[2019] UKFTT 487 (TC)

INCOME TAX – appeal against late filing penalties and Revenue determinations – penalties since cancelled by HMRC - application by HMRC for appeals to be struck out for absence of jurisdiction – application granted and appeals struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07290

Appeal number: TC/2019/00844

BETWEEN

PAUL PARVATAN **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
JANET WILKINS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 2 July 2019

The Appellant did not attend and was not represented

Joshua Gyasi, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Parvatan gave Notice of appeal to the Tribunal on 10 February 2019 in which he stated that the appeal was against penalties of £10,798.50 for late filing of self-assessment returns. The appeal to HMRC was made late.

2. HMRC applied to have Mr Parvatan's appeal struck out on the basis that the Tribunal does not have jurisdiction in relation to the proceedings. This was made on the grounds that:

(1) the penalties of £6,100 against which Mr Parvatan had appealed have been cancelled; and

(2) the determinations for the tax years 2005-2006, 2006-2007 and 2007-2008 (which were issued in accordance with s28C Taxes Management Act 1970 ("TMA 1970")) are not appealable decisions under s31 TMA 1970.

3. This hearing was listed to determine the matter, including:

(1) the question of jurisdiction;

(2) if we conclude we have jurisdiction, whether permission should be given for appeals to be made late; and

(3) the substantive matters in the grounds for appeal

4. Mr Parvatan did not attend the hearing and was not represented. We reviewed the Tribunal file and were satisfied that he had been informed of the date and location of the hearing. There was no evidence that a request for postponement had been made, and the file showed that he had been informed that he must assume that the hearing of the appeal is going ahead unless he is notified otherwise. We were satisfied that the postal address and email address being used by the Tribunal for communications were those that had been provided by Mr Parvatan in his Notice of appeal to the Tribunal. Accordingly, and having regard to Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") we concluded that it was in the interests of justice that the hearing should proceed.

5. The question of jurisdiction must necessarily be addressed first. However, we have recited some of the relevant background so far as necessary to explain the matter.

BACKGROUND

6. HMRC produced a copy of their computer records headed "Tax year summary" which showed:

(1) for the tax year 2005-2006, an issue date of 6 April 2006, with a tax return due on 31 January 2007, received on 14 January 2013,

(2) for the tax year 2006-2007, an issue date of 6 April 2007, with a tax return due on 31 January 2008 and received on 14 January 2013, and

(3) for the tax year 2007-2008, an issue date of 6 April 2008, a paper filing due date of 31 October 2008 and an online filing due date of 31 January 2009 and received on 14 January 2013.

7. These records do not specify what was issued on 6 April each year, but this was presumably the notice to file.

8. HMRC state that they have made determinations under s28C TMA 1970 against Mr Parvatan for the tax years 2005-2006, 2006-2007 and 2007-2008. We were shown a copy of the Self Assessment Statement which included:

(1) "Determination" for tax year 2005-2006 of £1,000 created on 7 August 2007,

(2) "1st payment on account" of £500 due for tax year 2006-2007 created on 7 August 2007, and "2nd payment on account" of £500 due for tax year 2006-2007 created on 7 August 2007, and

(3) "Determination" for tax year 2007-2008 of £1,000 created on 24 October 2011.

9. That Self Assessment Statement also shows that various late filing penalties were imposed for the tax years 2010-2011, 2012-2013, 2013-2014 and 2014-2015. There was no evidence available as to whether they had been properly assessed and notified, but the Statement also shows that all of these penalties were cancelled on 28 February 2019.

10. HMRC's address history shows that from 7 February 2006 to 19 December 2017 Mr Parvatan's address was recorded as 166 Inchmery Road. With effect from 20 December 2017 that was changed to the taxpayer's current address as shown on the Tribunal file. As Mr Parvatan did not attend the hearing we do not know whether he continued to reside at 166 Inchmery Road until that date, or if he lived at any other addresses in this period and had failed to update HMRC.

11. Mr Parvatan has stated in his witness statement that he only became aware of the debt when an officer from HMRC attended his house and presented him with a bill giving him 14 days to pay. We do not know when this was.

12. On 15 November 2018 Mr Parvatan wrote to HMRC explaining that he had no taxable income for the tax years in question and therefore a self-assessment submission was not necessary. He re-sent this letter to HMRC on 7 January 2019.

13. On 11 January 2019 HMRC wrote to Mr Parvatan in response to his appeal against the penalties charged for the tax years 2010-2011, 2012-2013, 2013-2014 and 2014-2015. They explained that the appeal to HMRC was made outside the statutory 30 day time limit and refused to accept that late appeal.

14. HMRC's SA Notes contain two entries for 28 February 2019 which refer to a letter received from Mr Parvatan on 14 January 2019, with a copy of a letter from him dated 15 November 2018 which HMRC had not received, stating that he had no taxable income from 2010-2011 to 2014-2015 as he was at home looking after his daughter. He had not started back at work until January 2019. His penalty appeal was accepted for the tax years 2010-2011, 2012-2013, 2013-2014 and 2014-2015.

RELEVANT LEGISLATION

15. Part IV TMA 1970 is headed Assessment and Claims. Sections 28A and 28B deal with the closure of an enquiry into a tax return and consequent amendments to the return; s28C permits HMRC to make a "determination" where no return has been delivered; s29 permits the making of assessments where HMRC discover that tax has not been assessed; s30A and s30B deal with "assessing procedure" and partnership discovery assessments and s31 to s31B with appeals. Later sections deal with claims, errors and time limits.

16. Section 28C, so far as relevant, provides that:

> "(1) This section applies where –
>
> (a) a notice has been given to any person under section 8 or 8A of this Act (the relevant section),
>
> and
>
> (b) the required return is not delivered on or before the filing date.

(1A) An officer of the Board may make a determination of the following amounts to the best of his information and belief, namely –

(a) the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment, and

(b) the amount which is payable by him by way of income tax for that year;

and subsection (1AA) of section 8 … applies for the purposes of this subsection as it applies for the purposes of subsection (1) of that section.

(2) Notice of any determination under this section shall be served on the person in respect of whom it is made and shall state the date on which it is issued.

(3) Until such time (if any) as it is superseded by a self-assessment made under section 9 of this Act … on the basis of information contained in a return under the relevant section, a determination under this section shall have effect for the purposes of Parts VA, VI, IX and XI of this Act as if it were such a self-assessment.

(4) Where –

(a) proceedings have been commenced for the recovery of any tax charged by a determination under this section; and

(b) before those proceedings are concluded, the determination is superseded by such a self-assessment as is mentioned in subsection (3) above,

those proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid.

(5) No determination under this section, and no self-assessment superseding such a determination, shall be made otherwise than –

(a) before the end of the period of five years beginning with the filing date; or

(b) in the case of such a self-assessment, before the end of the period of twelve months beginning with the date of the determination.

(6) In this section "the filing date" means the day mentioned in section 8(1A) … of this Act."

17. Section 31provides:

"(1) An appeal may be brought against –

(a) any amendment to a self-assessment under section 9C …

(b) any conclusion stated or amendment made by a closure notice …

(c) any amendment to a partnership return …

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

…

(3) A determination under section 12AE of this Act (choice between different cases of Schedule D) may not be questioned on an appeal under this section.

(4) This section has effect subject to any express provision in the Taxes Acts, including in particular any provision making one kind of assessment conclusive in an appeal against another kind of assessment."

18. Section 197 Finance Act 1994 ("FA 1994"), which inserted s 28C into TMA 1970 , is as follows:

> "**197 Construction of certain references**
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> (1) In the Tax Acts and the Gains Tax Acts, any reference (however expressed) to a person being assessed to tax, or being charged to tax by an assessment, shall be construed as including a reference to his being so assessed, or being so charged—
>
> (a) by a self-assessment under section 9 or 11AA of the Management Act , or
>
> (b) by a determination under section 28C, 28D or 28E of that Act (which, until superseded by such a self-assessment, has effect as if it were one).
>
> (2) In this section "the Gains Tax Acts" means the Taxation of Chargeable Gains Act 1992 and all other enactments relating to capital gains tax."

19. Section 831(1)(b) Income and Corporation Taxes Act 1988 ("ICTA 1988") contains the definition of the "Income Tax Acts ":

> "(1) In this Act, except so far as the context otherwise requires—
>
> (a) …
>
> (b) "the Income Tax Acts " means the enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax."

20. Section 831(2) ICTA 1988 sets out the definition of the "Tax Acts":

> "(2) In this Act "the Tax Acts", except so far as the context otherwise requires, means this Act and all other provisions of the Income Tax Acts and the Corporation Tax Acts ."

21. Section 118(1) TMA 1970 includes the definition of "the Taxes Acts ":

> "(1) In this Act, unless the context otherwise requires—
>
> …
>
> "the Taxes Acts " means this Act and—
>
> (a) the Tax Acts,
>
> (b) the Taxation of Chargeable Gains Act 1992 and all other enactments relating to capital gains tax … "

22. Section 199 FA 1994 contains a definition of "the Management Act ":

> "**199 Interpretation and commencement of Chapter III**
>
> (1) In this Chapter "the Management Act" means the Taxes Management Act 1970 ."

23. Rule 8 (2) (a) of the Tribunal Rules provides:

> "(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
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> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them."

DISCUSSION

24. On the basis that the penalties issued for the tax years 2010-2011, 2012-2013, 2013-2014 and 2014-2015 have been cancelled by HMRC, we proceeded on the basis that Mr Parvatan was seeking to appeal against the determinations made by HMRC. HMRC have applied to strike out the appeal on the basis that the determinations are not appealable decisions and are therefore not within the jurisdiction of the Tribunal.

25. If the Tribunal does not have jurisdiction in relation to Mr Parvatan's appeal against the determinations then, pursuant to Rule 8(2)(a) we must strike out this appeal.

26. Section 31(1) TMA 1970 sets out the matters against which an appeal may be brought. It is clear that the determinations are not within any of s31(1)(a) to (c). The question arises as to whether they constitute "any assessment to tax which is not a self-assessment" for the purposes of s31(1)(d). This was considered by the Upper Tribunal in *Bartram v HMRC* [2012] UKUT 184 (TCC) where it was held that no appeal lies to the Tribunal against a determination made under s28C. The Upper Tribunal's reasoning was as follows:

> "53. There are accordingly two reasons why s 31(1)(d) TMA 1970 does not give rise to a right of appeal against a determination. The first is that s 197(1) FA 1994 does not (despite the assumption to the contrary made by Mr Bartram's former advisers) define a determination as an "assessment"; it merely equates the process of being made subject to a determination to the corresponding process of the taxpayer "being assessed to tax" or "being charged to tax by an assessment". The second reason is that s 197(1) FA 1994 does not apply to TMA 1970, because TMA 1970 does not come within the definition of "the Tax Acts".
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> 54. I do not consider it to be a coincidence that both these reasons lead to the same conclusion. The scheme of the legislation is that the Tax Acts are concerned with a taxpayer "being assessed to tax" in accordance with the legislation contained in the Tax Acts. What constitutes "an assessment" is a matter for separate legislation, as contained in "the Management Act". I therefore agree with the conclusion of the FTT at paragraph 27 of its decision, and with Miss Turkie's submissions as recorded in the second and third sentences of paragraph 27 above.
>
> 55. The above conclusion brings the focus back to s 28C (3) TMA 1970 . Until superseded by a self-assessment made under s 9 TMA 1970, a determination has effect for the stated purposes as if it were a self-assessment. The parts of TMA 1970 referred to in s 28C (3) are payment of tax, collection and recovery, interest on overdue tax, and "miscellaneous and supplemental". Other than the latter, these Parts are dealing with enforcement of liability to tax; "miscellaneous and supplemental" covers a range of mechanical matters, including the definition section, s 118 TMA 1970. An unchallenged determination enables HMRC to use the provisions for the purpose of enforcing the liability created by that determination.
>
> 56. There appears to be nothing else in TMA 1970 or elsewhere to support the existence of a right of appeal against a determination. Further, and consistently with the effect of s 28C TMA 1970, s 50(6) -(11) TMA 1970 (which falls within Part V – "Appeals and Other Proceedings") refers in all cases to "self-assessment" or "assessment" and not to "determination".
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> 57. At paragraphs 28 to 33 of its decision, the FTT considered the scheme of s 28C TMA 1970, and concluded that the procedure envisaged by s 28C required no right to appeal against the amounts in any determination. It then considered the question what remedy a taxpayer has if a determination was

> purportedly issued where the conditions for its issue were not fulfilled. I agree with the conclusions set out by the FTT in those paragraphs.
>
> …
>
> 60. I agree with the FTT's conclusion at paragraph 35 of its decision that no appeal lies to the FTT against a determination made under s 28C TMA 1970."

27. We agree with this reasoning and conclusion, and in any event we are bound by this decision of the Upper Tribunal. Accordingly, we strike out Mr Parvatan's appeal in its entirety, on the basis that the only matter now covered by it relates to the appeal against the determinations.

CONCLUSION

28. The penalties for late filing of self-assessment returns for the tax years 2010-2011, 2012-2013, 2013-2014 and 2014-2015 have been cancelled by HMRC.

29. Mr Parvatan's appeal against the determinations made by HMRC for the tax years 2005-2006, 2006-2007 and 2007-2008 are struck out.

ALTERNATIVE REMEDIES?

30. This is not to say that Mr Parvatan does not have any remedies available to him in respect of the Revenue determinations.

31. We would note that he could seek to challenge their validity as a defence to any debt recovery actions that may be brought and there may be a possibility of bringing a claim in the High Court for judicial review.

32. Other options may include making a claim under paragraph 3A of Schedule 1AB TMA 1970 for the determinations to be discharged (one of the conditions of which is that it would be unconscionable for HMRC to collect (or not to repay) the amount in question) and/or raising the matter with the Revenue Adjudicator. The latter two options may offer him a forum to raise questions as to whether HMRC gave notice to him under s8 or s8A TMA 1970 (which is a necessary pre-condition to HMRC making a determination) and whether an officer of the Board did actually make a determination in respect of the tax year 2006-2007 (on the basis that the Self Assessment Statement does not refer to such a determination being made for this year (in contrast to the other two tax years) and simply refers to payments on account being due for this year, the entries for which were created, according to HMRC's records, before the tax return for that year was due to be filed).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 27 July 2019