[2018] UKFTT 665 (TC)

TC06813

Appeal number: TC/2016/03030

PROCEDURE – Application by appellant to set aside decision to strike out appeal - allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DECISION
ON AN APPLICATION TO SET ASIDE
IN THE CASE OF

MAINPAY LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

1. In this application, Mainpay Ltd ("the appellant") seeks to set aside my decision made on 1 August 2018, reported as *Mainpay Ltd v HMRC* [2018] UKFTT 552 (TC), which decision was to strike out the appeal made by the appellant against assessments to VAT.

2. A decision may be set aside if one of four conditions in rule 38(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules") is met and the Tribunal considers it is in the interests of justice to do so.

3. In this application ("the set aside application"), the appellant relies on rule 38(2)(c) and, as a fall back, (d).

4. The condition in rule 38(2)(c) is that there has been a procedural irregularity in the proceedings other than one set out in sub-paragraph (a) or (b). The irregularity that the appellant points to is the failure by the Tribunal to recognise that the appellant had made and had not withdrawn an application to amend its grounds of appeal.

5. The context of the application to amend is that the appellant made an application on 25 July 2018 for the case to be heard on a single day, 2 August 2018, instead of the two days starting on 1 August for which it had been listed ("the postponement application"). This application followed the appellant's service (late) of its skeleton on 25 July.

6. By an email at 1338 on 26 July HMRC objected to the postponement application saying:

> "1. On 25 July 2018 the Appellant's representative filed and served the Appellant's skeleton argument. The Appellant in its skeleton argument raises for the very first time, and just 5 working days before the hearing, new arguments that do not form a part of its original grounds of appeal or any subsequent document served by the Appellant. Additionally the Appellant has further changed its position as it no longer taking issue with the assessment being 'out of time' and not made to 'best judgment'. HMRC object to the Appellant raising new arguments at such a late stage in proceedings and without any justification or explanation for such a complete change in position. In any event the Appellant has not applied to amend its Grounds of Appeal to enable it to argue any of the points it now wishes to rely on.
>
> 2. As HMRC object to the Appellant relying on its skeleton argument as served, the Tribunal will now need to determine this issue if the Appellant can rely on its skeleton argument as served and perhaps if the Appellant should be permitted to amend its grounds of appeal at this very late stage (please see below).
>
> 3. If an application to amend the Grounds is made and granted then HMRC will require time to consider the Appellant's new arguments and any submissions in response to those arguments and it may be that the hearing would have to be adjourned, and are not therefore currently in a position to agree that a one-day hearing would be sufficient."

7. They added that the appellant should not be permitted to rely on its skeleton.

8. On 26 July 2018 at 1554 ("the 1554 email") the appellant responded by email and the response included:

> "In terms of an application to amend grounds of appeal, the Appellant does not consider it necessary. Without prejudice to that, however, the Appellant does, if necessary, apply to amend. For the reasons given above, it is "a bit rich" for HMRC to object to having to defend their fundamental conclusion that the supplies are standard rated.

9. On 27 July the Tribunal directed:

> "This matter has been referred to Judge Morgan who has decided that the hearing shall proceed as currently scheduled for 1 and 2 August 2018. Judge Morgan notes that the issues raised by HMRC will need to be considered at the hearing and, in light of that, it is clear that one day only will not suffice."

10. At the start of the hearing on 1 August I asked Mr Brothers, the only representative of the appellant present (the appellant, a body corporate, was not present by any of its directors), whether he wished to apply to amend the grounds of appeal and he replied that he did not. He wished to rely on his third argument in the appellant's skeleton that the supplies in dispute were indeed exempt. I then turned to the HMRC application to strike out and having heard Ms Newstead Taylor of counsel for HMRC as to whether the argument in the skeleton was a development of one of the original grounds of appeal, I decided to grant HMRC s application to strike out on the basis that this argument was wholly new and was not a development of an argument included in the grounds of appeal and therefore because none of the original grounds of appeal were being relied on and no amendment of them had been sought, the appeal had no reasonable prospect of success.

11. The present set aside application, drafted by Mr Michael Firth of counsel, who would have appeared for the appellant had the case begun on 2 August, says that a failure to deal with an application to amend is a procedural irregularity, citing two cases in this tribunal by analogy. Further the application says that the Tribunal seems to have misunderstood the appellant's position as set out in the 1554 email. It goes on to say at [10]:

> "The Tribunal records, in its short decision, that "Mr Brothers made it clear that he did not apply to amend the grounds of appeal". In fact, by this point, the Appellant had already made an application to amend its grounds of appeal (albeit without prejudice to its primary position that such an application was unnecessary). That application was never withdrawn and, frankly, it would not have made any sense for the Appellant to withdraw it."

12. I have gone through very carefully a number of chains of emails (containing much duplication) which I received from the Tribunal between 1342 on 27 July and 0836 on 1 August. I cannot see that I received a copy of any email from the appellant to the Tribunal dated 26 July and timed at 1554. I should explain that the various emails from the parties to and from the Tribunal in the run up to a hearing by a judge who is fee-paid, as I am, would normally be handled by a salaried judge, Judge Harriet Morgan in this case, who deals with case management issues up to the hearing. The Tribunal then copies to the hearing judge any matters which bear on the question whether the case will go ahead or be postponed, but not usually contemporaneously.

13. In this context I received Judge Morgan's decision not to postpone the hearing together with a number of emails which included HMRC's of 26 July (see §6) but not the 1554 email.

14. I see that on 1 August at 0836 I received by email from the Tribunal the appellant's application dated 27 July to appeal Judge Morgan's case management decision not to postpone.

15. That application ("the appeal application"), also drafted by Mr Firth, contains 21 pages starting with a chronology of events. Of the 1554 email it says (on page 2):

> "26 July 2018 – the appellant responds, noting with surprise HMRC's objection to the appellant arguing that the supplies were exempt. The appellant also observed that if it were not permitted to relay on its skeleton argument there would be no need for a hearing at all because there would be no arguments to hear. Accordingly the appellant submitted that the simple answer was to adjourn the hearing to allow HMRC to consider the arguments."

16. I observe that nothing was said in this précis of the email about amending the grounds of appeal. But the application did include the 1554 email with its two paragraphs about an application to amend, that quoted at §8 and a paragraph containing appropriate case law quotations. This was on page 19 of the appeal application.

17. I cannot recall whether I noticed that email before the hearing or only after it. Had it been before I very much doubt that I read as far as page 19. My primary concern would have been to see if there had been a last minute cancellation or a travel delay affecting a party. It would have been clear to me at an early point in my reading of the email and the attachment that this was not an email I needed to study at length even if I had had the time.

18. It was therefore only HMRC's email at 1338 on 26 July that I had seen which referred to amending the grounds of appeal. It is with that background that I asked Mr Brothers the question I did about an application to amend. Mr Brothers did not say that the appellant had in fact made one and that it was still to be dealt with. He would have been aware of Judge Morgan's direction that matters were to be dealt with on 1 August.

19. I appreciate though that Mr Brothers is not legally qualified and that the niceties of pleadings, applications and other case management issues would not be that familiar to him and that he would rely on counsel for advice on such matters.

20. I also accept that there was in fact an application to amend in the 1554 email, even though prefaced by remarks that it was not thought to be necessary. But it was one of which I was not aware, even though the Tribunal as a body was.

21. In these circumstances I consider that there was a procedural irregularity in that I was not made aware in time of the contents of the 1554 email. The question then is whether it is in the interests of justice to set the decision aside in the light of that irregularity.

22. Had Mr Firth appeared for the appellant on 1 August and said what Mr Brothers said I would not have set aside the decision even though I was unaware of the application to amend, because Mr Firth would clearly have realised that by failing to mention it he had elected to rely only on his primary argument that the skeleton was a development of the grounds of appeal.

23. But because Mr Brothers may not have appreciated why I was asking him the question, given that he may have assumed I was aware of the 1554 email, I think the situation is different.

24. Nonetheless I should not set aside the decision if, had the application to amend been mentioned and advanced the outcome would inevitably have been the same. To do that would not be in the interests of justice because it would waste valuable resources of the tribunal and the parties.

25. Having considered the point afresh, and bearing in mind that I did indicate to Mr Brothers that were he to have made an application to amend to me I would probably have accepted it, with some qualifications, and the case would have gone ahead. In those circumstances I cannot say that the outcome would have been the same.

26. I therefore consider that it is in the interests of justice to set aside the decision to strike out the appeal. The case should be relisted to hear the appellant's application to amend and then, if granted, HMRC's application to strike out, should they wish to pursue it or the appeal itself should they not.

27. As to the rule 38(2)(d) point, I do not need to deal with it. But I am inclined to think that it does not help Mr Firth. The appellant was represented by Mr Brothers, even if it would have preferred Mr Firth to be there as well.

28. I should add that HMRC have made an application for their costs under rule 10 of the FTT Rules. In the light of my decision to set aside I do not intend to deal with it now and I direct that it is stayed. If after the final determination on the appeal, by whatever means that happens, HMRC wish to renew their application or withdraw it they are at liberty to do so.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 12 November 2018