TC04632

Appeal number: TC/2014/04224

PROCEDURE – bankruptcy of appellant – standing to bring proceedings for permission to notify appeals late and to argue the appeals if permission given – held no standing in absence of authority from trustee in bankruptcy – application for permission struck out for want of jurisdiction.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR SHARAFAT ALI **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SIMON BIRD

Sitting in public at City Centre House, Birmingham on 17 August 2015

Mr O Mahmood of TAS Accountants for the Appellant

Mr A J O'Grady, Presenting Officer, for the Respondents

DECISION

1. This case was listed for hearing an application for permission to notify appeals to the Tribunal after the time limit given in s 49G Taxes Management Act 1970 ("TMA"), and (on the assumption that that application was successful) for hearing appeals against a number of discovery assessments (under s 29 TMA), amendments to returns (under s 28A TMA), a determination of penalties under s 95 TMA and an assessment to a penalty under Schedule 24 Finance Act ("FA") 2007, between them covering the tax years 2002-03 to 2009-10.

Preliminary matters

2. Before the hearing the Tribunal had noted from the papers that the appellant appeared to have been made bankrupt in 2013, and that although there were indications that in 2014 he was seeking to have the bankruptcy annulled, there were no indications that he had succeeded.

3. Accordingly when the hearing started the tribunal asked the appellant whether he was an undischarged bankrupt and he confirmed that he was. We also asked him if he had the authority of his trustee in bankruptcy to proceed in this matter in his own name. He did not think he had, although Mr Hafeez, also of TAS Accountants who was present, said that there had been discussions with the trustee about the hearing.

4. In view of the uncertainty about the position we said that the Tribunal would issue directions requiring the appellant to produce to us written authority from the trustee allowing the appellant to pursue the application and appeals, and if no such authority was produced within 30 days of the directions we would consider the authorities on the issue and take whatever steps seemed appropriate, steps which might well result in our striking out the application to notify late, with all the necessary consequential effects of that. The Directions were issued on 18 August 2015.

5. But we decided that since the parties had come to the hearing ready and willing to argue the issues, it could lead to unnecessary expense and delay simply to adjourn. We continued on the understanding that the proceedings might turn out to be futile.

6. On 26 August the Tribunal received an email from TAS Accountants to which was attached a letter from Mr Richard Hicken, the trustee in bankruptcy of the appellant. That letter, after describing the contacts between the trustee and Mr Hafeez of TAS Accountants about the appeal (as mentioned in paragraph 3 of this decision), stated:

> "I note that although I was informed of your intention to make the application to appeal the claim from HMRC, you did not request my consent prior to making this application. However, as requested in your letter, I can confirm I am willing to accept the decision which is made by the Tribunal in due course"

7. It is clear therefore that the appellant had no authority from the trustee to carry on the proceedings before the Tribunal. The rest of this decision considers the case law on bankrupts taking legal proceedings, especially on tax appeals and applications, and their application to the facts of this case.

Discussion

8. In *Robert Soul v Commissioners of Inland Revenue; Robert Soul v Violette Caillebotte (HM Inspector of Taxes)* 43 TC 662 (1966) ("the *Soul* cases"), Mr Soul was told by Harman LJ:

> "These are two applications by the Crown to dismiss or strike out two appeals. The appeals were originated by Mr. Soul, one against the Commissioners of Inland Revenue, and the other against one of H.M. Inspectors of Taxes. One concerns surtax and the other concerns income tax. Mr. Soul wants them to remain on the file. The Crown wants them dismissed, and submits that they should be dismissed for this very short reason, that Mr. Soul, having been adjudicated bankrupt, now has no interest left in the matter at all - that it has passed to his trustee in bankruptcy. And his trustee tells us that, having considered the appeals, he does not think they are worth pursuing; he is now unwilling to be a party to the appeals, or to prosecute them. In those circumstances I think that the Court is left with no option but to dismiss the appeals, because Mr. Soul has now no interest in the matter at all, having been adjudicated bankrupt.
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> …
>
> I would therefore assent to the proposal of the Crown to dismiss these appeals, and remove them from the record."

9. Diplock LJ added:

> "I too would allow the application and dismiss the appeals, on the ground that the only person entitled to prosecute them is the trustee in bankruptcy of Mr. Soul, and he does not wish to prosecute them."

10. In a later decision of the Court Appeal, *Heath v Tang* [1993] 1 WLR 1421, given by what could fairly be regarded as a "strong bench", Hoffmann LJ (sitting with Sir Thomas Bingham MR and Steyn LJ) said, explaining the principle applied by the Court in *Soul*:

> "The property which vests in the trustee includes 'things in action': see section 436. Despite the breadth of this definition, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property:" see *Beckham v. Dale* (1849) 2 H.L.Cas. 579 , 604, *per* Erle J. and *Wilson v. United Counties Bank Ltd.* [1920] A.C. 102. Actions for defamation and assault are obvious examples. The bankruptcy does not affect his ability to litigate such claims. But all

other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in his trustee. The bankrupt cannot commence any proceedings based upon such a cause of action and if the proceedings have already been commenced, he ceases to have sufficient interest to continue them. ...

The rule that the bankrupt could not sue on a cause of action vested in his trustee was enforced with such rigour that he could not even bring proceedings claiming that the intended defendant and the trustee were colluding to stifle a claim due to the estate and which, if recovered, would produce a surplus. But in any case in which he was aggrieved by the trustee's refusal to prosecute a claim he could apply to the judge having jurisdiction in bankruptcy to direct the trustee to bring an action, or to allow the bankrupt to conduct the proceedings in the name of the trustee. The jurisdiction of the bankruptcy judge to give such directions is now conferred by statute. Section 303(1) of the Insolvency Act 1986 says:

> 'If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.'

...

Thus the supervision of the insolvency administration by the bankruptcy judge protects the bankrupt from injustice which might otherwise be caused by his inability to bring proceedings outside the bankruptcy jurisdiction."

11. *Heath v Tang* was not a tax case and did not expressly consider the position of a bankrupt seeking to pursue a tax appeal to the first level of tribunal. But there have been cases subsequent to *Heath v Tang* which did consider proceedings relating to tax. In *Ahajot (Count Artsrunik) v Waller (HM Inspector of Taxes)* [2004] STC (SCD) 151 (SpC 395) ("*Ahajot*") , the Special Commissioner, Dr Nuala Brice, said:

> "25. The first question is whether, by operation of the law of bankruptcy, the appellant no longer has any right to pursue his appeals before the Special Commissioners.
>
> 26. There was a measure of agreement between the parties as to the general position under the bankruptcy law. However, the appellant argued that the general position did not apply either because he had a personal interest in the outcome of the appeals because of the possibility of penalties or because of the authority given by the trustee to the appellant on 23 April 1991. …
>
> The general position
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> 27. The parties agreed that, as there are no specific provisions either in the 1970 Act [The Taxes Management Act 1970] or in the Special Commissioners (Jurisdiction and Procedure) Regulations 1994, SI 1994/1811 about the effect of bankruptcy on the progress of an

appeal it was necessary to consider the bankruptcy legislation (in the 1986 Act and the 1986 Rules) in order to establish the position.

28. Ch IV of Pt IX (ss 305 to 335) of the 1986 Act deals with administration by the trustee. Section 305(2) provides that it is the function of the trustee to get in, realise and distribute the bankrupt's estate using his own discretion. Section 306 provides that the bankrupt's estate vests in the trustee immediately on his appointment taking effect. The bankrupt's estate is defined in s 283 as all property belonging to or vested in the bankrupt at the commencement of the bankruptcy. Section 382(1) defines a bankruptcy debt as any debt or liability to which he was subject at the commencement of the bankruptcy or to which he might become subject after commencement of the bankruptcy by reason of any obligation incurred before the commencement of the bankruptcy. Section 436 defines 'property' so as to include things in action, obligations and every description of interest arising out of or incidental to property.

29. The effect of s 306, under which a bankrupt's estate vests in the trustee immediately upon his appointment, is that the bankrupt is divested of his interest in his property and of any liability for his debts. The trustee has sole responsibility for determining the debts outstanding and for accepting or challenging them. Accordingly, it is normally the trustee who should continue any existing proceedings or start new proceedings. Mr Jones (for the Revenue) relied upon *Heath v Tang* [1993] 1 WLR 1421 at 1424–1427.

30. In *Heath v Tang* the applicant had been adjudicated bankrupt and sought to appeal against a judgment for a liquidated sum on which the bankruptcy petition had been brought. The application was refused and the Court of Appeal held that no special considerations applied to the judgments on which the bankruptcy orders were founded to justify departing from the general principle that, on adjudication, a bankrupt was divested of an interest in his property and liability for his debts and that accordingly he did not have the locus standi to institute an appeal. Hoffmann LJ said (at 1424) that the supervision of the insolvency administration by the bankruptcy judge protects the bankrupt from injustice which might otherwise be caused by his inability to bring proceedings outside the bankruptcy jurisdiction. He confirmed (at 1425) the principle that a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in the trustee.

…

Does the appellant have a personal interest in the appeals?

32. For the appellant Mr Ashford argued that the general principle in *Heath v Tang* did not apply in this appeal because this was a case where the appellant had a personal interest in the appeals. He argued that the appellant was potentially subject to penalties or criminal sanctions from which it followed that he had a personal interest in the appeals. He relied upon *Heath v Tang* (at 1424) for the principle that actions against the bankrupt personally which did not directly concern his estate could be maintained against the bankrupt himself and he was

entitled to defend them. He argued that the penalties were not provable in the bankruptcy and so the effect of the discharge was not to release the appellant from these contingent liabilities.

33. For the Revenue Mr Jones accepted that *Heath v Tang* was authority for the view that a bankrupt could defend an appeal if it had an impact on him personally and did not directly concern his estate as vested in the trustee. However, he argued that any penalties, if arising from matters which occurred prior to the bankruptcy order, were provable debts in the bankruptcy and, as the appellant had already been released from all provable debts on his discharge, it was not open to him to argue that the prospect of the imposition of penalties gave him a personal interest in the appeal. He relied upon *Re Hurren (a bankrupt), ex p the Trustee v IRC* [1982] STC 850, [1983] 1 WLR 183. In addition Mr Jones referred to r 12.3(2)(a) of the 1986 Rules which provided that a fine imposed for an offence was not provable in the bankruptcy. However, he pointed out that r 12.3(2) provided that 'fine' had the meaning given by s 281(8) of the 1986 Act which in turn provided that it meant the same as in the Magistrates' Courts Act 1980. That defined a 'fine' as including any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction. From this he argued that a penalty under Pt X of the Taxes Management Act 1970 was not a penalty imposed for an offence or under a conviction and so was provable in the bankruptcy.

34. In considering these arguments I first note that no penalties have in fact been assessed on the appellant. The assessments under appeal are all assessments for income tax and national insurance contributions. As such, they are governed by the general rules that a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in the trustee. It is, therefore, hypothetical to consider whether, if assessments to penalties were made, they would consist of an action against the bankrupt personally which he could defend. If, however, that question had to be asked, the answer would be found in Hurren. There on 6 October 1981 the Revenue commenced proceedings against Mr Hurren before the General Commissioners for the recovery of penalties under the 1970 Act. On 24 November 1981 Mr Hurren was adjudged bankrupt on the presentation of his own petition. A number of questions arose about the future conduct of the penalty proceedings. Walton J ([1982] STC 850 at 855, [1983] 1 WLR 183 at 189) held that the penalties were provable debts in the bankruptcy; that the proceedings before the General Commissioners should be stayed; that the bankrupt, the trustee and the Revenue should try to agree the amount of the penalties; but that if necessary there would be an order granting the trustee leave to agree or compromise the amount with the Revenue. Thus I agree with Mr Jones that a penalty under the 1970 Act is provable in the bankruptcy with the result that the appellant has already been released from any such debts by his discharge. That means that the appellant does not have any personal interest in the appeals before the Special Commissioners and so the exception in Heath v Tang cannot apply to him.

…

> 42. Having considered all the arguments on the first question for determination I conclude that, from the date of his appointment on 8 October 1990, the trustee in bankruptcy had sole responsibility for dealing with all these appeals. This is not a case where the appellant had a personal interest in the appeals which did not directly concern his estate as vested in the trustee. No penalties have been imposed but, even if they were, they would be debts provable in the bankruptcy and the discharge of the appellant means that he has already been released from such debts. …
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> 43. The conclusion on the first question is that, by operation of the law of bankruptcy, the appellant no longer has any right to pursue his appeals before the Special Commissioners. …
>
> DECISION
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> 49. My decisions on the questions for determination are: (1) that, by operation of the law of bankruptcy, the appellant no longer has any right to pursue his appeals before the Special Commissioners; …
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> 50. That means that the appeals must be dismissed.

12. We have cited lengthy extracts from this case because the facts in it are very close to those in this case, in particular because penalties under Part 10 TMA were potentially in issue in *Ahajot* as they are here. *Ahajot* is a decision from a co-ordinate jurisdiction, and is not binding on us, but, as would be expected of a decision of Dr Brice, it is carefully and comprehensively expounded, and we ought to follow it unless we consider it clearly wrong, which we certainly do not. But there have been two decisions of the Upper Tribunal (Tax and Chancery Chamber) since *Ahajot* to which we turn.

13. In *The Queen (on the application of Baljinder Singh) v HMRC (Stanley Rose trustee in bankruptcy intervening)* [2010] UKUT 174 (TCC), Warren J said, referring to the *Soul* cases:

> "**27.** … After serving his notice of appeal, he was adjudicated bankrupt. His trustee was not willing to be a party to the appeals or to prosecute them. The appeals were dismissed on the basis that the bankrupt had no interest left in the matter at all and that the only person entitled to prosecute them was the trustee.
>
> **28.** The position is, in my judgment, the same where a taxpayer has a statutory right of appeal to the Tax Chamber in respect of assessment raised prior to bankruptcy and is subsequently adjudicated bankrupt before he issues his appeal or, after having issued it, before it is heard. This was the conclusion reached by Dr Nuala Brice sitting as a Special Commissioner in *Ahajot (Count Artstunik* (sic)*) v Waller (HMIT)* [2004] STC 151. I agree with her decision."

14. Warren J's remarks here are we think *obiter*, but he does approve the decision of Dr Brice in *Ahajot*, and so this is a further reason why we should follow Dr Brice's decision.

15. Then in *David McNulty v HMRC* [2010] UKFTT 509 (TC) ("*McNulty*") the First-tier Tribunal (Judge Connell and Mr Redden) ("F-tT") considered an appeal by Mr McNulty against a closure notice amending his return to show a large liability to capital gains tax made in 1997-98. Mr McNulty was made bankrupt in December 2006 (as a result of the demands by HMRC for tax on the CGT assessment which had not been postponed), and a trustee appointed. Mr McNulty then pressed for his appeal to be heard by the Special Commissioners, but HMRC had asked the trustee whether he approved or authorised this action by Mr McNulty. Far from approving or authorising it, the trustee then entered into a s 54 TMA agreement with HMRC on 5 March 2008. The F-tT further noted that Mr McNulty had been discharged from his bankruptcy on 8 December 2007.

16. Nothing daunted, in 2010 Mr McNulty sent a Notice of Appeal to the F-tT appealing, it was taken, against the closure notice. HMRC then applied to strike out the notice of appeal.

17. The F-tT decision at [9] recited that:

> "The issue before the Tribunal was whether Mr McNulty's original appeal had been settled by agreement between HMRC and his Trustee in Bankruptcy and whether he had any right to pursue that appeal."

18. Mr McNulty contended that there was no valid s 54 agreement, and that he had an interest in the proceedings as if he was successful there was no debt due to HMRC and he would no longer be in bankruptcy.

19. For HMRC it was argued that the Tribunal had no jurisdiction to hear the appeal, and that Mr McNulty's remedy in relation to the s 54 agreement was to apply to the High Court under s 303 Insolvency Act 1986.

20. At [12] the F-tT held that Mr McNulty had no personal interest in the appeal, whether in relation to tax or penalties and that his only remedy in relation to the s 54 agreement was to seek to quash it in the High Court. The s 54 agreement was valid and settled the appeal against the tax by agreement [14]. The F-tT's decision was to strike out the appeal [15] without distinguishing between whether that was on the grounds of standing or the s 54 agreement or both.

21. Mr McNulty appealed to the Upper Tribunal. In the decision of that tribunal, *McNulty v HMRC* [2012] UKUT 174 (TCC) Arnold J recited the factual background and there it was stated that the penalty had been cancelled [5], though Mr McNulty's appeal to the F-tT had apparently included an appeal against it, which explains why the F-tT referred to penalties.

22. The first issue considered by Arnold J was whether Mr McNulty had standing to bring the appeal. Counsel for HMRC referred to six authorities, the *Soul* cases, *Heath v Tang* and two other non-tax cases, then *Ahajot* and *Singh*.

23. Counsel for Mr McNulty did not take issue with any of those authorities, but argued that:

(1) The appeal was against a criminal matter (this argument based on *Jussila v Finland* (2007) 45 EHRR 39) and so the right of appeal was a "personal" matter (one of the exceptions to the general rule that a bankrupt's estate passes to the trustee).

(2) The right of appeal was also personal because Arts. 1 or 8 of the European Convention on Human Rights was engaged.

(3) The trustee assigned the right of appeal to the appellant.

24. The first argument, that the assessment itself was a criminal matter, was dismissed summarily by Arnold J at [40]. The second argument was based on Mr McNulty's status as an accountant. It was also dismissed by Arnold J at [41] to [44]. The third was also dismissed by Arnold J at [45].

25. At [46] Arnold J said "I have concluded that the Tribunal was correct to hold that the Appellant had no *locus standi* to appeal against the closure notice dated 17 May 2004 because that right had vested in the Trustee". Accordingly the appeal was dismissed purely on the basis of standing.

26. We now turn to the facts of our case to see how the cases discussed above should be applied. Our case involves three types of proceedings, an application to the Tribunal to consider whether to give the appellant permission to notify the appeals late, and, if that is successful, appeals against assessments etc. to tax and appeals against determinations of, and an assessment to, penalties.

27. *Singh* was about judicial review proceedings against the refusal of HMRC to apply a concessionary practice, and so is not of direct relevance to this discussion. The *Soul* cases were about appeals against assessments to tax, as was *Ahajot*, though that case also mentioned the question of penalties though on a hypothetical basis. In *Ahajot* the appeals were dismissed rather than struck out. *McNulty* was about appeals against assessments and penalties and the appeals were struck out by the F-tT, a decision upheld by the Upper Tribunal which noted however that there were no penalties in existence at the time of the proceedings before the F-tT.

28. In the light of these cases, and in particular the *Soul* cases, *McNulty* and *Ahajot*, the first two of which are binding on us while the third is highly persuasive, we hold that the appellant, as an undischarged bankrupt, had no standing to bring his appeals against assessments to the Tribunal. Nor in the light of *McNulty* did he have standing to bring appeals against penalties to us. As to the application to notify the Tribunal late, *Singh* suggests strongly that, since an application to bring judicial review proceedings is not one for which an undischarged bankrupt has standing, an application to notify appeals late should be treated is an identical way.

Decision

29. If we strike out the application to notify the appeals late, the appeals automatically fall, so our decision is simply to strike out the application to notify late under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (lack of jurisdiction). That Rule applies to "proceedings" not just appeals.

30. We add, in case the appellant or his trustee might be contemplating whether there are any grounds of appeal and what the prospects might be, that having heard all the evidence, including oral evidence from Mr Ali, and the submissions which were ably presented by Mr Mahmood and Mr O'Grady, that had we been required to decide the matters before us, we would have given permission to notify the appeals late, but we would then have upheld all of HMRC's decisions embodied in its assessments, amendments and determinations, as varied by the reviewing officer in the case but no further. We add here that, contrary to HMRCs statement of case, our giving permission to notify late would have undone the s 54 TMA agreement that was deemed by s 49F(2) TMA to have been reached, so what we would have had before us were appeals against the assessments as raised, including those which the reviewing officer had decided should be cancelled. The reviewing officer's decisions have no force in law in the absence of a deemed s 54 agreement.

31. We should also refer to an argument put forward by Mr Hafeez at the end of the appellant's submissions otherwise made by Mr Mahmood. This was to the effect that HMRC had wrongly disregarded the appellant's rights under s 9ZB TMA. Neither Mr O'Grady nor we were able to discern what rights a taxpayer has under that section, except to object to HMRC's proposed corrections outside the enquiry process of obvious errors in a return. Since no correction of any such obvious errors had been proposed by HMRC at any time, let alone within the short window available to them, s 9ZB can no have no application.

32. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 14 SEPTEMBER 2015