Appeal number: TC/2014/01254

CORPORATION TAX – Procedure – Application for permission for extension of time to appeal to Tribunal – Delay due to reliance on adviser – Whether reasonable on facts – Yes – Permission granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

GREENWICH INVESTMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
RICHARD THOMAS

Sitting in public at 45 Bedford Square, London WC1 on 11 August 2014

Thomas Chacko, counsel instructed by Jerry Singh & Co Chartered Certified Accountants, for the Appellant

Mike Faulkner, of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Greenwich Investments Limited ("Greenwich") for permission to extend the time to notify its appeal to the Tribunal under s 49G(3) of the Taxes Management Act 1970 ("TMA").

2. Although the application was originally listed for hearing on Monday 23 June 2014, on that occasion Mr Jake Landman, who appeared on behalf of Greenwich at that hearing, explained that Pinsent Masons had only received a signed engagement letter from Dr Muthupalanlappan Kalairajah, the principal shareholder of Greenwich, on 20 June 2014, the previous Friday and that despite requests full factual information to enable submissions to be made had not been received from SN Advisory Services Limited ("SN"), the former adviser to Greenwich. In the circumstances, as Greenwich was not able to participate fully in the proceedings (an element of dealing with a case fairly and justly as required by rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009), we directed that the hearing be postponed and re-listed. We also directed, inter alia, that:

> (1) The appellant shall provide the respondents and the Tribunal with a copy of its skeleton argument seven days before the re-listed hearing of the application;
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> (2) The respondents ("HMRC") shall provide the appellant and the Tribunal with a schedule of its costs of the 23 June 2014 hearing;
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> (3) The appellant be given an opportunity (in accordance with Rule 10(5) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009) as to why it should not pay the respondent's costs of the 23 June 2014 hearing at the commencement of the re-listed hearing of the application; and
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> (4) The re-listed hearing of the application to be reserved for hearing by the same Tribunal (Judge Brooks and Mr Richard Thomas).

3. On 4 July 2014 the Tribunal wrote to the parties giving notice that the application had been re-listed for hearing on Monday 11 August 2011.

4. In compliance with the directions HMRC provided a 'Statement' of its costs "thrown away" as a result of the postponement of the hearing on 23 June 2014. These amounted in total to £1,467.93. However, despite the direction that Greenwich provide its skeleton argument seven days before the hearing, through no fault of Mr Thomas Chacko of counsel who appeared for Greenwich and who was not instructed until 5 August 2014, the skeleton was received by the Tribunal and HMRC together with a witness statement from Dr Kalairajah on Thursday 7 August 2014, two working days before the re-listed hearing.

5. A further witness statement, from Mr Jerry Singh of Jerry Singh & Co Chartered Certified Accountants, who acted for Greenwich, was provided to us on the morning of the hearing having been sent to the Tribunal by email at 16:40 on Friday 8 August 2014.

Background

6. In the accounts for its accounting period ending 31 August 2006 Greenwich had included an amount of £1.5m payable to an Employee Benefit Trust ("EBT"). It had not added the amount back in its corporation tax computations. The EBT had been established on the advice of Mercury Tax Group ("Mercury"). Although Jerry Singh & Co remained accountants for Greenwich, all issues relating to the EBT, including correspondence with HMRC, were dealt with by Mercury. HMRC did not enquire into the return for this period.

7. Following an enquiry into Greenwich's tax return for the accounting period ended 31 August 2007 HMRC issued a Determination under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and a Decision under s 8 of the Social Security Contributions (Transfer of Functions Etc.) Act 1999 on 17 March 2010. A "discovery assessment" in respect of the accounting period ending 31 August 2006, made under paragraph 41 Schedule 18 Finance Act 1998, was issued by HMRC on 23 August 2010 to reverse the corporation tax deduction for contributions to the EBT and certain fees in connection with it. It is clear from HMRC's letter of 31 March 2011 to Mercury that the Determination, Decision and Assessments were made on a protective basis in view of the imminent expiry of the time limits for assessing and therefore no review was offered to Greenwich, not did Greenwich seek one at that time.

8. Appeals against the Regulation 80 Determination and s 8 Decision were made to HMRC on 22 March 2010 and an appeal against the discovery assessment made on 9 September 2010.

9. It is clear from subsequent correspondence with HMRC that the validity of the discovery assessment was disputed by Mercury (eg the letters from Mercury to HMRC of 16 December 2010, 1 February 2011 and 28 March 2011) and, in a letter dated 25 May 2011, Mercury requested a review of this issue in accordance with s 49B TMA. On 9 December 2011 HMRC wrote to Greenwich (sending a copy of the letter to Mercury) with the conclusion of the review upholding the discovery assessment. The letter concluded, under the sub-heading "Next Steps":

> If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. *If you want to notify the appeal to the tribunal, you must write to the tribunal within 30 days of this letter.* You can find out how to do this on the HM Courts and Tribunals website. ...
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> ...
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> If you do not notify the appeal to the tribunal within 30 days of the date of this letter the appeal becomes settled in accordance with my conclusion, being treated as if it were determined by agreement under Section 54 Taxes Management Act 1970. Arrangements will then be made for the tax due to be collected.

The reference in the letter to the requirement for the Tribunal to be notified of an appeal derives from s 49G(2) TMA which provides that an appellant "may notify the

appeal to the tribunal within the post-review period" with the "post-review" period being defined as "the period of 30 days" from the date of the document in which HMRC give notice of the conclusions of the review. The period therefore ended on 9 January 2012.

10. Although it appears that Dr Kalairajah did instruct Mercury to notify the appeal on behalf of Greenwich and understood that this had been done, the appeal was not notified to the Tribunal within the statutory time frame: rather, by a letter dated 5 January 2012 to HMRC, Mercury questioned whether the review had been properly undertaken and requested that HMRC "consider the relevant case law" although stating that Greenwich would appeal to the tribunal "if it proves necessary".

11. HMRC replied on 10 January 2012 stating:

> ... there is no provision for me to reconsider or revise the statutory review once it has concluded, and if the company wishes to continue to pursue the appeal it needs to notify it to the tribunal, as set out in the "Next Steps" section of my letter of 9 December 2011. Having said this, as long as the appeal remains open there is nothing to prevent the appellant continuing to provide further representation to HMRC if they wish.

12. However, from its letter of 25 June 2012 to HMRC, it seems that Mercury did not receive this reply until 6 July 2012 when a copy was sent. In between, a letter dated 18 June 2012 had been sent by HMRC to Mercury stating that as no appeal had been notified to the Tribunal the appeal "has become determined in accordance with the review conclusion". This is the effect of s 49F(2) TMA.

13. On 19 July 2012 Mercury wrote to HMRC again disputing the discovery assessment. The reply from HMRC, dated 31 July 2012, refers to the review and reiterates HMRC's willingness to discuss "any new points" while reminding Mercury that "the company must advise the tribunal if it wishes to pursue the appeal". However, the letter continued by responding to points made by Mercury in its letter.

14. In the absence of the person dealing with Greenwich at Mercury, Jerry Singh & Co wrote a holding letter to HMRC on 15 August 2012 "so the rights of the company may be preserved". Following the liquidation of Mercury and its replacement by SN as Greenwich's adviser, SN wrote to HMRC on 19 September 2012 stating inter alia:

(1) Both Greenwich and SN believed the review "was not carried out properly and that the ensuing attempt at dialogue was ignored by HMRC"; and

(2) Greenwich "and hopefully HMRC would prefer not to have to take this case to tribunal."

15. In response to that letter HMRC wrote to Greenwich on 19 November 2012. HMRC's letter stated that as the Tribunal had not been notified of an appeal within 30 days of receiving the conclusion of the review the appeal was treated as determined by agreement. However, the letter continued:

> I would rather progress matters without the need for formal action or possible recourse to the Tribunal. So, if you would like to meet me and someone from the central HMRC EBT Team to discuss possible settlement and/or remaining issues I would be only too happy to arrange such a meeting at a date, time and place convenient to all.

16. In a further letter from HMRC, dated 4 December 2012, Greenwich was invited to enter into discussions as to whether an agreed settlement could be reached in relation to "taxation liabilities relating to the company's EBT". This seems to the us to be a standard letter that was issued to all EBT cases under enquiry offering a settlement opportunity, and was not tailored to the individual case. In particular it did not refer to the need to notify the Tribunal if the appeal against the discovery assessment was to be taken further.

17. On 3 July 2013 HMRC wrote again to Greenwich asking it to consider the settlement opportunity offered in its 4 December 2012 letter before more "formal actions" were taken. This letter also did not mention the need to notify the Tribunal.

18. Following further correspondence HMRC wrote to Greenwich on 11 December 2013 in which it is stated:

> Your appeal against this assessment was reviewed by HMRC's Appeals and Review Team, and HMRC's right to make a discovery assessment was upheld. You did not then notify the appeal to the Tribunal within 30 days of the Review Officer's letter and as such, the appeal is treated as determined by agreement under Section 49C(4) [sic] TMA 1970. I have therefore released the additional tax for collection.
>
> A Regulation 80 Determination and a Section 8 Notice of Decision for 2005/2006 were raised on 3 March 2010 to protect the PAYE and Class 1 NIC which may be due if payments were made either into sub trusts or paid out to the directors. As we have treated the payments into the EBT as a CT deduction, I will now vacate both the Reg 80 Determination and Section 8 Assessment on a without prejudice basis.

19. On 20 December 2013 SN wrote to HMRC asking them "to take this letter as an appeal against the attempt to collect [the tax]".

20. On 30 January 2014 a Notice of Appeal was sent to the Tribunal. On 25 February HMRC pointed out to Jerry Singh & Co that the Notice had not mentioned that the appeal was 25 months late and that the company should notify the Tribunal that permission was sought to notify the appeal late. A revised Notice with the application to notify late was sent to the Tribunal on 3 March 2014. On 24 April 2014 the parties were notified that a hearing of an application by Greenwich for permission to make a late appeal would be heard on 23 June 2014.

21. However, it appears that although Dr Kalairajah understood that SN, as successor to Mercury, would represent Greenwich before the Tribunal after the Notice of Hearing had been received they refused to do as the issue concerned the discovery assessment and not the EBT. Therefore, on 9 June 2014 Jerry Singh & Co wrote to the

Tribunal requesting a postponement of the hearing to "appoint an experienced agent" and said that they had had difficulty in doing so due to those approached being on annual leave either then or at the date of the hearing. HMRC objected to any postponement and the Tribunal refused to postpone the hearing. On 13 June 2014 Pinsent Masons wrote to the Tribunal making a further request for a postponement. This too was refused by the Tribunal on 17 June 2014.

22. As noted above the request for a postponement made at the hearing on 23 June 2014 was granted and directions made and it is against this background that we first consider whether Greenwich be ordered to pay HMRC's costs "thrown away" as the result of the postponement of the hearing on 23 June 2014 and second whether it should be given permission to notify its appeal to the Tribunal notwithstanding the expiry of post-review period of 30 days from receipt of conclusion of the review.

Costs

23. The ability of the First-tier Tribunal to make an order in respect of costs is derived from s 29 of the Tribunals Courts and Enforcement Act 2007. This provides:

> (1) The costs of and incidental to—
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> (a) all proceedings in the First-tier Tribunal, and
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> (b) all proceedings in the Upper Tribunal,
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> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

24. Insofar as it applies to standard category cases, such as the present, rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) ...
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;...
>
> (c) ...

Rule 10(5) of the Tribunal Procedure Rules provides that a person must be given an opportunity to make representations before an order for costs can be made against him.

25. Mr Thomas Chacko, who appeared on behalf of Greenwich, submitted that in the present case that neither Greenwich nor its representatives had acted

unreasonably. Attempts to find experienced professional representation had commenced once it was known that SN would not act for Greenwich and an application for postponement had made to the Tribunal. Even if Pinsent Masons had been instructed earlier, as they had not been provided with sufficient information by SN to make the application it would still have been necessary for the hearing on 23 June 2014 to be postponed.

26. For HMRC Mr Mike Faulkner contended that the late submission of the skeleton argument and witness statements on behalf of Greenwich were symptomatic of its approach to the case and its unreasonable conduct of the appeal.

27. In our view, although Greenwich was somewhat dilatory in the way in which it instructed Pinsent Masons, given that they had not been provided with sufficient information by SN to make the application and that it had been Mercury and subsequently SN which had dealt with HMRC in the period leading up to and including the submission of the Notice of Appeal, we do not consider that Greenwich or its advisers Pinsent Masons and Jerry Singh & Co have acted unreasonably in the proceedings and consequently do not order it to pay HMRC's costs of the 23 June 2014 hearing.

Extension of Time

28. It is accepted, especially following the recent decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC), that the approach to applications for extensions of time is as set out by Morgan J in in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC), where he said, at [34]:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

29. Morgan J also found that the following matters set out in the pre-2013 version of Part 3.9 of the Civil Procedure Rules ("CPR") provided a useful checklist when considering such an application:

> On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—
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> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; an

(i) the effect which the granting of relief would have on each party.

30. Although the CPR does not apply to proceedings before the Tribunal, which are governed by the Tribunal Procedure Rules, both the pre-2013 CPR and Tribunal Procedure Rules have a similar overriding objective which is to deal with cases "justly". This includes ensuring they are dealt with "expeditiously and fairly" (CPR) and "fairly and justly" (Tribunal Procedure Rules).

31. In relation to the *Data Select* factors Mr Chacko submitted that the purpose of the 30 day time limit is to provide certainty and avoid any element of surprise. In this case there would be no ambush for HMRC as it had always been contended on behalf of Greenwich that the review was incorrect. Turning to the length of the delay, of almost 26 months, Mr Chacko accepted that Mercury and subsequently SN should have been aware of the statutory provisions but that it was reasonable for Greenwich to have relied on its specialist advisers who had been instrumental in establishing the EBT in the first place and who were conducting the dispute with HMRC on behalf of Greenwich.

32. The consequences of extending the time would prejudice HMRC insofar as the claims for PAYE and NIC have been abandoned. However, although we did not hear argument on the point, it seems to us that from the admitted fact that at 31 August 2006 the payment to the EBT had not in fact been made (it was shown in creditors), there could not have been any payments of PAYE income of the amount of £1.5 million in the tax year 2005-06, either by Greenwich or the trustees of the EBT. Not to extend time would prejudice Greenwich as it would not be able to appeal against the discovery assessment, and would have no chance to show that the assessment was incorrect. In considering the consequences for an appellant the Tribunal is entitled to have regard to whether the appellant's case is arguable (*O'Flaherty v HMRC* [2013] UKUT 01619 TCC per Judge Berner at [34] and [63]): we do not think that we could say the appellant's case here is unarguable without hearing full argument.

33. Mr Faulkner emphasised the fact the 30 day time limit was enshrined in statute and it was therefore the intention of Parliament that it should apply. He also referred to correspondence being copied to Greenwich and that Dr Kalairajah would have been aware of the situation and should have acted and not necessarily relied on Mercury and subsequently SN, especially when it was clear that an appeal had not been notified to the Tribunal. His contention was that it was a matter of fact and degree whether reliance by Greenwich on its advisers was reasonable.

34. In the present case, given that the EBT was established on the advice of Mercury which, until the responsibility was assumed by SN, dealt with HMRC on behalf of Greenwich on all matters relating to the EBT we find that it was reasonable for Greenwich to rely on Mercury and subsequently SN especially as Dr Kalairajah had instructed Mercury to appeal within the statutory time scale and had understood, incorrectly, that an appeal had been made.

35. Therefore turning to the "checklist" in Part 3.9 of the CPR:

(a) While we consider that while it is clearly in the interests of the administration of justice that there should be time limits, as this contributes to the finality of litigation we accept, as Mr Chacko submitted, that there is a difference between a late appeal being permitted and the failure to comply with rules or directions in the course of an appeal;

(b) It would seem that once Greenwich became aware of the necessity of the appeal being notified to the Tribunal, brought about by the release of tax for collection in December 2013, an Notice of Appeal was submitted on 3 March 2014 albeit an attempt to do so was made in January 2014.

(c) It would seem that the failure to comply was brought about as the result of the failure of Mercury and subsequently SN and not intentional on the part of Greenwich which followed the advice it was given;

(d) The failure can be explained by the reliance by Greenwich on its advisers which we have found to be reasonable in the circumstances of the case;

(e) Any failure to comply with the directions made at the 23 June 2014 hearing can be explained by the difficulties faced by Greenwich in losing and acquiring representation with sufficient knowledge to deal with the application; and

(f) Clearly the failure to comply with was not caused by Greenwich but by its advisers and, as in (e) above, the difficulties arising in obtaining proper representation after the refusal to act by SN.

As a hearing date has not been fixed item (g) of the checklist does not apply to the present case. We have, at paragraph 32 above, considered the effect of the failure to comply and the granting of relief would have on each party, items (h) and (i) of the CPR checklist.

36. Having carefully considered all the circumstances of the case, and weighing the interests of both Greenwich and HMRC and the potential prejudice to each of them, we have reached the conclusion that, on balance, we should give permission for Greenwich to notify its appeal to the Tribunal out of time.

Directions

37. Accordingly we direct:

(1) Permission is granted for the appellant (Greenwich) to notify its appeal to the Tribunal.

(2) The appeal shall be allocated to proceed as under the Standard Category.

(3) The respondents shall provide the appellant and the Tribunal with its Statement of Case by 30 October 2014.

(4) Not later than 11 November 2014 each both parties shall provide the other party and the Tribunal with a list of documents on which they seek to rely in connection with the appeal.

(5) Not later than 11 November 2014 each party shall provide to the other statements from all witnesses on whose evidence they intend to rely at the hearing and shall notify the Tribunal that they have done so. Such witness statements shall be taken as the evidence in chief of that witness.

(6) Not later than 11 December 2014 both parties shall send or deliver to the Tribunal and each other a statement detailing:

(a) the expected number of attendees at the hearing;

(b) the anticipated duration of the hearing; and

(c) dates to avoid for a hearing between 1 February to 30 April 2015.

(7) The parties shall endeavour to agree and prepare a paginated and bound bundle comprising of all documents referred to in the list of documents provided by the parties in accordance with direction 4, above, the Notice of Appeal, Statement of Case and the witness statements provided as directed above.

(8) Not later than 14 days before the hearing both parties shall send or deliver their skeleton argument (including details and copies of any legislation and authorities) to each other and the Tribunal.

(9) The appellant shall provide the Tribunal with three clean copies of the bundle produced in accordance with direction 5, above, by 09:30 of the (first) morning of the hearing.

(10) At the hearing any party seeking to rely on a witness statement may, with the permission of the Tribunal, call that witness to answer supplemental questions and must call that witness to be available for cross-examination (unless notified in advance that the witness' evidence is not in dispute.

(11) Either party may apply at any time for these Directions to be amended, suspended or set aside, or for further directions.

Right to Apply for Permission to Appeal

38. 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.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 20 August 2014