

A load of junk

Nick Davies comments on the recent case of Rohit Kotecha v HMRC, in which an application to reinstate an appeal was successful despite the application being made late

We were delighted to obtain Tribunal's decision in this recent case, heard in February, in which we were seeking the reinstatement of an appeal that had been struck out. Actually, we were doubly up against it because, as well as the strike out of the appeal, the application to reinstate it had been made 56 days late.

Thankfully, Judge Popplewell was able to find in favour of the taxpayer on both elements of the case, but the very fact that it had to be heard at Tribunal in the first place offers some salutary lessons for all tax practitioners which will be covered later in this article.

The facts

We were brought into this case and appointed as Appellant's Representatives at a very late stage in the proceedings once the taxpayer's accountant had realised that he was probably out of his depth. By that point significant and potentially fatal damage to the case had already been done.

The substantive matter related to whether Business Property Relief applied for Inheritance Tax purposes. HMRC had denied the relief (although, in our view, the matter had not been properly investigated, and that will be our next battle) and the matter was appealed to the FTT by the taxpayer's accountant. Unfortunately, it was at this point that the problems began.

The matter was appealed into Tribunal on 25 June 2023. On 17 August 2023 Tribunal allocated the case to the complex category, and it was at this point that the first mistake was made. Although the accountant confirmed receipt of Tribunal's letter, he did not notify his client of the implications of the complex category. These implications are rather serious. Essentially, unless both parties agree to opt out, costs of the winner are at stake for the unsuccessful party. Not only did the accountant fail to notify the taxpayer of this, he also failed to pursue an opt out from the costs regime.

At this point, matters took a significant turn for the worse. The accountancy practice had acquired further server capacity for their email system and, as a result of this, all emails from Tribunal and HMRC went into the accountant's junk folder from 9 October 2023 onwards. Emails from Tribunal were also copied to two junior staff members, but they didn't understand what they were looking at, and didn't see fit to notify the accountant, assuming that he would be dealing with the matter. The Judge accepted that this was reasonable on their part.

The results of this were catastrophic. The Appellant failed to comply with any Tribunal directions and also failed to respond to an Unless Order warning of the imminent strike out of the appeal. Inevitably, on 9 April 2024, the appeal was struck out. The Appellant then had 28 days to seek reinstatement but, again, no representations were made.

And that was that for Mr Kotecha's appeal, until 2 July 2024, when Tribunal wrote to the accountant seeking representations on a costs order that had been submitted by HMRC in

May. Apparently, on this occasion, the junior staff who were being copied into Tribunal emails did realise that something was probably amiss, given that costs were being mentioned, and brought the matter to the accountant's attention. This was the point at which it was discovered that something had been amiss with the email system, and we then were appointed with a veritable mountain to climb.

The application of Martland

The Upper Tribunal's guidance in Martland is summarised as follows: "When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton v White."

We take the key words here to be "on balance". When considering the three-stage approach we realised that previous case law was against us in terms of whether the 56-day delay in making the application for reinstatement was serious and significant. We accepted that it was both. There is no point in taking on an argument that we weren't going to win.

However, we were certainly of the mind that consideration of the other stages might be able to rebalance the position in our favour. Moving on to the second stage, it is for Tribunal to establish the reason (or reasons) for the default. This was very straightforward. The email difficulties meant that it was simply not possible for Mr Ved (the appellant's representative) to comply with Tribunal applications or to submit the reinstatement application in time as he was unaware of those Directions and did not know that the appeal had been struck out.

There was a significant hurdle for us to get over here. Firstly, the accountant had admitted to receiving a letter from HMRC dated 22 September 2023, which was prior to the commencement of the email problem. This letter, amongst other things, advised that HMRC had a deadline of 1 November 2023 to file their Statement of Case. Anyone with any experience of Tribunal proceedings (and the accountant claimed to have some, albeit limited, experience) would surely have diarised that date, not least because they would want to know if HMRC had failed to comply with the direction. Had he done so, then the non-receipt of the Statement of Case would undoubtedly have led him to discover the email situation. Unfortunately, the accountant failed to make a diary entry.

The accountant turned out to be a far better witness than a Tribunal representative, and submitted evidence that at the time he was involved in a very contentious and stressful personal situation with a law firm, and this was taking up all of his focus. This was also directly responsible for the email failure, as the sheer size of email attachments being sent and received at the time is what clogged up the firm's email server.

Fortuitously, once the email problem was discovered, he had the foresight to take a photograph of his junk folder showing all of the unopened emails from Tribunal and HMRC. Our ability to present this photograph as evidence was critical to persuading the Judge of the legitimacy of the problem.

Having dealt with the reasons for the delay, we moved on to the third stage of Martland, which is the evaluation of "all the circumstances of the case". In our view, we had some strong arguments:

1. Was it reasonable for the taxpayer to rely on his accountant? The test here is whether we were able to show that Mr Kotecha did whatever any reasonable taxpayer in his situation

would have done. Mr Kotecha is a 70-year-old pharmacist with no knowledge of the tax system. He had relied on the accountant to look after his affairs for over 20 years and had never previously had any problems. That being the case, we submitted that it was entirely reasonable for him to consider that he had appointed a suitably qualified professional to represent him, and that the accountant would contact him if he had to do anything. All correspondence was being sent to (but not received by) the accountant, and Mr Kotecha wasn't copied in.

2. What were the respective prejudices to the parties of the appeal being reinstated or not? We accepted that HMRC would like finality in the matter, but made the point that the restatement of the appeal would merely delay that finality. On the other hand, the prejudice to Mr Kotecha was considerable. He would be prevented from arguing his case that a considerable sum of money (over £500,000) was not due. HMRC argued that Mr Kotecha was well able to afford it given the overall value of his late wife's estate, but this ignored the fact that Mr Kotecha's wealth isn't liquid. He would have needed to sell property quickly to satisfy the tax charge. And, in any case, half a million pounds is a significant amount of money to anybody, and we took exception to HMRC seeking to belittle its value to Mr Kotecha.

The FTT decision

We were not entirely confident of winning this case but, especially given the amount of money at stake and our view that Mr Kotecha was a victim of an unfortunate set of circumstances outside of his control, it wasn't an option for him to not at least try. Added to this our reservations about the manner in which the case was handled by HMRC prior to the Tribunal listing, rushing to issue a view of the matter without properly investigating, we are delighted that both matters were found in his favour.

Critically, the Judge declared himself satisfied that the email failings were as we said they were, thanks to the photographic evidence that we were able to provide. He also made the point that, in his view, "this is not a seriously culpable failing. It is simply one of those IT issues which, horror of horrors, might have happened to anyone." Quite, and there but for the grace of God...

On the point of the reasonableness or otherwise of Mr Kotecha's failure to seek updates from his accountant, the Judge was not sure that it would have had any impact on the failures to comply even if he had. The reason for this is that the accountant would simply have reported back that he had heard nothing from either HMRC or Tribunal, and Mr Kotecha would have had no reason to doubt this. The failures would therefore have continued unchecked.

So, in his balancing exercise, and bearing in mind his comments that, given the specific circumstances, this had not been "a seriously culpable failing", the Judge was of the opinion that if the appeal wasn't reinstated this would involve imposing a sanction on the taxpayer that would be disproportionate to the seriousness of the conduct that led to the failures. In making this statement, he cited the comment in BMW Shipping Agents that "considerations of proportionality remain at the heart of the overriding objective set out in Rule 2 of the FTT Rules."

Lessons to be learned

There are a number of takeaways from this case. In our view, the biggest is that tax advisors, no matter how experienced, should think very carefully before taking the decision to represent a client in Tribunal. It is very specialised work, and technical excellence in taxation does not qualify someone to do it. We consider the accountant in this case to have been very fortunate. He maybe couldn't have done too much to avoid the non receipt of his emails, but he was well aware of the deadline for the submission of HMRC's Statement of Case. In our view, failing to diarise that was a failing that nobody with experience and understanding of Tribunal procedures would ever make. It really was a schoolboy error, and he was fortunate that there were other aspects to the case that enabled us to succeed, albeit with a struggle.

It is also very unfortunate that the accountant either didn't recognise the serious implications of a case being allocated to the complex category or simply failed to mention it to his client. Again, a schoolboy error on a very fundamental point for anyone doing Tribunal work.

But I would suggest the most obvious lesson is to check your junk folders!

- Nick Davies is the founder of NHD Tax Solutions Ltd