Neutral Citation: [2023] UKFTT 00972 (TC)

Case Number: TC08993

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2022/14085

PROCEDURE - withdrawal and cancellation by HMRC of decision under appeal – should appeal be struck-out under Rule 8(2)(a) for lack of jurisdiction – Rasam Gayatri Silks [2010] UKFTT 50 (TC) *applied and* LS & RS v HMRC [2017] UKUT 257 (ACC) *distinguished.*

Judgment date: 9 November 2023

Decided by:

TRIBUNAL JUDGE ALEKSANDER

Between

LEARNA LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the application without a hearing under the provisions of Rule 29(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

DECISION

INTRODUCTION

1. On 23 November 2022, the Appellant filed its appeal against a decision of HMRC that it was not an eligible body (specifically a college of the University of South Wales) for the purposes of Group 6, Schedule 9, VAT Act 1994.

2. On 9 June 2023, HMRC notified the Tribunal that they no longer wished to defend the decision under appeal, and have accordingly withdrawn and cancelled their decision. They notified the Tribunal that the parties were in discussion in order to reach an agreement on how to dispose of the proceedings, and applied that the stay then in force in relation to the appeal be extended.

3. On 28 July 2023, HMRC emailed the Tribunal as follows:

> Unfortunately the parties have been unable to agree on how these proceedings should be concluded.
>
> It is HMRC's position that, given the withdrawal and cancellation of the decision under appeal (notified to the Tribunal on 9 June 2023) there is no longer an extant appealable decision and therefore no longer any issue over which the Tribunal can have jurisdiction. Therefore, the appeal should be struck out in accordance with Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as per *LS & RS v HMRC* [2017] UKUT 257 (ACC)).

4. Rule 17 provides parties with the ability to withdraw the case made by them. However, HMRC has chosen not to withdraw its case under Rule 17, but rather to apply for the appeal to be struck out under Rule 8(2)(a). Rule 8(2)(a) provides that the Tribunal must strike out proceedings if it does not have jurisdiction in relation to them (references in this decision to "Rules" are to the rules of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

5. On 31 July 2023, the Appellant's representative responded as follows:

> We suggested to the Respondents that, by consent and further to Rule 34, we should ask the Tribunal to direct that the appeal is allowed. We consider that the Tribunal has jurisdiction to make such a direction and rely on *Rasam Gayatri Silks* [2010] UKFTT 50 (TC) in this regard.

CASES

6. *Rasam Gayatri Silks* concerned an appeal against a decision of HMRC to issue a Customs Warning Letter in respect of the alleged furnishing by the Appellant of inaccurate importation declarations. The appeal was filed with the Tribunal in April 2009. On 14 July 2009, HMRC applied for the appeal to be struck out:

> The grounds for this application are that the Commissioners have now withdrawn the disputed decision and so there is no longer a decision to be appealed and the Appellant should withdraw their appeal.

7. Judge Berner refused the application for the following reasons:

(1) There is no basis for the proposition that because HMRC withdraw their disputed decision, it becomes incumbent on the Appellant to withdraw its appeal;

(2) Rule 8(3)(c) is not engaged as this addresses the merits of the Appellant's case – and given the withdrawal of HMRC's decision, it cannot be said that the Appellant's case had no reasonable prospects of success; and

(3) Rule 8(2) is not engaged, as there was a valid appeal made against a decision that was in force at the time the appeal was made.

8. Judge Berner said at [13]:

> […] In my view Rule 8(2) does not apply. This was a valid appeal against a decision that was in force at the time of the appeal. The Tribunal had jurisdiction over those proceedings. While the appeal is outstanding, and before it is determined or one party withdraws, in my judgment the Tribunal continues to have jurisdiction. Without formal withdrawal by a party the appeal remains outstanding and the proceedings have not ended. The argument that "there is no longer a decision to be appealed" is, in my view, misconceived in a case where the decision is not withdrawn before the appeal is made. The fact is that there was a decision to be appealed and a valid appeal was made in respect of which the Tribunal had jurisdiction. The subsequent withdrawal of the decision did not end the appeal proceedings over which the Tribunal continued to have jurisdiction.

9. *LS & RS v HMRC* is a decision of the Upper Tribunal (Administrative Appeals Chamber) relating to tax credits. The legislative scheme under the Tax Credits Act 2002 ("TCA") provides for HMRC to make a decision as to the entitlement of a person to a tax credit (and its amount) following the end of a tax year (s18 TCA). That decision replaces any initial (s14 TCA) or revised decisions (ss 15 and 16 TCA) made during the course of the tax year. There were two cases before the Upper Tribunal. In one case, an appeal had been made against a s16 TCA decision to the FTT, and HMRC had made a s18 TCA decision before the FTT had released its decision. In the other case, HMRC had made a s18 TCA decision after the FTT had released its decision.

10. The Upper Tribunal set out the basis of the jurisdiction of a statutory tribunal as follows:

> 17. It is a common law rule that a statutory tribunal must not act outside its jurisdiction: *Evans v Bartlam* [1937] AC 473 at 480. This is a constitutional principle that represents the proper distribution of the judicial power of the State under the ultimate authority of Parliament. Despite counsel's argument, there is no scope for a pragmatic approach to what is, and is not, within a tribunal's jurisdiction. A tribunal either has jurisdiction or it doesn't. It cannot claim jurisdiction over an issue on the basis that it is dealing with it as an academic one. Nor can its jurisdiction depend on what would, or would not, be convenient in the circumstances of a particular case or class of cases. As Black LJ said in *In re X (Court of Protection: Deprivation of Liberty) (Nos 1 and 2)* [2016] 1 WLR 227:
>
> > 47. […] I note the authorities, therefore, as a useful reminder that a pragmatic approach to litigation may sometimes be appropriate, particularly in the light of the overriding objective set out in today's procedural rules, but they do not, to my mind, constitute a licence to ignore jurisdictional and procedural rules completely nor do they permit the courts to be used to determine issues just because it would be useful to have an authoritative answer.
>
> This does not mean that pragmatic considerations may not be relevant to interpreting the legislation that confers the jurisdiction on the tribunal. They may also be relevant in the exercise of the tribunal's case management powers. But those powers can only be exercised within the tribunal's jurisdiction; they cannot be applied as a way to bring within the scope of the tribunal's jurisdiction something that is not authorised by statute.

> […]
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> 20. It is the nature of an appeal that it must be against something. According to the Appendix to the Tribunal of Commissioners' decision in *R(IS) 2/97*:
>
> > 9. Appeal is the process by which the decision of an administrative adjudicating authority is reconsidered and if necessary set aside or altered by a higher determining authority. […]
>
> The Tribunal of Commissioners was referring to an appeal to what is now the First-tier Tribunal. Hence the reference to an administrative adjudicating authority. More generally, an appeal is a challenge to a decision on the ground that it is wrong, either in fact or law. This appears from the analysis in *Furtado v City of London Brewery Company* [1914] 1 KB 709. The issue there was whether an application under the Income Tax Act 1842 was an appeal. In argument, counsel said (page 710):
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> > To constitute an appeal there must be something which he [the taxpayer] says is wrong and desires to have put right.
>
> The Court of Appeal accepted this argument, saying (page 714):
>
> > There is not anything from which the applicant is appealing.
>
> Without a decision, an appeal has no meaning or substance. It has no subject matter. This is a consequence of the combined effect of the nature of an appeal and the need for a decision as the subject matter of that appeal.

11. The Upper Tribunal found (at [40]) that the effect of HMRC making a decision under s18 TCA is to deprive any previous decision made under ss 14, 15, and 16 of any operative effect. In consequence the decision against which the appeal was brought has lapsed:

> […] and as a result, the tribunal has no jurisdiction in relation to any appeal that has been lodged. It makes no difference in principle to the reasoning whether the earlier decision ceased to have operative effect before or after the claimant lodged the appeal. (at [25])

12. The Upper Tribunal noted (at [32]) that if the claimant disputed the s18 decision, he would need to lodge a new appeal against the s18 decision because of the mandatory requirement that HMRC must reconsider their decision before an appeal against it can be made.

DISCUSSION

13. A swifter resolution to this appeal would have occurred (and without the need for judicial intervention) if HMRC had notified the Tribunal that it was withdrawing its case under Rule 17. However, it chose not to do so, and it now falls to me to decide how these proceedings are to be brought to a conclusion.

14. As the Upper Tribunal states, there is no scope for a "pragmatic solution" in relation to a decision that goes to the Tribunal's jurisdiction.

15. I would distinguish the circumstances in this appeal from the circumstances under consideration in *LS & RS v HMRC.* In the cases considered in that appeal, new decisions under s18 TCA had the effect of "lapsing" and replacing the appealed decisions. However, in the circumstances of this appeal, HMRC have not issued a new decision which has had the effect of replacing the appealed decision. They have merely withdrawn the appealed decision.

16. I would also distinguish this appeal from the circumstances in *Furtado (Surveyor of Taxes) v City of London Brewery Company* (1913) 6 TC 382 which was cited in *LS & RS v HMRC*. With all respect to the Upper Tribunal, it appears that the Administrative Appeals

Chamber may have misunderstood the administrative process that applied in 1911 to the determination of income tax liabilities, and the role at that time of the Commissioners for the General Purposes of Income Tax. The Upper Tribunal's decision appears to say that there was no underlying decision capable of being appealed (there was just an application for a decision). But it is clear from reading the Case Stated[1] that the General Commissioners had made a decision, which the predecessor to HMRC considered was wrong and wished to appeal. The substantive issue before the Court of Appeal was the extent to which the legislation allowed decisions of the General Commissioners to be appealed to the High Court. The facts were that the City of London Brewery Company had made an application to the General Commissioners for a tax relief. The General Commissioners granted the tax relief. The Surveyor of Taxes then sought to appeal that decision to the High Court. In the Court of Appeal, Swinfen Eady LJ (delivering the judgment of the court) said:

> The Rule of Law is that although certiorari lies unless expressly taken away yet an Appeal does not lie unless expressly given by Statute.

17. The Court of Appeal held that the relevant legislation only conferred a right of appeal in respect of decisions of the General Commissioners on an appeal on a tax assessment, and not on a decision on an application for a tax relief. In contrast, in the circumstances of this case, it is not disputed that this Tribunal has jurisdiction in respect of decisions of the kind under appeal.

18. I find that the withdrawal by HMRC of an appealed decision cannot completely oust the jurisdiction of this Tribunal. If that were correct, then, for example, the Tribunal would have no jurisdiction to award costs against HMRC under Rule 10(1)(b) in circumstances where HMRC have acted unreasonably and withdrew an assessment (see for example *First Choice Recruitment v HMRC* [2019] UKFTT 412 (TC)). If the withdrawal of the assessment had the effect of denying jurisdiction to the Tribunal, then no costs awards could ever be made against HMRC in circumstances where they withdrew an assessment which was being appealed before the Tribunal.

19. I agree with Judge Berner in *Rasam Gayatri Silks* that the mere fact that a decision is withdrawn after an appeal has been validly made does not necessarily mean that this Tribunal no longer has jurisdiction in respect of the appeal.

20. I find that Rule 8(2)(a) is not engaged, as the Tribunal continues to have jurisdiction in respect of this appeal. I also find that Rule 8(3)(c) is not engaged - given the withdrawal of HMRC's decision, it cannot be said that the Appellant's case has no reasonable prospects of success. I therefore decline to strike-out this appeal under Rule 8.

DETERMINATION

21. I refuse HMRC's application to strike-out this appeal.

DIRECTIONS

22. I agree with the Appellants that the Tribunal has jurisdiction to make an order under Rule 34 to allow the appeal by consent. This is dependent on the parties making a joint application to that effect, and I invite the parties to consider making such an application.

23. Absent such a joint application (or HMRC withdrawing its case), there will need to be a hearing to dispose of this appeal. I do not have jurisdiction under Rule 29 to determine this appeal without a hearing – unless both parties agree to the appeal being determined "on the papers". Such a hearing could be short and take place by video. I have separately issued

[1] The General Commissioner's decision is recorded in the Case Stated to the High Court. This is set out in the official report in Tax Cases, but not in the ICLR report cited in the Upper Tribunal decision.

directions that the parties shall either (i) provide dates to avoid for a video hearing, or (ii) consent to the appeal being determined "on the papers".

24. Of course, it remains open for HMRC to withdraw its case under Rule 17, or for the parties to make a joint application for this appeal to be determined by consent under Rule 34.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 09th NOVEMBER 2023