[2018] UKFTT 644 (TC)

TC06792

Appeal number: TC/2011/05366

PROECURE – scope of Tribunal's jurisdiction – whether an appealable decision – no – whether the Tribunal could revisit a previous FTT decision – no – whether a section 54 TMA agreement can be re-opened – no – whether the Tribunal has jurisdiction to consider statutory interest – no – application for strike-out granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

GHOLLAM HUSSAYN TAHMOSYBAYAT (known as Thomas Bayat) — **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at North Shields on Monday 30 July 2018

The Appellant in person

Ms C Cowan, Officer of HMRC, for the Respondents

DECISION

The core issue

1. This was a hearing in respect of the application made by the respondents ("HMRC") on 23 August 2017 to strike out this appeal pursuant to Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") for want of jurisdiction.

2. The Notice of Appeal dated 19 January 2017 lodged by the appellant stated that:

   (a) the decision he was appealing was dated 10 June 2014,

   (b) the conclusion of the review was dated 12 January 2017,

   (c) the original appeal to HMRC was dated 8 November 2007, and

   (d) the quantum was £21,602.70

3. The decision dated 10 June 2014 was in fact a Tribunal Decision ("the Decision") in an appeal involving the appellant and his company and its neutral citation is 2014 UKFTT 571 (TC).

4. The "review" decision was attached to the Notice of Appeal and was a letter from an HMRC Complaints Officer.

5. The quantum is a reference to an HMRC Debt Collection Statement of Account issued when pursuing payment of £21,602.70.

6. HMRC state that there is no appealable decision and therefore the issue is whether there is a valid appeal; hence the application which was vigorously opposed.

The Tribunal's jurisdiction and the relevant law

7. Section 3 of the Tribunals Courts and Enforcement Act 2007 ("TCEA 2007") provides:

> "There is to be a tribunal, known as the First-tier Tribunal, for the purposes of exercising the functions conferred on it under or by virtue of this Act or any other Act."

8. Section 31 Taxes Management Act 1970 ("TMA") reads:

> "**31 Appeals: right of appeal**
>
> (1) An appeal may be brought against —
>
> (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
>
> (b) any conclusion stated or amendment made by Closure Notice under sections 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),

(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or

(d) any assessment to tax which is not a self-assessment …".

9. The relevant provisions of Section 50 TMA read:

"(6) If, on an appeal notified to the tribunal, the tribunal decides:

(a) that … the appellant is overcharged by self-assessment;

…

(c) that the appellant is overcharged by an assessment other than a self-assessment,

The assessment or amount shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

…

(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.

(11) But subsection (10) is subject to …

(b) Tribunal Procedure Rules."

10. The relevant provisions of Section 54 TMA read:

"(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had to determine the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement …".

11. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") reads:-

"**20.—Starting appeal proceedings**

[(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.][1]

(2) The notice of appeal must include—

[1] Substituted by Tribunal Procedure (Amendment No.3) Rules 2010/253 rule 6(5)(a) (November 29, 2010)

(a) the name and address of the appellant;
(b) the name and address of the appellant's representative (if any);
(c) an address where documents for the appellant may be sent or delivered;
(d) details of the decision appealed against;
(e) the result the appellant is seeking; and
(f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

….".

The Notice of Appeal

12. I have identified at paragraphs 2 to 5 above the decisions and amount that the appellant alleges are the subject matter of this appeal.

13. He specified three grounds of appeal, which can be briefly summarised as:-

(a) The original Tribunal had not had all the information that was required and, in particular, had not had sight of the Agreement entered into by the parties before the hearing (see paragraph 16 below).

(b) The 2007 Capital Gains Tax ("CGT") and interest charges should be reviewed and specifically he should be granted principal private residence relief ("PPR") and enhanced expenditure for CGT thereby giving rise to a repayment of CGT. Interest charges should therefore be removed.

(c) There should be relief for mortgage loan interest.

He also sought an order or costs in respect of the 2014 appeal.

14. The letter from HMRC's Complaints Department, which was attached to the Notice of Appeal, stated that:

(a) The appellant was essentially asking if HMRC will re-open settled appeals via the complaints process and that is not possible.

(b) The appellant had not appealed the Decision. The legal process had been exhausted.

(c) He was referred to the Adjudicator's Office.

Correspondence between the parties

15. On 16 February 2017, the Tribunal wrote to the appellant asking what the purpose of the Notice of Appeal was since the matter had been decided three years previously.

16. The appellant sought an extension of time in order to speak with HMRC and that was granted. HMRC wrote to the appellant on 28 March 2018 confirming that:

(a) An Agreement ("the Section 54 Agreement") had been signed by both parties on 12 March 2014 immediately before the Tribunal hearing.

(b) The appellant's representative had emailed HMRC on 27 March 2014 confirming that the figures were accepted.

(c) The tax returns had then been amended electronically on 24 July 2014.

(d) The appeal was therefore determined under Section 54 Taxes Management Act 1970 ("TMA") on 24 July 2014.

17. On 19 April 2017, the appellant's current representative wrote to the Tribunal arguing that the appeal was against what he described as "additional assessments to capital gains tax". The appeal was on the basis that the Section 54 Agreement was not valid, it having been entered into under a misunderstanding.

18. That was treated as a submission and HMRC were invited to respond. They did so on 31 May 2017. In particular they pointed out that the appellant had had 30 days in which to repudiate or resile from the Section 54 Agreement which was made on 12 March 2014. He had not.

19. On 7 August 2017, the Tribunal invited the appellant to inform the parties which decision he sought to appeal and the appellant did not respond.

20. On 23 August 2017, HMRC lodged the application for strike out.

21. On 4 September 2017, the appellant responded stating that he had not received copies of the correspondence and requesting an extension of time. The appellant contended that the Tribunal had jurisdiction to consider the Self-Assessment Statement of Account for tax, interest and penalties and it was that that was being appealed.

22. On 26 September 2017, the appellant lodged a nine page letter setting out grounds of appeal. The appellant again reiterated that he was appealing the Statement of Account. He also wished to appeal the interest and penalty charges shown in that Statement of Account. He sought relief for a capital loss on shares in 2005 and he also sought mortgage interest relief. Both of the latter allegedly formed part of the enquiry which HMRC had opened into his affairs but had not been included in the matters before the previous Tribunal or the Section 54 Agreement.

23. He concluded by stating that he summarised the four grounds on which he was "… seeking Tribunal Review of the appeal and agreement made":

(a) He had had a legitimate expectation that HMRC would have considered the loss claims.

(b) HMRC's refusal to recognise the capital loss claim, loan interest payment and expenditure of CGT made in 2002/03 and 2004/05 as per the agreed returns and HMRC's manner of so doing was so unfair as to amount to an abuse of power.

(c) The refusal by HMRC to recognise the claims was a breach of their duty to treat taxpayers fairly and consistently.

(d) The opening of and/or maintenance of the enquiry for 15 years until 2017 was unlawful and based on an unlawful use of statutory power.

24. HMRC responded on 27 November 2017, not having received the said letter, reiterating their application for strike out.

Factual Background

25. On 31 May 2006, HMRC opened enquiries into the appellant's tax affairs for the years ended 5 April 2003 to 5 April 2005 inclusive under the provisions of Section 9A TMA. HMRC concluded that there were omissions from those returns with taxable income and capital gains arising in earlier years relating to car and car fuel benefits, income from property and a capital gain on the disposal of a property.

26. On 10 October 2007, HMRC issued Closure Notices for the years 2002/03 to 2004/05 inclusive as well as Discovery Assessments for the years ended 5 April 2001 and 5 April 2002.

27. Those Assessments, Closure Notices and the consequential penalty determination were subsequently appealed.

28. That appeal was heard on 12 and 13 March 2014 together with an appeal for the appellant's company Isocom Ltd under reference TC/2010/06875. That Tribunal, consisting of Judge Blewitt and Mr Brown, was informed by the parties that as far as the appellant was concerned, the issues in respect of income from property and capital gains had been agreed and the only issue remaining for the Tribunal to determine was that in relation to car and car fuel benefits and the consequential penalties (paragraph 5 of the Decision).

29. The parties signed the handwritten Section 54 Agreement on 12 March 2014. On 19 March 2014, HMRC wrote to the appellant with a typewritten version of the Section 54 Agreement setting out the rental income for each of the years in question and the additional tax and penalties due, the rents declared and the revised rents and confirmed that the penalties were reduced to 15% with an additional abatement of 5% under each heading.

30. As far as Capital Gains Tax was concerned it stated:

> "Capital Gain
>
> The original figures from the SA Return are to stand.
>
> Claim to additional expenditure and ppr relief are withdrawn".

31. On 27 March 2014, HMRC received an email from the appellant's representative confirming that the revised figures were accepted.

32. On 31 March 2014, in response to a request from Judge Blewitt, the confirmed figures in the Section 54 TMA Agreement were lodged with the Tribunal and that included the statement about capital gains described in the preceding paragraph.

33. On 10 June 2014 the Tribunal issued the Decision. It was not appealed.

34. On 24 July 2014 the tax returns, assessments and penalties were all revised, in line with the Section 54 Agreement and the appeals closed.

35. On 16 October 2014, the appellant was told he would receive intimation of the balances due and in November 2014 he wrote to HMRC appealing interest and penalties.

Discussion

36. The appellant vigorously opposed HMRC's application and produced a comprehensive Skeleton Argument and Bundle. He had clearly expended considerable time and energy on researching the position. He is very frustrated by his extensive contact with HMRC and what he considers to be lack of appropriate progress to address his concerns.

37. At the outset I endeavoured to explain the limitations of the Tribunal's jurisdiction. I referred the appellant to *HMRC v Hok Ltd*[2] where paragraph 36 reads:-

> "It is important to bear in mind how the First-tier Tribunal came into being. It was created by s.3(1) of the Tribunals, Courts and Enforcement Act 2007, 'for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act'. It follows that its jurisdiction is derived wholly from statute … it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair."

38. At paragraph 57 it goes on to say:-

> "… The clear inference is that it [Parliament] intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this [Upper] Tribunal."

39. It follows that I have no jurisdiction to consider the numerous assertions that the appellant has been unfairly treated or that HMRC have abused their powers.

40. In summary, the Tribunal can only consider an appealable decision.

41. What is an appealable decision? In this context, Section 31 TMA sets out what amounts to an appealable decision. In summary, those are amendments of self-assessment, conclusions stated in or amendments made by a Closure Notice, amendments to partnership returns and any assessment to tax which is not a self-assessment.

42. The Statement of Account is emphatically not a decision issued under any enactment and nor is the January 2017 letter. They both simply set out the position at a given date.

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[2] 2012 UKUT 363 (TCC)

43. The appellant has latterly asked that the interest charges form part of the subject matter of this appeal, they having been itemised in the Statement(s) of Account (there are several in addition to that referenced in the Notice of Appeal). HMRC correctly state that this Tribunal has no jurisdiction in relation to interest charges. Judge Herrington in *HMRC v Gretton*[3] stated at paragraph 13 that he accepted HMRC's submissions which read:-

> "12. HMRC submit that the First-tier Tribunal did not have the jurisdiction to decide that no interest would be payable. They referred to section 86 of the TMA which provides:-
>
> '(1). The following, namely:
>
> (a) any amount on account of income which becomes due and payable in accordance with section 59A(2) of this Act, and
>
> (b) any income tax or capital gains tax which becomes due and payable in accordance with sections 55 or 59B of this Act,
>
> shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the relevant date until payment.'
>
> HMRC submit that the word 'shall' is used to indicate that there is no discretion as to whether interest is applied to any amount of tax paid after the due date and this is further reflected in the fact that the statute provides no right of appeal against the application of interest in such cases."

I agree.

44. I certainly have no jurisdiction to consider costs in the earlier appeal. In any event Judge Blewitt decided that matter at paragraph 80 of the Decision.

45. I heard oral argument that the appellant considered that the critical matter was the extent of the Capital Gains. That is explicitly encompassed by the Section 54 Agreement and the Tribunal had sight of that prior to issuing the Decision. I observe that it clearly excludes PPR, which is now sought.

46. It is not within my remit but, in the course of the hearing the appellant indicated that correspondence with the Adjudicator's office had identified that an amended self-assessment return relating to CGT had been lodged with HMRC. He argued that when amending the returns etc on 24 July 2014 that had not been incorporated.

47. Ms Cowan undertook to instigate enquiries. She did and the outcome is that only an unsigned and undated return was included in a Bundle sent to HMRC prior to a meeting on 17 January 2017 which obviously was years after the Section 54 Agreement.

48. There is no appealable decision in regard to CGT before me. I have no jurisdiction in that regard.

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[3] 2012 UKUT 261 (TCC)

49. The appellant did not appeal the Decision. Similarly he did not exercise his right to resile from the Section 54 Agreement within 30 days.

50. In plain English where parties come to a Section 54 Agreement about any issue that is included in an appeal, then that Agreement is treated as being as final as any decision of the Tribunal.

51. By agreement, as Judge Blewitt records in the Decision, the only matters which came to that Tribunal, and on which the appellant was successful, were the car and fuel benefits and relevant penalties. All of the other matters were settled by the binding Section 54 Agreement at that time. The appellant was represented at that time. Therefore, although the Section 54 Agreement referred only to certain items, the other issues to which the appellant now refers, such as mortgage interest relief or capital losses must either have been "dropped" or conceded in the course of the enquiry or were not pursued in the Grounds of Appeal to that Tribunal. The Decision does not refer to them.

52. What do I mean by "all other matters"? That is quite straightforward. The appellant appealed the Closure Notices, Discovery Assessments and Amendments. Therefore all matters in those years of assessment were capable of being considered by the previous Tribunal in terms of section 50(6) TMA, if pursued by the appellant at that time.

53. They certainly cannot form part of this appeal as there is no decision on those matters before me.

54. The combined impact of the unappealed Tribunal decision and the Section 54 Agreement is that those matters are finally determined; in other words, closed. What that means is that neither I nor any other First-tier Tribunal can revisit either the Decision or the amendments which followed from the Closure Notices and Discovery Assessments.

55. Lastly, the appellant relies on section 50 TMA to say that this Tribunal has wide powers. It does but only where there is a valid appeal of an appealable decision. There are no appealable decisions before this Tribunal. The Statement of Account(s), the interest charges and the letter from HMRC are not appealable decisions.

56. Accordingly, I must grant HMRC's application.

57. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 31 October 2018