of law? No. Appeal dismissed.

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

PIERHEAD PURCHASING LIMITED **Appellant**
- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Hon Mrs Justice Proudman DBE

Sitting in public at the Royal Courts of Justice Rolls Building London EC4A 1NL on 12 June 2014

Mr Geraint Jones QC, instructed by Rainer Hughes solicitors, for the Appellants

Mr Christopher Foulkes, instructed by the General Counsel and the Solicitor to HM Revenue & Customs, for the Respondents

DECISION

TRIBUNAL JUDGE: The Hon Mrs Justice Proudman DBE

The issue

1. This is an appeal from the decision released on 7 March 2013 of the First-tier Tax Chamber ("FTT"), Judge Malcolm Gammie CBE QC. The FTT refused permission to appeal at some date in 2013 (the release date is not specified but for the reasons it gives the Upper Tribunal ("UT") specifies it as 15 July 2013) but permission was granted by the UT (Judge Roger Berner) on 9 August 2013.

2. The appellant applied on 16 October 2012 to reinstate an appeal of HMRC's decision to deny input tax for three Value Added Tax periods in 2006 on the ground that the relevant transactions were connected to the fraudulent evasion of VAT and that the appellant either knew or should have known of that fact. The amount of tax at stake seems to vary according to the UT's permission (£1.4m) and the FTT's decision (nearly £2m) but it is likely that the discrepancy is accounted for by the difference between assessments to VAT and denial of input tax. The precise amount does not matter for present purposes as on any basis it is substantial. The appellant also applied for an extension of time to make the application to reinstate, saying that it had not received a letter from the FTT sent to its then solicitors informing it of the relevant time limit. Rule 5 (3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") gives the FTT power to extend the time for any application. HMRC served Notice of Objection to the application to reinstate.

3. The principal ground for reinstatement relates to the suspension of the appellant's registration under the Warehousekeepers and owners of Warehoused Goods Regulations (its "WOWGR" licence) mentioned below. That suspension is under appeal and it is said that the application to reinstate should be allowed and the two appeals should be consolidated and heard together.

4. The hearing of the appeal was due to begin on 16 April 2012 but on that day the appellant withdrew its appeal on the advice of its leading counsel, who had only recently been instructed. He said in terms that the reason why the appeal

was being withdrawn was because of irregularities in the (direct) tax position of Mr Richard Hercules, the appellant's sole director, and the application before the FTT was made on the basis that HMRC "had damning evidence which will be very difficult to overcome".

5. On 29 August 2012 HMRC suspended the appellant's WOWGR licence on the basis stated in the notice that the appellant had "a current VAT debt of £1,401,103" so that the appellant, "is no longer deemed fit and proper to hold a WOWGR authorisation".

6. Among other findings the FTT found the following as facts:

- It came as something of a shock to Mr Hercules that his counsel advised him to withdraw the appeal at the door of the court [29].

- The FTT's notification dated 17 April 2012 that the appellant had 28 days to apply for reinstatement was not passed on to the appellant by the appellant's solicitors [41].

- Mr Hercules and therefore the appellant did not consider the possibility or consequences of the appellant's WOWGR licence being withdrawn [8] and [30]. The decision to withdraw the appeal was made without advice having been given as to the possible consequences in relation to the WOWGR licence. No finding of negligence was made against Mr Hercules's counsel (and the appellant has refused to waive privilege so that the advice given could be scrutinised) but the appeal proceeded on the assumption that advice was not given. It follows that the appellant had not been at fault in this respect: see [14] of the UT's decision granting permission to appeal.

- The appeal was withdrawn on the advice of counsel [21] and [45]. Mr Hercules largely admitted in cross-examination [22] that he had failed to declare some of his personal sources of income and had deliberately understated the appellant's profits. Contrary to the evidence given by Mr Hercules (see [26] and [29]) the appellant understood that withdrawal of the appeal meant that a very substantial sum of VAT would have to be repaid [29]-[30] and [56].

- A company called Pierhead Drinks Limited was set up to take over from the appellant, should HMRC seek to recover the full VAT debt which the appellant would not be able to repay, so that Mr Hercules's

son and his employees could continue in business through the new company: [31], [32], [54].

7. Not only is the substantive matter in dispute but also various ancillary matters. First, whether or not it is implicit in the FTT decision that permission to bring the application out of time was granted and, if so, on what basis. Thirdly, whether limited permission to appeal only was granted, that is to say limited to particular issues, or whether the appellant is permitted to raise all relevant grounds of appeal. I should deal with those matters first.

Was permission granted?

8. The FTT held that there was "a strong relationship between the grounds that are advanced to justify the application and the time that has elapsed since the appeal was withdrawn" ([42]). Permission to reinstate was refused. The FTT said in the Refusal of permission to appeal, "The application was made late but as the Tribunal indicated this was not a determining factor in its decision." At [56] of the decision the FTT observed,

> "The fact that its failure to repay has brought an unanticipated consequence does not in the circumstances merit my exercising my discretion to extend the time allowed for reinstatement or to grant the Appellant's application to reinstate."

9. At first I was minded to find that the UT had decided in [4] of the decision giving permission to appeal that the FTT granted the application to extend time by dealing with the substantive application to reinstate. However I am now satisfied that in [4] the UT was referring to the application for permission to appeal having been made late so that the UT did not address the present issue.

10. Mr Jones QC argued that the FTT must be treated as having extended time since jurisdiction to deal with the substantive application only arose once permission had been granted and the substantive application was in terms refused. That being so, he argued, it was inconsistent to extend time but not to grant permission to reinstate, bearing in mind the passage from [42] quoted in paragraph 8 above with which Mr Jones agreed. Mr Foulkes however submitted that the FTT was well aware of the two-stage process, as appears from [41] to [47] of the decision, but nevertheless decided to treat the two

matters together, and that this is evident from [41] of the decision where it is said,

> "Logically I should…proceed by treating the Appellant's application as an application for the Tribunal to extend the time allowed under Rule 17(4) and, assuming that I grant such extension, as an application to reinstate its appeal. I find it more productive…to consider the two issues together, if only because there are prima facie grounds for agreeing to extend the time allowed for the application."

11. The FTT's decision not to grant permission to extend time is clear, he submitted, from [56], so that the conclusion at [57] was merely a shorthand way of compendiously referring to his rejection of both applications.

12. Mr Jones on the other hand said that this was not what the FTT was referring to in [56] because of the expression "time allowed for reinstatement" which merely was a different way of saying that the FTT was going to dismiss the substantive appeal.

13. I do not agree. While the FTT might have used more felicitous wording, it seems to me clear that Mr Foulkes is right and that [56] means what he says it means. No inconsistency of approach can be read into the FTT's original decision as the two matters were decided together.

14. At all events, permission to appeal was granted and I now have to consider the substantive matter although I do so, as I have said, without any gloss on the substantive appeal owing to the inconsistency in allegedly allowing an extension of time but refusing the reinstatement.

Was only limited permission granted?

15. In my view the appellant was given general permission. It is true that the UT said in its decision notice ([9]),

> "Although Pierhead has identified five grounds on which it is said that the FTT made a decision that was plainly wrong, I have concluded that permission to appeal should be given on the general ground that the FTT may have made an error of law in failing to take sufficient

account of the lack of fault on the part of Pierhead in withdrawing an appeal without having been advised of all the consequences of doing so, and the possibility therefore that of Pierhead had been so advised, it would not have withdrawn."

16. However, this was the *reason* for granting permission to appeal, not that the permission is limited by this ground. That seems to me to be plain by the observation at [15], "For that reason, I consider it would be appropriate to grant Pierhead permission to appeal", and the unconditional conclusion at [16], "I give Pierhead permission to appeal the FTT decision."

17. I therefore propose to consider the substantive matter of reinstatement, unconstrained by questions of extending time and unconstrained by limits on the application for appeal. However the latter is probably academic since Mr Jones only really relied on the ground specified by the UT in any event.

Principles to be applied on an appeal

18. An appeal to the UT lies on a point of law only: section 11 of the Tribunals, Courts and Enforcement Act 2007. It is common ground that there is an appeal on a point of law where the Judge's decision is so plainly wrong as to be perverse. If the Court sets aside the decision of the FTT it can either remit the case back to the FTT with directions for reconsideration or re-make the decision. If it does the latter, it may (a) make any decision which the FTT could make if the FTT were remaking the decision and (b) may make such findings of fact as it considers appropriate.

19. I should emphasise that the UT is not in a position to assess the oral evidence that was before the FTT. I note in particular that in this case there was oral evidence from Mr Hercules as well as the receipt of witness statements. It is one thing to review the conclusions of law reached by the FTT on the basis of the facts which it found; it is another to substitute one's own conclusions for the "multi-factorial assessment" or value-judgment reached by the Tribunal, having heard the evidence, as a matter of inference from those facts.

20. It is accepted that the following principles are applicable in the present case. The appeal is against a case management decision so that the principles expounded by Chadwick LJ in *Royal & Sun Alliamce v. T & N* [2002] EWCA Civ 1964 at [38], see also *Walbrook Trustees v. Fattal and Ors* [2008] EWCA Civ 427 at [33]), although said in a different context, are applicable,

> "…this court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

21. Withdrawal of cases before the FTT is dealt with in rule 17 of the Rules. Rule 17 (3) provides that a party which has withdrawn its case may apply to the FTT for the case to be reinstated. 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.

22. The overriding objective is the same in its application to the FTT and the UT. It provides as follows:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

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.

24. I was asked by Mr Jones to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance given in *Mitchell v. News Group*

Newspapers Limited [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to Tribunals in any event) does not now exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective.

The grounds of appeal

25. The appellant says that the FTT made an error of law in failing to take sufficient account of the lack of fault on the appellant's part in withdrawing the appeal without having been advised of all the consequences of doing so. Reliance is placed on the fact that the FTT was only referred to the lower Tribunal's decision in *ATEC Associates Ltd v. Revenue and Customs Commissioners* [2009] UKFTT 178 (TC) and was unaware of the fact that this decision had been reversed on appeal by Briggs J in the UT at [2010] UKUT 176.

26. The FTT relied on *ATEC* at first instance in saying (at [50] and [51]) that the incompetence (if such were to be proved) of the taxpayer's professional adviser was not a basis for reinstating an appeal; the failings of a representative do not ordinarily confer any such right and is a matter between the appellant and its representative.

27. However on appeal Briggs J held that the authorities on which the FTT had relied were decided in the context of the Value Added Tax Tribunals Rules 1986 and not the new (2009) Rules, with the consequence that the FTT believed it did not have jurisdiction and was considering a remedy based on natural justice. Briggs J accepted that if there had been no jurisdiction under the Rules so that the question was indeed one of natural justice, the decision not to grant relief would have been unassailable. However, he held that there was jurisdiction under the 2009 Rules and went on to examine the criteria by which the exercise of discretion should be undertaken. He held that CPR 3, although not strictly applicable, was relevant and went on to consider the default having been caused by the party's legal representative rather than the party himself. The case was distinguishable, he decided, from *Mullock v. Price* [2009] EWCA Civ 1222 in which the Court of Appeal declined to apply the same provision in the context of an application to set aside a default judgment to which the more limited provisions of CPR 13.3 applied. The case was closer to relief from sanctions and he therefore considered the preponderance of blame as between the appellant and his legal adviser.

28. In granting permission to appeal in this case the UT said at [15],

> "…the question of the effect of a failure on the part of legal representatives to advise on the consequences of withdrawal (the question essentially being whether the applicant is nonetheless to be regarded as responsible for the withdrawal or by contrast the applicant is to be regarded as not culpable) is a matter of principle. Having weighed the matter I have concluded that I am not satisfied that it is unarguable that the FTT failed to apply the correct principles in this respect."

29. I agree that the failure of the FTT to refer to and consider the UT's decision in *ATEC* meant that the test for granting permission to appeal was satisfied. However, I do not consider that the appeal should succeed.

30. It is true that, in considering the reasons for the delay the FTT placed reliance on the FTT decision in *ATEC*. However, after the FTT had referred to *ATEC*, it said (at [52]),

> "That apart, I am unable to accord great significance to the Appellant's failure to receive the Tribunals' notification [of the fact that an appellant only had 28 days to apply for reinstatement of the appeal] because I am not satisfied that it would have made any difference if it had been received. It seems to me that the Appellant had agreed to withdraw its appeal in the light of leading counsel's advice and (as I have found) with a full understanding that the VAT would then have to be repaid…and there is no evidence on which I can conclude that the Appellant would have done anything within the 28 days allowed even if the letter had been received."

31. Accordingly, as far as delay is concerned, the FTT would have come to the same conclusion even if it had been aware of the UT decision in *ATEC*.

32. However, the FTT went on to say (at [53]),

> "That leaves the 'unanticipated' withdrawal of the Appellant's WOWGR licence. If the Appellant's licence had been withdrawn solely because HMRC took the view, in the light of the Appellant's dropping its appeal, that the Appellant had been involved in VAT fraud, there might be some substance to this ground for reinstatement. As the original notification of withdrawal indicates,

> however, the basis on which the licence is withdrawn is because a large VAT debt remains unpaid."

33. Mr Jones pointed out that the notice of withdrawal can be amended at any stage, and if this appeal fails it may well be amended to allege VAT fraud. However, that does not detract from the FTT's finding, which is that on any basis the licence was not withdrawn "solely" for that reason. The FTT took into account the evidence it had heard as to Mr Hercules's alternative course of action to guard against the contingency that HMRC would seek to recover VAT from the Appellant and came to the view that the withdrawal of the licence was the result of that course of action. The FTT's conclusion was ([56]),

> "The fact that [the Appellant's] failure to repay has brought an unanticipated consequence does not in the circumstances merit my exercising my discretion…In effect, the Appellant seeks to change its mind after the event having discovered that HMRC are intent on collecting the VAT in question and are not prepared to allow it to disappear unnoticed into oblivion."

34. The Appellant has a separate appeal on foot challenging the withdrawal of the WOWGR licence. It is common ground that no issue (or like) estoppel applies for the purposes of that appeal. I agree with the FTT that the fact that the Appellant may seek to raise many of the same issues as were live in the previous appeal is not a sufficient reason for reinstating the previous appeal when no other good or sufficient reasons for that reinstatement have been given.

35. It seems to me that, as I have said, the FTT in this case reached its conclusion on the assumption that counsel had not advised the appellant of the risk that its WOWGR licence might be withdrawn. It also made its findings on the basis that the appellant did not appreciate or even think about the risk. It is the necessary corollary that the appellant might have made a different decision on withdrawal had that risk been considered. Having taken into account the circumstances in which the appeal was withdrawn, on the basis of those assumptions, the exercise by the FTT of its discretion is not in my judgment capable of being interfered with on appeal. It is important in my view to uphold robust case management decisions at first instance, and I do so.

36. Mr Jones also complained that the FTT mentioned on no fewer than four occasions that the appellant had accepted the advice of "leading counsel" to withdraw its appeal. It is therefore said that this is an indicator of the FTT regarding the appellant as having responsibility for the decision to withdraw, demonstrating that the weight to be given to questions of responsibility was

affected by an incomplete or downright incorrect reliance on *ATEC* before the FTT. I do not accept this for the simple reason that the FTT assumed the appellant to be blameless and looked from this perspective at the absence of consideration of the risk that the WOWGR licence might be withdrawn. The FTT's view was clearly that it did not consider the absence of consideration of the risk to be sufficiently significant to lead the FTT to find in favour of reinstatement, rather than failing to take account of the appellant's lack of responsibility for that absence.

37. Mr Jones contended that the FTT failed to take into account the "rather obvious fact" that the appellant's inability to repay the VAT is likely to have been heavily dependent upon the appellant being able to continue to trade with the benefit of its WOWGR licence. However, the licence was only withdrawn when the VAT was not paid. In any event, I do not consider that this shows error of law sufficient to bring an appeal into play.

38. I should say that Mr Foulkes asked me, by way of cross-appeal, to find that the FTT had been wrong in finding that it could not take the merits of the appeal itself into account. Mr Foulkes submitted that the lack of merits in the appeal was self-evident. However, it seems to me that the FTT was right in deciding that it was unable to take any view on the merits of the appeal. To do otherwise, in the absence of evidence and a full hearing, would have been to pre-judge the matter.

39. However, if I am wrong in upholding the FTT's decision, the question arises whether I should remake the decision or remit it back to the FTT.

40. If making the decision myself, I would take into account the following matters in favour of reinstating the appeal:

- A large sum of money is at stake which could mean make or break for the appellant.
- Fraud has been alleged, in effect against Mr Hercules, and unless he is permitted to reinstate the appeal, his name will always be subject to a blot.
- The prejudice to HMRC will be less than that outlined above to the appellant and Mr Hercules if the appeal is consolidated with the appeal as to the WOWGR licence.

- Although the FTT did not ascribe blame to counsel, it proceeded on the assumption that the appellant was not told of the possibility of its WOWGR licence being withdrawn.

41. Against reinstating the appeal I take into account the following matters.

- There has been delay in applying to reinstate. It is true that the appellant said that it did not appreciate the risk until 29 August 2012 (so that there could not have realistically have been an application to reinstate before that date), but the application to reinstate was not made until 16 October 2012. A further two months therefore passed after the date of withdrawal of the WOWGR licence before the application was made, more than twice the 28 days permitted by Rule 17.

- Whether the licence was properly withdrawn is a matter which can be litigated, and is being litigated, separately.

- The case is very different from *ATEC* where the default of the legal adviser was patent and indeed gross.

- The importance of finality and the undesirability of allowing the appellant to have two bites at the cherry, in other words, to change its mind. Extending time would be prejudicial to the interests of good administration and legal certainty. Although, as the FTT pointed out, the rules about appeals being allowed out of time in exceptional, rare and limited cases may well not apply to the situation where it is sought to reinstate an appeal which has not been heard (see [47]), and this is a case where the rules themselves contemplate reinstatement ([49]), it is still necessary that the facts justifying the extension of time, and the application, should be proved.

- The fact that Mr Hercules admitted to failing to declare a number of sources of income in his personal tax returns and also to deliberately understating the appellant's profits.

- The fact that Mr Hercules was found to have lied to the FTT about his knowledge that the appellant would have to pay the VAT, and the fact that he had taken steps (although legitimate steps) to avoid payment of that VAT.

42. Taking these considerations into account and weighing them in the balance it is in accordance with the overriding objective to refuse permission to reinstate the appeal, and, if I am wrong in dismissing the appeal, I would myself refuse permission.

The Hon Mrs Justice Proudman DBE

RELEASE DATE: 10 JULY 2014