



**TC07918**

*INCOME TAX – claim for repayment under UK-Bangladesh Double Tax Convention for five years – repayment for earliest year refused by HMRC on the basis that it was outside the statutory time limit – repayment of tax for later years reduced by tax said to be due for that earliest year – appeal on the basis that the Convention provided for a longer time limit and that HMRC should not have reduced the repayment – HMRC application for appeal to be struck out for lack of jurisdiction – held, application allowed in part and directions issued for the appeal to continue in part.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/06438**

**BETWEEN**

**MOHAMMED MASBAH UDDIN**

**Appellant**

**-and-**

**H M REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ANNE REDSTON**

**On 24 January 2020 HM Revenue and Customs applied to strike out the Appellant's appeal. The Tribunal determined that application on 24 October 2020 without a hearing.**

**Mr Compton of HM Revenue and Customs' Solicitor's Office, for the Respondents.**

**Universal Solicitors and subsequently MRKS Solicitors, for the Appellant.**

## DECISION

### Summary

1. Mr Uddin is a Bangladeshi national. He entered the UK as a student on 10 August 2009 and studied here until July 2014, returning to Bangladesh in October of that year. While in the UK he was also employed on a part-time basis, and income tax was deducted from his earnings.
2. On 23 February 2018, Universal Solicitors submitted a claim for the repayment of tax Mr Uddin had paid in 2012-13 through to 2016-17, because under Article 19 of the UK-Bangladesh Double Tax Convention 1980 (“the DTC”) a student in Mr Uddin’s position was not liable to UK tax on his earnings. The firm asked HMRC to “assess our client’s repayment position according to the information held by the HM Revenue & Customs’ records for those years”.
3. HMRC accepted that Mr Uddin came within Article 19. Having checked their records, they made a repayment for 2013-14 and 2014-15, but not for 2012-13, because that claim was outside the four year time limit provided by s 43 of the Taxes Management Act 1970 (“the TMA”). HMRC also did not make a repayment for 2015-16 and 2016-17 because Mr Uddin did not have any earnings during those years.
4. However, before making the repayment for 2013-14 and 2014-15, HMRC first deducted an underpayment of tax which they said had arisen in relation to his work during 2012-13.
5. Universal Solicitors appealed against HMRC’s decision, on the basis that HMRC had no right to refuse to repay the 2012-13 tax, or to deduct tax underpayments from subsequent years, because the DTC gave Mr Uddin an exemption from tax for five years, and this took priority over the TMA.
6. Two issues were thus raised by the appeal:
  - (1) whether HMRC were correct to refuse to repay the tax deducted from Mr Uddin’s earnings in 2012-13 on the basis that the claim was made outside the four year time limit provided by the TMA; and
  - (2) whether HMRC were correct to reduce the tax repayment in relation to 2013-14 and 2014-15 to recover tax they said Mr Uddin had underpaid in 2012-13.
7. On 24 January 2020, HMRC applied to strike out Mr Uddin’s appeal on the basis that the Tribunal had no jurisdiction to hear a claim made outside the statutory time limits.
8. The Application was decided on the papers. I decided that:
  - (1) the DTC did not include any provision relating to the time limit for claims;
  - (2) HMRC are correct that a claim for repayment had to be made within the four years provided for by TMA s 43;
  - (3) the Tribunal had no jurisdiction to consider Mr Uddin’s appeal to the extent that it concerned the claim to repay the tax deducted from his earnings in 2012-13; but
  - (4) the appeal was also about HMRC’s reduction of the amount repaid for 2013-14 and 2014-15, by deducting what they said was a tax underpayment for 2012-13. The Tribunal has the jurisdiction to consider that issue, and on that point Mr Uddin’s case

was clearly arguable. This is because Mr Uddin was not liable for tax in 2012-13, and also because there are statutory limits on HMRC's assessment powers. I explain these concerns in more detail at §42-48.

9. I therefore strike out the appeal to the extent that it is in respect of a claim for the repayment of tax paid by Mr Uddin during 2012-13. However, the appeal is not struck out to the extent that it is against HMRC's reduction of the amount repaid for 2013-14 and 2014-15 by offsetting what they said was a tax underpayment.

10. That means that Mr Uddin's appeal will in due course be determined by the Tribunal, but only in relation to whether HMRC were correct to reduce the repayment made for 2013-14 and 2014-15 by making an offset relating to 2012-13.

11. At the end of this decision I have issued directions for HMRC to provide a Statement of Case.

### **The evidence and findings of fact**

12. I was provided with a bundle of documents from HMRC containing correspondence between the parties, and between the parties and the Tribunal. From that evidence I make the following findings of fact, none of which were in dispute.

13. Mr Uddin is a Bangladeshi national. He entered the UK as a student on 10 August 2009 and studied at Glyndwr University; Guildhall College London and Anglia Ruskin University. He finished his studies in July 2014, and on 30 October 2014 returned to Bangladesh and currently lives in Dhaka.

14. While in the UK, Mr Uddin was also employed on a part-time basis by a number of employers, including Sainsburys, McDonalds and Travelodge. Income tax was deducted from his earnings. On 23 February 2018, Universal Solicitors based in Whitechapel submitted a claim for the tax to be repaid under Article 19 of the DTC, for 2012-13 through to 2016-17.

15. Their letter of claim said their client had lost "all tax related documents such as P60 and P45" and asked HMRC to "assess our client's repayment position according to the information held by the HM Revenue & Customs' records for those years". Attached to the claim was a letter of authority for the repayments to be made to a Mr Nabi Hossan, whose address was the same as that of Universal Solicitors.

16. HMRC asked for further details of Mr Uddin's studies, and these were provided on 28 March 2018. On 24 April 2018, HMRC informed Universal Solicitors that they would issue a cheque for the tax Mr Uddin had paid in 2013-14 and 2014-15, but that no payment would be made for the other three years. For 2012-13, this was because the claim was out of time, as it had not been made within the four years required by TMA s 43. For 2015-16 and 2016-17, this was because Mr Uddin had not held any employment during those years.

17. On 26 April 2018, HMRC issued Universal Solicitors with a "calculation letter". Although this was not in the Bundle, I have inferred its contents from subsequent correspondence. The letter said HMRC had established that Mr Uddin had paid tax of £5,843.40 for 2013-14 and 2014-15, but that HMRC had reduced that sum by £2,060.01 to £3,783.39, in order to recover an underpayment of tax which they said had arisen in relation to Mr Uddin's work during 2012-13. The cheque was thus for £3,783.39 rather than the £5,843.40 which had been deducted from Mr Uddin's earnings in those two years. I also

infer from the correspondence that Mr Uddin worked during 2012-13 and had tax deducted from his earnings, but that in HMRC's view the amount of tax deducted was too low.

18. On 4 May 2018, Universal Solicitors wrote to HMRC, saying that HMRC had no right to deduct tax due for 2012-13 from the repayment, because the DTC allowed their client to recover all the taxes paid for five years. They added that Mr Uddin's employers had "always deducted tax from his wages" and that HMRC had repaid five years' worth of tax in relation to previous clients when the firm had made claims in the past.

19. On 3 July 2018, HMRC replied, relying on the four year time limit in TMA s 43, and adding that "this means that the underpayment of tax from 2012-13 is still recoverable, and the deduction of £1,700.07 from [the] repayment to recover the underpayment is correct".

20. It was unclear why HMRC here refer to a deduction of £1,700.07 when the repayment was reduced by £2,060.01, but I did not need to know the answer to that question in order to decide the Application .

21. On 13 July 2018, Universal Solicitors responded to HMRC, repeating their earlier arguments. On 14 September 2018, HMRC wrote back, also restating their position. Correspondence continued in the same vein, until on 12 August 2019, HMRC confirmed they would not change their position, and on 10 September 2019, Universal Solicitors notified Mr Uddin's appeal to the Tribunal. The grounds of appeal were a rearticulation of the firm's position on the DTC, including the statement that there should have been no adjustment of the payment already made.

22. On 10 October 2019, MRKS Solicitors wrote to the Tribunal, attaching a letter of authority from Mr Uddin, saying that he had decided to change his instructing solicitors from Universal Solicitors to MRKS.

23. On 24 January 2020, HMRC applied to strike out Mr Uddin's appeal on the basis that the Tribunal had no jurisdiction to hear a claim which was outside the statutory time limits. A hearing was listed to decide that Application, but this was cancelled because of the pandemic.

#### *The Tribunal's directions*

24. On 13 May 2020, the Tribunal contacted the parties by way of a standard letter and asked for their views as to how "the appeal" should proceed. MRKS understood the letter as meaning that the Tribunal was seeking to list the substantive appeal, and asked for an oral hearing. HMRC reminded the Tribunal that they had made a strike-out Application, which could be decided on the papers.

25. On 9 June 2020, I issued directions to the parties. By way of preliminary, I explained that the letter should have referred to the Application, and that if HMRC succeeded, Mr Uddin's appeal would be struck out and there would be no hearing.

26. I agreed with HMRC that it was in the interests of justice to decide the Application on the papers. By my directions:

- (1) each party was required to provide the other with lists of documents;
- (2) HMRC were to make up an electronic bundle comprising those documents;

(3) MRKS had permission to provide a submission in response to the Application, and HMRC had permission to respond to that submission if made; but

(4) if MRKS did not provide a submission, the Tribunal would assume that the parties had nothing to add to the points in their inter-partes correspondence and in the Application.

27. MRKS and HMRC exchanged lists of documents, and HMRC made up the Bundle, but MRKS did not provide a submission. I therefore decided the Application on the basis of the material in the Bundle.

### **Mr Uddin's appeal**

28. The Application asked the Tribunal to strike out Mr Uddin's appeal. That appeal was against:

(1) HMRC's refusal to repay the tax deducted from Mr Uddin's earnings in 2012-13 on the basis that the DTC provide for a five year time limit rather than the four years in the TMA; and

(2) HMRC's reduction of the tax repayment made for 2013-14 and 2014-15 to recover tax they said Mr Uddin had underpaid in 2012-13.

### **The Rule, the TMA and the DTC**

29. The relevant provisions are Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, TMA s 43 and Article 19 of the DTC.

#### *Rule 8*

30. Rule 8(2) provides that the Tribunal must strike out "the whole or a part of the proceedings if it does not have jurisdiction in relation to the proceedings or that part of them".

31. Rule 8(3)(c) provides that the Tribunal may strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding".

#### *TMA s 43*

32. TMA s 43 is headed "time limit for making claims", and subsection (1) reads

"Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than 4 years after the end of the year of assessment to which it relates."

#### *The DTC*

33. The DTC applies to persons who are residents of the contracting states, namely Bangladesh and the UK. Article 19 is headed "Students", and reads:

"(1) An individual who is a resident of one of the Contracting States at the time he becomes temporarily present in the other Contracting State and who is temporarily present in the other Contracting State solely for the purpose of:

(a) Studying in the other Contracting State at a university or other recognised educational institution; or

(b) Securing training at a recognised educational institution required to qualify him to practise a profession; or

(c) Studying or carrying out research as a recipient of a grant, allowance or award from a governmental, religious, charitable, scientific, literary or educational organisation;

shall be exempt from tax in that other Contracting State on:

(i) Remittances from abroad for the purpose of his maintenance, education, study, research or training;

(ii) The grant, allowance or award; and

(iii) Income from personal services rendered in the other Contracting State (other than any rendered by an articulated clerk or other individual undergoing professional training to the person or partnership to whom he is articulated or who is providing the training) provided that the income constitutes earnings reasonably necessary for his maintenance and education.

(2) In no event shall an individual have the benefit of the provisions of this Article for more than five years.”

### **HMRC’s Application**

34. By the Application, HMRC made the following submissions:

(1) The TMA provides a clear four year time limit within which claims must be made, and the DTC did not override that time limit.

(2) If a claim was submitted out of time, and HMRC refused to consider the claim for that reason, the Tribunal had no jurisdiction to decide an appeal against that refusal decision.

(3) This was clear from *HMRC v Raftopoulou* [2018] EWCA Civ 818 (“*Raftopoulou*”) where the Court of Appeal confirmed the FTT’s judgment at first instance that it had no jurisdiction to consider Mr Raftopolou’s claim.

(4) The FTT had said at [10]:

“The relevant tax year, the tax year to which the return relates in the present case, is 2006-07. Therefore, any claim had to be made by 5 April 2011. Dr Raftopoulou’s claim was made on 13 October 2011. In the absence of any statutory provision to extend or appeal against this time limit it must follow that a claim such as Dr Raftopoulou’s does not fall within the jurisdiction of the Tribunal and as such under Rule 8 of the Procedure Rules I have no alternative but to strike out her case.”

35. No part of the Application explained the legal basis on which HMRC considered they had the power to offset tax said to be owing for 2012-13 against tax properly repayable for 2013-14 and 2014-15.

### **Discussion and decision**

*Article 19(2)*

36. The first question is what is meant by Article 19(2) of the DTC. In my view, the meaning is clear. Where a Bangladeshi national is in the UK as student, but is also working, he can rely on Article 19(1) to claim exemption from UK tax on his earnings “provided that the income constitutes earnings reasonably necessary for his maintenance and education”. HMRC have accepted that this was Mr Uddin’s position.

37. Article 19(2) then says “in no event shall an individual have the benefit of the provisions of this Article for more than five years”. Thus, where a person is in the UK for six years, and claims the benefit of the Article for the first five years, he cannot also rely on the Article for the final year. The Article says nothing about claims, but rather deals only with exemption from liability.

38. Under UK law, where a person has paid tax to which he is not liable, he is entitled to recover that money as long as he makes his repayment claim within the relevant statutory time limit. There is nothing in Article 19(2) which allows a person to override that time limit.

#### *Jurisdiction*

39. It follows that Mr Uddin’s claim for a repayment of tax in relation to 2012-13 is out of time because it was made more than four years after the end of that tax year. It is clear from *Raftopoulou* that the Tribunal has no jurisdiction to consider Mr Uddin’s claim to repay the tax deducted from his earnings in 2012-13.

40. If that were the only issue, the Application would have succeeded and Mr Uddin’s appeal would have been struck out in its entirety. But there is also the question of the offset.

#### *The offset*

41. HMRC identified that Mr Uddin had paid tax of £5,843.40 for 2013-14 and 2014-15, taken together. However, they did not repay £5,843.40, but reduced the repayment by £2,060.01 in order to recover an underpayment of tax which they said had arisen in relation to Mr Uddin’s work during 2012-13.

42. In correspondence, HMRC asserted that they have the right to make this offset. But it is far from clear that they have that right, and it is certainly arguable that they do not.

43. In *Whitney v IRC* [1926] AC 37 at 52, Lord Dunedin famously said:

“There are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.”

44. It follows that in a situation where the individual has no liability (stage 1) but has been assessed (stage 2), he can recover that tax within the statutory time limits (stage 3).

45. For 2013-14 and 2014-15, Mr Uddin was not liable to tax because of the DTC (stage 1), but as the tax had been assessed by deduction from his wages (stage 2), he was entitled to a repayment because he made a claim within the statutory time limit (stage 3). For 2011-12, Mr Uddin was similarly *not liable* to tax, because of the DTC. On what basis can HMRC now seek to assess the “underpayment” for that year by deducting it from the repayment? HMRC appear to be saying that because Mr Uddin has not made his repayment claim within the statutory time period (stage 3), he is liable to the tax for that year (stage 1).

46. HMRC are also saying that they can assess that tax by deduction (stage 2), but they have not explained the legal basis for that power. I note that:

- (1) Mr Uddin was an employee, not a self-employed person;
- (2) he received his earnings after deduction of tax using the PAYE system;
- (3) the PAYE Regulations place the primary obligation for deducting tax on the employer, not on the employee;
- (4) if HMRC wish to recover tax from an employee rather than an employer, they can:
  - (a) issue a “direction” under Reg 72 of the PAYE Regs;
  - (b) require the employee to complete a self-assessment tax return;
  - (c) or (possibly) issue a “discovery” assessment under TMA s 29; and
- (5) each of those courses of action has a statutory time limit. The ordinary time limit for issuing a Reg 72 determination or a discovery assessment is four years, and the same time limit applies to the completion of an SA return, see TMA ss 34 and 34A.

47. I therefore found it difficult to understand the legal basis for HMRC’s reduction of the 2013-14 and 2014-15 repayment by offsetting tax they said had been underpaid for 2012-13, both because of the lack of any liability to tax for that year, and because of the time limits set by the assessment machinery.

*Strike out?*

48. As Tribunal has no jurisdiction to consider Mr Uddin’s claim to repay the tax deducted from his earnings in 2012-13, his appeal must therefore be struck out to the extent that it concerns that issue.

49. However, the Tribunal does have jurisdiction to consider Mr Uddin’s appeal against the reduction of the repayment made for 2013-14 and 2014-15 by offsetting tax said to be due for 2012-13, so Rule 8(2) is of no application to that part of his appeal.

50. I also considered whether that part of his appeal should be struck out under Rule 8(3)(c) as having no reasonable prospect of success, but that is clearly not the position, for the reasons set out above. HMRC may be able reduce the repayment as they have done here, but the opposite is certainly arguable and Mr Uddin has a reasonable prospect of success.

### **Decision, direction and appeal rights**

51. For the reasons set out above, the Application is:

- (1) allowed to the extent that it concerns the claim to repay tax deducted from Mr Uddin’s wages in 2012-13; but
- (2) refused to the extent that Mr Uddin has appealed against HMRC’s reduction of the amount paid for 2013-14 and 2014-15 by offsetting what they said was a tax underpayment for 2012-13.

52. As a result, Mr Uddin’s appeal will in due course be determined by the Tribunal, unless it is settled beforehand, but only in relation to whether HMRC must repay Mr Uddin the balance of the tax deducted from his earnings in 2013-14 and 2014-15.

53. HMRC are directed to file and serve a Statement of Case in relation to that issue by 60 days from the date of issue of this decision.



54. 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 Rules. 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 REDSTON**

**TRIBUNAL JUDGE**

**RELEASE DATE: 3 NOVEMBER 2020**