



TC06918

Appeal number: TC/2017/07293

*PROCEDURE – strike out application – arguments of legitimate expectation
– whether tribunal has jurisdiction – no – appeal struck out*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SAXTON 4 X 4 LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public in London on 6 September 2018

**Mr Austin and Mr Cripps, directors of the appellant and Mr Reynolds,
accountant, for the appellant
Mr Elliott, Counsel, instructed by the General Counsel and Solicitor to Her
Majesty's Revenue and Customs for the Respondents**

DECISION

Introduction

5 1. This is an application by the Respondents (HMRC) under Rule 8(2)(a) and/or Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chambers Rules) 2009 (the “Tribunal Rules”) to strike out the appellant’s appeal against HMRC’s decision regarding the timing of a tax deduction for a contribution by the appellant to a share incentive plan.

Background

10 2. The appellant established a share incentive plan on 6 June 2009, and the plan was approved by HMRC on 1 July 2009. The appellant subsequently made a contribution to the plan trustees who, on 6 July 2009, used that contribution to acquire shares in the parent company of the appellant.

15 3. The appellant filed a corporation tax return for the accounting period ended 6 July 2009 and apportioned the contribution to the two accounting periods ended 31 December 2008 and 6 July 2009, giving rise to a loss which the appellant claimed to carry back to the accounting periods ended 31 December 2006 and 2007.

20 4. Following enquiries, HMRC issued closure notices amending the appellant’s returns for the accounting periods ended 31 December 2006, 2007 and 2008. The amendments removed the deduction claimed in those periods in relation to the contribution to the share incentive plan and denied the carried back losses.

25 5. The appellant appealed to the Tribunal on 29 September 2017, stating that its grounds of appeal were that HMRC had “provided guidance on the tax treatment of the transaction. HMRC do not wish to be bound by their incorrect guidance”. In particular, an HMRC officer, having consulted with a Head Office specialist, advised that the appellant could rely on the guidance.

30 6. On 22 February 2018, HMRC applied to the Tribunal to strike out the appellant’s appeal on the basis that the Tribunal does not have jurisdiction to consider the sole argument advanced by the appellant, which is based on a breach of legitimate expectation rather than the application of legislation.

Appellant’s submissions

35 7. The appellant did not dispute that HMRC were correct in their interpretation of the legislation. They knew that the legislation had changed and had sought confirmation from HMRC that they could still rely on HMRC’s guidance. HMRC had given that confirmation but now refused to be bound by that guidance.

8. The appellant submitted that the tribunal has power to consider this matter under the overriding powers to deal with cases fairly and justly. They submitted that this was confirmed by Sales J in *Oxfam* [2010] TSC 686:

5 “The tribunal is used to dealing with complex issues of tax law. There is no reason to think that it would not be competent to deal with issues of public law, in so far as they might be relevant to determine the outcome of any appeal” (§69)

9. The appellant submitted that HMRC’s decision to amend the appellant’s tax returns was so unfair as to amount to an abuse of power which, according to *R v IRC, ex p Unilever plc* [1996] STC 681,

15 “is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power”

10. The appellant submitted that the Upper Tribunal in *Hok* [2012] UKUT 363 (TCC) found support in the decision in *Wandsworth v Winder No.1* [1985] AC 461 which held that a county court was entitled to decide a matter on public law grounds.
20 The appellant took the view that the Upper Tribunal had misinterpreted the decision in *Wandsworth v Winder No.1* when, at §52, the Upper Tribunal said that the decision did not assist: the submission was that the Upper Tribunal had interpreted the case as being whether the Council had power to raise rents, which would not be of assistance in *Hok*, rather than whether the County Court had power to quash the Council’s
25 decision.

11. The appellant submitted that the county court powers are similar to those of this Tribunal.

12. In addition, natural justice meant that the First-tier Tribunal should have jurisdiction. The costs of judicial review are prohibitive and so meant that taxpayers
30 cannot contest public law matters.

HMRC’s submissions

13. HMRC outlined the legislation providing a deduction for plan contributions as follows:

35 (1) s989 Corporation Tax Act (CTA) 2009, which applies to accounting periods ending on or after 1 April 2009, provides that a deduction for plan contributions is given in the accounting period in which the “interim period” ends. The “interim period” ends twelve months after the acquisition of the shares by the plan trustees.

40 (2) Accordingly, in this case, the interim period began on 6 July 2009 and ended on 5 July 2010. The interim period therefore ended in the appellant’s 1

July 2010-30 June 2011 accounting period and the deduction is only allowed in that period.

14. HMRC noted that the appellant has never indicated that it disagrees that, on the correct application of the legislation, it was only entitled to a deduction for the contribution to the share incentive plan in its accounting period ended 30 June 2011.

15. HMRC submitted that the appellant's sole argument set out in the grounds of appeal is one of breach of legitimate expectation. Further, when directed by the Tribunal on 16 March 2017 to make representations on HMRC's strike out application, the appellant responded to say that "Unfortunately we do not agree with HMRC's interpretation of this case" and did not provide any explanation or substantive representations as to why it resists HMRC's application for strike out of the appeal.

16. HMRC stated that they do not accept that the appellant has any argument based on legitimate expectation but, regardless, submit that the Tribunal does not have jurisdiction to determine that issue as it is a public law argument:

(1) it is well-established that the First-tier Tax Tribunal does not have an inherent jurisdiction and cannot consider arguments of legitimate expectation in relation to amendments made by a closure notice;

(2) The Upper Tribunal in *Hok* held that public law arguments are not within with the First-tier Tribunal's jurisdiction (at §56):

"[the Tribunals, Courts and Enforcement Act 2007] gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct"

(3) The Upper Tribunal considered the point again in *Abdul Noor* [2013] UKUT 071 (TCC) and reached the same conclusion (§87):

"the [First-tier Tribunal] does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax ... a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the [First-tier Tribunal] has no jurisdiction to determine the disputed issue in the context of an appeal under section 83".

(4) Although *Hok* and *Abdul Noor* concerned VAT, the case of *Always Sheet Metal Ltd* [2017] UKFTT 198 (TC) held that:

"the Tribunal has no jurisdiction to consider the arguments that Mr Hackett is advancing as to estoppel and legitimate expectation. There is no material difference between the right of appeal set out in s31 of TMA 1970 (or paragraph 34(3) of Schedule 18) and that set out in

5 s83(1)(c) of the Value Added Tax Act 1994. All the statutory provisions confer a right of appeal against specified HMRC decisions and none makes any reference to matters other than the statutory provisions dealing with the taxes concerned. If Parliament did not intend s83(1)(c) to give the Tribunal jurisdiction to consider matters other than a person's right to credit under VAT legislation, I see no reason why Parliament could have intended it to consider, on an appeal under s31 of TMA 1970 or paragraph 34(3) of Schedule 18, questions of estoppel and legitimate expectation which go beyond the relevant statutory provisions. If anything, the provisions of s50(6) and s50(7) of TMA 1970 make this even clearer in the context of this appeal than it was in the VAT appeal being considered in *Noor*, as those sections emphasise that the Tribunal's focus should be on the amount of the assessments being made and leave no room for a consideration of whether considerations of legitimate expectation or estoppel prevent HMRC from making the assessments."

17. HMRC therefore submitted that the Tribunal has no jurisdiction to consider arguments of legitimate expectation or other public law arguments in an appeal under s34(3) Schedule 18 Finance Act 1998. Accordingly, the appeal should be struck out under Rule 8(2)(a) on the basis that the Tribunal has no jurisdiction to consider the appellant's ground of appeal. Alternatively, as the Tribunal cannot determine the appeal in the appellant's favour based on that ground, the appellant's argument has no reasonable grounds of success and should be struck out under Rule 8(3)(c).

25 **Discussion**

18. It is clear that there is no dispute between the parties as to the correct application of the legislation in this matter. The dispute is entirely as to public law, whether HMRC should be precluded from applying statutory provisions.

19. The appellant quotes *Oxfam* in support of their argument, but Sales J in that case made it clear (at §80) that he was "departing from a widely held view that the Tribunal's jurisdiction is more limited". The issue in *Oxfam* and the issue here are also very different. In *Oxfam*, the tribunal was required to decide the amount of input tax which Oxfam could recover, a question which, as Sales J said at §63, is clearly within the ambit of s 83(1)(c) of VATA. Here, the question is not whether the deductions can be made but, instead whether HMRC should be precluded from disallowing the deductions in the years claimed by the appellant.

20. The point was considered further in the Upper Tribunal decision in *Hok* which concluded that "That ... is a quite separate question of administration, one which, in accordance with the authorities to which we have already referred, is capable of determination only by way of judicial review and therefore not by the First-tier Tribunal". Further, the Upper Tribunal in *Hok* made it clear that the First-tier Tribunal has only that jurisdiction conferred on it by statute and does not have a judicial review function nor does it have jurisdiction to apply common law principles.

21. The appellant's submission that the Upper Tribunal in *Hok* considered at §52 that *Wandsworth v Winder No.1* provided support for the view that this Tribunal has jurisdiction is not sustainable as, at §52, the Upper Tribunal specifically states that "neither *Wandsworth v Winder* nor ... offers any support to the proposition that the
5 First-tier Tribunal is able to apply ... "sound principles of the common law". The submission in the hearing that the Upper Tribunal had misunderstood the decision in *Wandsworth* is also not sustainable: the court in *Wandsworth* was not deciding whether to quash a Council decision but, instead, whether the Council's decision had the effect which the Council argued that it had, in the context of a contractual dispute.
10 That is a very different issue to the position in *Hok* or, indeed, in this case.

22. The decision in *Hok* is binding on this Tribunal and so I find that this Tribunal does not have jurisdiction to consider the arguments put forward by the appellant in the substantive appeal.

23. Although the appellant did not specifically dispute HMRC's assertion that the
15 decision in *Hok* (and *Abdul Noor*) applied to corporation tax in the same way as VAT, I agree with the decision in *Always Sheet Metal Ltd* that there is no material difference in the rights of appeal and so no room for a consideration in relation to corporation tax of whether considerations of legitimate expectation or estoppel prevent HMRC from making the assessments.

20 **Decision**

24. The appellant's grounds of appeal are solely public law arguments and, as set out above, this Tribunal does not have jurisdiction to consider those arguments. Accordingly, I find that I am required to strike out the proceedings under Rule 8(2)(a) of the Tribunal Rules.

25 25. The appeal is therefore struck out.

26. 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
30 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.

35 **ANNE FAIRPO**
TRIBUNAL JUDGE

RELEASE DATE: 04 JANUARY 2019