



[2021] UKFTT (TC)

TC08289

PROCEDURE – application to strike out – whether the tribunal has jurisdiction in respect of allegations of fraud by third party – no – whether no reasonable grounds of success in respect of discovery – no – application partly upheld

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/02682

BETWEEN

STUART A CORMACK

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the application on 6 July 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of restrictions arising from the COVID-19 pandemic. The documents to which I was referred are a bundle of documents of 165 pages and an authorities bundle of 173 pages.

DECISION

Introduction

1. This decision relates to an application of 11 November 2020 by the Respondents (“HMRC”) to strike out the appeal made by the Appellant (“Mr Cormack”) on 5 August 2020.

Background

2. In February 2019 HMRC enquired into Mr Cormack’s self-assessment tax returns for the tax years 2014/15 and 2015/16, specifically with regard to claims for relief made under the SEED Enterprise Investment Scheme (“SEIS”) and the Enterprise Investment Scheme (“EIS”). Relief of £24,000 had been claimed in each year. HMRC had repaid tax of £13,064 (for 2014/15) and £7,706.82 (2015/16).

3. HMRC considered that the criteria for valid claims under SEIS and EIS had not been met, as the required compliance certificates had not been issued. Discovery assessments were issued accordingly, on 19 March 2019.

4. On 12 April 2019, Mr Cormack’s agents wrote to HMRC to appeal the assessments on the basis that the SEIS and EIS relief was due. In correspondence, the agents stated that Mr Cormack had believed that the third party who completed and submitted his return for him was claiming reimbursements of travel costs. Mr Cormack had not approved or agreed the tax returns submitted. Mr Cormack had discussed SEIS/EIS relief with the third party but had declined to claim as he could not afford the relevant investments. The tax payments had been made to the third party or their associates, Mr Cormack had not received the full amounts, and Mr Cormack had been the victim of fraud.

5. A review of HMRC’s decision to issue the discovery assessments was requested. On 8 January 2020, the reviewing officer upheld the decision to issue the assessments.

6. On 5 August 2020, following further correspondence, Mr Cormack appealed to this Tribunal. His grounds of appeal are that:

(1) The discovery assessments were wrong in law because he had been the victim of fraud.

(2) HMRC were aware that the third party involved was making fraudulent claims.

On 9 November 2020, Mr Cormack expanded on his grounds of appeal in a document titled “Statement of Case”, setting out the following as points at issue:

(3) Whether a taxpayer can be responsible for the fraudulent behaviour of a dishonest tax agent;

(4) Whether HMRC were responsible for granting the third party agent status;

(5) Whether any steps were taken by HMRC to review the third party’s agent status;

(6) Whether the tax returns were valid as they were fraudulently compiled by the third party;

(7) Whether HMRC had made a discovery;

(8) Whether the assessments were time barred.

7. On 11 November 2020, HMRC applied to strike out the proceedings on the grounds that the Tribunal has no jurisdiction and that Mr Cormack has no reasonable prospects of success.

HMRC's submissions

Jurisdiction

8. HMRC contended that the jurisdiction of the Tribunal is determined by reference to the Taxes Management Act dependant on the relevant assessing provision. Although statute provides a right of appeal against the discovery assessments, the Tribunal's powers in respect of the assessments are constrained to deciding whether the amount assessed is correct.

9. It was submitted that, in this case, the Tribunal has no jurisdiction to allow the appeal against the assessments or amend amount of the liability upon any basis other than that the EIS and SEIS claims for relief should be allowed in full or in a different sum.

10. HMRC noted that Mr Cormack had also contended that he should not be liable for the amounts assessed and that HMRC should pursue the third party for these amounts as it was the third party who had made the claims and received (whether directly or indirectly) the repayments.

11. HMRC submitted that there is no legislation which provides for liability for the loss of tax to be waived or transferred to another person. HMRC contended that the question of who should make payment of any monies due to HMRC is a question of enforcement and is therefore a matter which is outwith the Tribunal's jurisdiction.

12. HMRC further submitted that other issues raised by Mr Cormack as to the extent to which HMRC should have relied upon the authority given to the agent, the extent to which parties other than the agent were involved and whether checks should have been made are all tax management or operational matters and again are beyond the question of entitlement to EIS relief or the calculation of the liability.

13. HMRC submitted that, as the First-tier Tribunal does not have any judicial review function and Mr Cormack does not raise any other questions of public law, the Tribunal lacks jurisdiction to address these aspects of the Appellant's grounds of appeal and so these aspects should be struck out pursuant to Rule 8(2)(a) First-tier Tribunal (Tax Chamber) Rules (the "FTT Rules").

No reasonable prospect of success

14. HMRC submitted that the Tribunal's jurisdiction in this matter is therefore limited to whether HMRC were correct to reject the Enterprise Initiative Scheme (EIS) and Seed Enterprise Investment Scheme (SEIS) claims for relief.

15. It was contended that Mr Cormack does not dispute HMRC's position that the SEIS and EIS relief claims are not valid. It was also contended that he does not dispute HMRC's position that he is not entitled to EIS or SEIS relief.

16. HMRC submitted that, on that basis, this aspect of the appeal has no prospect of success and should be struck out pursuant to Rule 8(3)(c) First-tier Tribunal (Tax Chamber) Rules.

Discovery

17. HMRC set out the timetable relating to the assessments, and the statutory provisions relating thereto. HMRC contended that the behaviour which led to the loss of tax was at least careless as there were claims made for SEIS and EIS relief which were not available to Mr Cormack. As such, the longer time limits for a discovery assessment to be made (s29(4) Taxes Management Act ("TMA") 1970) were satisfied as the time limit for such an assessment for the earlier year was 5 April 2019 and the assessments were issued on 19 March 2019.

18. HMRC also contended that the provisions of s29(5) TMA 1970 were met, as an officer could not reasonably have been expected to be aware of the excessive relief claims before the end of the enquiry window.

Appellant's submissions

Jurisdiction

19. Mr Cormack noted that HMRC had accepted that there was a right of appeal against the submissions and contended that the decision in *Oxfam v HMRC* [2009] EWHC 3078 (Ch) ("*Oxfam*") had concluded that this Tribunal was able to entertain public law arguments where they were relevant to an appeal within the statutory jurisdiction of the Tribunal. Mr Cormack also noted that the decision in *Cambrian Hydro Power Limited* [2012] UKFTT 764 (TC) had required that HMRC reconsider a case because "the fairness and justice of the situation calls for a fresh decision".

20. As such, it was submitted that the Tribunal had jurisdiction.

Prospects of success

21. Mr Cormack contended that, as above, the Tribunal had jurisdiction to consider the status of the tax returns submitted by the third party, who was authorised and regulated by HMRC. Mr Cormack submitted that this should be considered in the light of the legal principle that "fraud unravels everything", as indicated by Lord Bingham in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyds Rep 61.

Relevant Rules

22. Rule 2 of the FTT Rules provides, so far as material:

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes -

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it -

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

23. Rule 8 of the FTT Rules relates to the striking out of a party's case and provides, so far as material, as follows:

(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
...

(3) The Tribunal may strike out the whole or a part of the proceedings if ...

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

Discussion

24. The case of *HMRC v Woodstream Europe Ltd* [2018] UKUT 398 (TCC) considered the proper approach to applications to strike out the whole or part of proceedings for want of jurisdiction, and noted (at §14, approving the FTT decision at §44) that “a decision is only appealable if an enactment provides for it to be appealable to the Tribunal”. The Upper Tribunal also noted that (at §15) that:

“If the FTT lacks jurisdiction it must strike out the proceedings. That is a binary decision, which the Tribunal must address and determine at the hearing of the strikeout application. This is to be contrasted with an application to strike out a claim, or part of it, on the grounds that it has no reasonable prospect of success. In the latter case, the Tribunal will not exercise its discretion to strike out if there is a non-fanciful argument in support of the claim, or relevant part.”

25. Mr Cormack cited the decision of Sales J in *Oxfam* as authority for the Tribunal having the ability to consider public law arguments in this context. However, the subsequent decisions of *Hok Ltd v HMRC* [2012] UKUT 363 (TCC) (“*Hok*”) and *HMRC v Noor* [2013] UKUT 71 (TCC) (“*Noor*”) and the Court of Appeal's decision in *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 (“*BT Trustees*”) have substantially reduced the impact of the decision in *Oxfam*. Their decisions are binding on this Tribunal. The position of this Tribunal following these decisions is helpfully set out in *R & J Birkett T/A The Orchards Residential Home, Dunmore Residential Home, Kingland House Residential Home, The Firs Residential Home, Merry Hall Residential Home v HMRC* [2017] UKUT 89 (TCC) at §30:

“The FTT is a creature of statute. It was created ... for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act. Its jurisdiction is therefore entirely statutory: *Hok* at §36, *Noor* at §25, *BT Trustees* at §133.

... In *Hok* at §52 the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued ... such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at §73 the UT, similarly constituted, accepted that the [FTT] would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.”

26. Here, Mr Cormack contends (in summary) that HMRC should not have raised the assessments on him because the tax returns were submitted fraudulently by a third party. The Tribunal's jurisdiction with regard to assessments is limited to by statute to considering whether the amount of such assessment is correct; there is nothing in statute which gives the Tribunal power to consider whether such assessment should have been raised in the first place.

27. Even if Mr Cormack's contention is construed as being that the assessment should be reduced to nil (which is within the powers granted to the Tribunal by s50 TMA 1970), it remains the case that there is nothing in the statute which enables this Tribunal to consider the public law points raised in deciding whether the assessment is correct.

28. The assessment arises because HMRC has concluded that SEIS and EIS relief are not available to Mr Cormack because the necessary compliance certificates have not been issued (as required by s203(1) Income Tax Act 2007 for EIS and s257EB(1) Income Tax Act 2007 for SEIS). This Tribunal is limited by statute to considering whether HMRC's decision that the compliance certificates have not been issued is correct.

29. This is not one of the limited circumstances acknowledged by the UT in *Noor* in which public law principles can be considered by this Tribunal. It is therefore not open to the Tribunal to consider the wider circumstances as to how the claim for relief came to be made in the first place.

30. Mr Cormack's submissions with regard to the decision in *Cambrian Hydro Power Limited* [2012] UKFTT 764 (TC) are noted but this is a decision of the First-tier Tribunal, which is not binding on anyone except the parties. In contrast, this Tribunal is bound by the decisions of the Upper Tribunal in *Hok* and *Noor*.

31. Accordingly, I conclude that this Tribunal has no jurisdiction to consider Mr Cormack's appeal against the assessments on the basis of his grounds (1) and (6), that the tax returns were submitted fraudulently by a third party or that the returns should be treated as not having been made because they were submitted pursuant to fraud.

32. With regard to Mr Cormack's submissions as to grounds (2), (4) and (5), these are complaints as to HMRC behaviour. There is no statutory provision which enables this Tribunal to consider these complaints. I conclude therefore that this Tribunal has no jurisdiction to consider such grounds of appeal.

No reasonable prospect of success

33. Mr Cormack contended that the appeal against the decision to refuse EIS and SEIS relief had reasonable prospects of success because he considered that the Tribunal had jurisdiction to consider his submissions with regard to fraud.

34. As set out above, I conclude that the Tribunal does not have such jurisdiction. I note that there have been no submissions that the claims for EIS and SEIS relief were valid, nor any dispute that compliance certificates required were the legislation were not provided. I conclude that there is no reasonable prospect of the appeal succeeding in relation to the decision to refuse EIS and SEIS relief.

Discovery

35. HMRC's submissions on this point contended that Mr Cormack and/or a person acting on his behalf, had acted at least carelessly with regard to the claims for relief such that extended time limits applied and the assessment had been issued within those time limits.

36. In their review letter, HMRC also contended that Mr Cormack had acted carelessly. Neither the review letter, nor the application, provide any details as to why they made this contention. They similarly contend that the third party acted carelessly and that 'it was reasonable to conclude' that the third party was acting on behalf of Mr Cormack as the third party had been registered as Mr Cormack's agent and received repayments from HMRC as a result of filing returns using Mr Cormack's details. However, no details were given as to why it was reasonable to reach this conclusion given the allegations of fraud.

37. In the alternative, HMRC submitted that an officer could not reasonably have been expected to have been aware of that the relief was invalidly claimed before the expiry of the standard enquiry window, such that the extended time limits applied. No detail was provided by HMRC to support their contention that an officer could not reasonably have been expected to be aware of the invalid claim within the normal enquiry window.

38. Mr Cormack provided no submissions in response to HMRC's contentions regarding the validity of the discovery assessments, nor did he provide any detail as to why he had included the validity and timeliness of those assessments when setting out the points he considered to be at issue in this appeal.

39. Considering the application and the circumstances, I do not think that it is appropriate to strike out the appeal in respect of the validity of the discovery assessments: the burden of proof as to validity lies with HMRC and I do not consider that they have satisfied that burden of proof in this strike out application.

Conclusion

40. The strike out application is granted in respect of all grounds of appeal except the grounds of appeal relating to the validity of the discovery assessments, that is grounds (3) (to the extent that it relates to discovery), (7) and (8) in §6 out above.

Right to apply for permission to appeal

41. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 4 OCTOBER 2021