Neutral Citation: [2023] UKFTT 720 (TC)

Case Number: TC 08910

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2019/02056

Procedure – application for a stay of proceedings – whether proceedings in FTT to be stayed pending outcome of proceedings pending in High Court raising similar issues – appeal potentially raising other issues – tax exclusivity principle considered – whether expedient to stay proceedings and in line with overriding objective in the FTT Rules – no – application refused

Heard on: 8th August 2023
Judgment date: 17 August 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

PAUL HENLEY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Avient, of counsel, instructed by J S & Co LLP, Brighton

For the Respondents: Mr Daniel Hopkins, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant ("Mr Henley") has applied to this Tribunal for a stay of proceedings in his appeal under rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2099 ("the Rules").

2. The reason Mr Henley gives for his application is that an issue (which, for reasons which will become clear, I will refer to as "Derry Ground 2") to which his appeal gives rise is also raised in proceedings (the "Parallel Proceedings") recently commenced in the High Court, where other taxpayers are seeking declaratory relief to the effect that HMRC's position on Derry Ground 2 is wrong, and the outcome of those proceedings (being a decision of a court the judgments of which are binding on this Tribunal) will determine the outcome of this appeal. On that basis, submits Mr Henley, it would be expedient for this Tribunal to stay proceedings in this appeal pending the outcome of the Parallel Proceedings.

BACKGROUND

3. Mr Henley has appealed against a closure notice issued by HMRC on 20 September 2018 under paragraph 7, Schedule 1A to the Taxes Management Act 1970 ("TMA"). The closure notice disallows trading losses of some £980,216 in the tax year 2011/12. It does this by removing box 78 (losses to be carried back to previous years) from Mr Henley's self-assessment tax return for that year. Mr Henley's tax calculation for 2011/12 did not reflect the losses and so the tax Mr Henley calculated as due for 2011/12 is unaffected by the closure notice. This is because the trading losses were carried back and used in the 2009/10 tax year. The closure notice also said that "HMRC have dealt with the loss carry-back claim as follows – The carry back claims have not been given".

4. These losses were said to have arisen from Mr Henley's participation in a marketed tax avoidance scheme, which involved transactions in film distribution and other rights, which were said to be trading transactions giving rise to the losses. HMRC challenged the loss claims on various grounds. Mr Henley has abandoned his defence of the losses and accepts that they were not validly claimed. His appeal now focuses only on HMRC's challenge to his carry back of the losses to the 2009/10 tax year. As we have just seen, the closure notice stated that "The carry back claims have not been given", but Mr Henley says that the closure notice cannot have this effect and it is now too late for HMRC to deny the carry back of the (non-existent) losses into the 2009/10 tax year.

5. It may seem odd, at first sight, that non-existent losses (Mr Henley accepts that the losses he claimed were not generated in 2011/12 (or indeed ever)) can have an enduring tax effect. Someone approaching this issue for the first time might expect that the disallowance of the losses would automatically cause any tax effect of the loss claims to be reversed. That, however, is not how the tax system works. Putting the point very broadly, there are detailed rules governing the submission of tax returns (and the making of claims for tax purposes) and HMRC's ability to enquire into returns (and claims). If HMRC do not enquire into a return in time, or do so and then close their enquiry, the relevant matter (so, for example, a taxpayer's liability to tax in a particular year) is considered closed unless HMRC discover something of which they were not aware at the relevant time. This is to summarise a very complicated code at a very high level, but it is what lies behind Mr Henley's submission that the way this code works means that his tax position in 2009/10, so far as the losses are concerned, has become final and the discovery (in a non-technical sense) that the losses were never there in the first place can have no effect on that.

6. A similar situation arose in *R (oao Derry) v HMRC*. Mr Derry claimed to have incurred a capital loss on the disposal of some shares in November 2010 and to carry that loss back into the 2009/10 tax year under section 132 Income Tax Act 2007 ("ITA"). In January 2011 Mr Derry submitted his self-assessment tax return ("SATR") for 2009/10, claimed this loss relief and reduced the amount of tax he calculated as being due for that year in his SATR; he showed the tax due for the year in isolation and then reduced it by the tax relief for the capital loss. In December 2011 he submitted his 2010/11 SATR, identified the capital loss and claimed the loss against his 2009/10 income. HMRC subsequently opened an enquiry into his claim for loss relief under Schedule 1B TMA and that enquiry remained open. They also opened an enquiry into his 2010/11 SATR. However, HMRC never opened an enquiry into Mr Derry's 2009/10 SATR and it became too late for them to do so. HMRC issued a demand for payment of tax which HMRC said Mr Henley had self-assessed (his calculation of his 2009/10 tax liability before share loss relief) but not paid, on the ground that he was not entitled to deduct the share loss relief (which HMRC disputed) from his self-assessment.

7. Two issues were raised in the Court of Appeal, [2017] EWCA Civ 435, and Supreme Court, [2019] UKSC 19. The first of these ("Derry Ground 1") was whether Mr Derry's claim for loss relief fell within Schedule 1B, TMA because of the way sections 132 and 133 ITA were drafted. If it did not and the claim was properly made within the return for 2009/10, the enquiry under Schedule 1A had no statutory basis.

8. The second issue ("Derry Ground 2") was whether, even if Ground 1 were determined against Mr Derry, he should be construed as having self-assessed a liability in his SATR of some £95k for 2009/10. Mr Derry completed his SATR for 2009/10 showing a liability of some £95k, reduced by a tax credit (for the share disposal losses) generating a net tax repayment of some £70k. He completed his SATR making entries in boxes 1 and 15. Box 1 showed the amount of tax which he assessed to be due before adjustment. This box was filled in automatically on the basis of his earlier entries of his taxable income for the year. Box 15 then contained the amount of share loss relief which he claimed to be entitled to carry back to 2009/10 from the following year. Box 15 appears in a section headed "Adjustments to tax due", and the rubric under the heading expressly refers to "carrying back to 2009-10 certain losses from 2010-11". This was then confirmed by the information entered in box 16 and a separate personal tax computation (for which there is no prescribed form) setting out the calculation. The refund of £70k was simply arrived at by deducting the share loss relief claimed from the total tax due for the year (as shown in box 1 of the SATR) of £95k. The point here is that there is a difference (at least for the purposes of section 9A TMA) between a tax return and a tax return form. If an item is not taken into account for the purposes of calculating the tax payable for the year by the taxpayer submitting the form, it is not part of the "return" for section 9A purposes. Mr Derry's argument was that boxes 15 and 16 were part of his "return" (because they were how he self-assessed, albeit wrongly, his tax liability for 2009/10), so he had not self-assessed a tax liability of £95k at all, and, if HMRC were going to challenge his computation, they had to do so under section 9A TMA, but they had failed to do so and it was now too late to start.

9. In the Court of Appeal Mr Derry lost on Derry Ground 1 but won on Derry Ground 2. In the Supreme Court he won on Derry Ground 1, with the result that the Supreme Court did not reach a conclusion on Derry Ground 2. They did not, however, endorse the decision of the Court of Appeal on Derry Ground 2. Lord Carnwath (with whom three of the other Supreme Court justices agreed) said this at [68]:

> "I am not satisfied that these issues have been fully explored in argument before us, which has concentrated on the entitlement to relief rather than the means of enforcement. As has been seen, there remain unresolved

> uncertainties as to the correct interpretation of the entries in the on-line form and their treatment by the Revenue. In addition, we heard little discussion of the relationship of the enquiries respectively under section 9A and Schedule 1A paragraph 5. Apart from timing, I did not understand it to be suggested that there was any material difference between the processes. While it may be prudent for the Revenue to institute an enquiry under the former section, if there is any doubt about what is properly to be treated as part of the return, it does not necessarily follow that the Revenue is thereafter bound by the contents of the return for all purposes. If it later emerges that a claim was wrongly included in the return for that year (for example, because it should have been treated as subject to TMA Schedule 1B), it may at least be arguable that the Revenue should not be precluded at that later stage from opening an enquiry on the correct basis."

10. Lady Arden went further and expressed a "provisional" view that the Court of Appeal was wrong on Derry Ground 2.

11. As this was the ratio of its decision, the decision of the Court of Appeal on Derry Ground 2 is binding on this Tribunal, the Upper Tribunal and the High Court, but not the Court of Appeal; *R v Secretary of State for the Home Department ex parte Al-Mehdawi*, [1989] 1 All ER 777. The Supreme Court can effectively overrule a decision of the Court of Appeal by an expression of opinion, as well as by reaching a decision inconsistent with that arrived at by the Court of Appeal. However, the threshold for this is very high and requires an expression of opinion on the part of the court as a whole that the case was wrongly decided and is not to be treated as authority; *Consett Industrial and Provident Society Limited v Consett Iron Company Limited*, [1922] 2 Ch 135, and more recently *R v Barton and Booth*, [2020] EWCA Crim 575. Whilst the Supreme Court in *Derry* do not appear to have been wholly persuaded by the decision of the Court of Appeal on Derry Ground 2, the terms in which they expressed themselves do not come anywhere near the *Consett/Barton and Booth* threshold and I do not regard them as having overruled it.

12. A significant amount of time was spent in the hearing analysing *Derry* and, to a lesser extent, two other Supreme Court cases, *HMRC v Cotter*, [2013] UKSC 69, and *R (oao de Silva) v HMRC*, [2017] UKSC 74. It is very important that this decision does not become (as the hearing occasionally threatened to become) a discussion of the merits of these decisions and the relative strengths of HMRC's and Mr Henley's cases. We do, however, need to understand *Derry*, in particular, in order to form a view on its relevance to this case and the Parallel Proceedings and properly to understand Mr Avient's submissions.

13. Mr Henley (like Mr Derry) included tax relief for the losses he claimed in box 15 of his 2009/10 SATR. He says:

(1) In the light of the decision of the Court of Appeal on Derry Ground 2, that relief was included in his "return" (as opposed to just his return form) for 2009/10. HMRC enquired into his 2009/10 tax return, but they issued a final closure notice on 16 December last year which amended his 2009/10 SATR to take account of HMRC's conclusions on a different issue but expressed no conclusion and required no amendment to his SATR on account of the losses we are concerned with.

(2) No section 9A enquiry was started in relation to 2011/12 and there is no other basis on which HMRC can adjust the amount chargeable for that year.

(3) As far as the closure notice in relation to the enquiry under paragraph 5, Schedule 1A TMA is concerned, the statement that the carry back claim has not been given has no effect on the tax due and payable in 2009/10 or 2011/12.

14. In point (3) above lies a difference between Mr Derry and Mr Henley. In Mr Henley's case, HMRC's enquiry into his standalone claim for loss relief remained open; see Henderson LJ at paragraph [13] in the Court of Appeal. In Mr Henley's case, as we have seen, HMRC issued a closure notice. We should pause here and consider the procedure for making claims such as Mr Henley's, where a loss incurred in one year of assessment (the "later year") is to be given in an earlier year of assessment ("the earlier year"). In such a case Schedule 1B TMA disapplies section 42(2) TMA (which states that, where a person is required to submit a tax return, they must wherever possible include claims in the return). It goes on to provide that the claim is to relate to the later year and is to be for an amount equal to the difference between the tax paid in the earlier year and the tax that would have been paid on the assumption that effect could have been, and was, given to the claim in the earlier year.

15. Schedule 1A sets out how these claims are to be made and allows HMRC to enquire into them. On the conclusion of their enquiry HMRC are required to issue a closure notice. Paragraph 7 provides that the closure notice must either allow the claim or, in the case of a claim for a discharge or repayment of tax, "amend the claim so as to make good or eliminate the deficiency or excess" or, in any other case, "disallow the claim, wholly or to such extent as appears to the officer appropriate". Paragraph 8 allows HMRC, within 30 days of issuing a closure notice under paragraph 7 amending a claim for a repayment of tax, to give effect to the amendment by making "such adjustment as may be necessary" including by way of assessment on the claimant.

16. The conclusions I draw from all of this are:

(1) The correctness (or not) of the decision of the Court of Appeal on Derry Ground 2 may turn out to be important to Mr Henley.

(2) If it does, the decision of the Court of Appeal in *Derry* on Derry Ground 2 will determine that issue against HMRC at least until Mr Henley's case reaches the Court of Appeal; but

(3) There is an additional issue in Mr Henley's case which did not arise in *Derry* itself, namely the effect of a Schedule 1A closure notice which disallows a claim under Schedule 1B where HMRC enquired into the earlier year tax return and issued a final closure notice making no adjustments to the SATR for the earlier tax year on account of the losses in question. It may be, given the time limit in paragraph 8 for HMRC to raise an assessment, that this particular ship has sailed as far as HMRC are concerned and there is nothing in this point, but Parliament was clearly aware of the need for a paragraph 7 closure notice to "eliminate" an excessive repayment claim and this is not an issue on which, as far as I am aware, there has been a previous decision. It is, of course, not even remotely appropriate for me to express an opinion on the answer to this question; it is enough for me to note that it is "out there" to be answered.

THE PARALLEL PROCEEDINGS

17. In a witness statement before the tribunal Mr David Rogers (a principal in the firm of chartered accountants representing Mr Henley and others) explained that his firm had represented Mr Derry in his litigation and goes on to say:

> "The Firm has been engaged by a number of taxpayers where it is believed that the decision of Lord Justice Henderson in *R (on the application of Dercy) v Revenue and Customs Commissioners* [2017] EWCA Civ 435 in respect of Ground 2 has application ("Derry Ground 2"). The issue of Derry Ground 2 having application in relation to the assessment of tax and/or the amount of tax payable (the latter commonly being referred to as enforcement).

> As a result, the Firm is currently engaged to deal with issues arising from Derry Ground 2 in relation to:
>
> (i) HMRC enquiries under s9A Taxes Management Act ("TMA") 1970, into the Year 1 and/or Year 2 self-assessment returns and tax calculations (see paragraph 16 below)
>
> (ii) HMRC enquiries under Sch lA TMA 1970 into standalone claims
>
> (iii) Appeals to HMRC against closure notices issued in relation to (i) and (ii) (iv) Appeals to the FTT
>
> (v) Enforcement action
>
> (vi) Claims seeking declaratory relief in relation to (i), (ii) and (v)
>
> The broad spectrum of scenarios where Derry Ground 2 has practical application in respect of the Firm's clients is caused by which claims and/or self-assessment returns HMRC asserts it has the power to challenge, and then how HMRC asserts any amendments are reflected in the taxpayer's statement of account, thereby reflecting what tax is payable. This explains why Derry Ground 2 spans both assessment and enforcement, the latter I believe to be outside the jurisdiction of the FTT. However, I understand this latter point is a matter for the FTT and not me."

18. Mr Rogers explains that, whenever Derry Ground 2 is raised, HMRC's "stock response" is to say that the *Derry* litigation only determined Derry Ground 1. He goes on to say that,

> "Derry Ground 2, as determined by the Court of Appeal, has application to any loss, including those from a trade. The latter is the type of loss claimed by Mr Henley and identified in the further and better particulars. Again, I don't believe this is in dispute, the issue as far as I understand it, is that HMRC do not accept the decision of the Court of Appeal. HMRC's skeleton argument, as in correspondence relating to other of the Firm's clients, simply restates the arguments which were used and failed in the Court of Appeal.".

19. This has been an issue for a number of his firm's clients, and he concludes by saying:

> "The Firm having sought to resolve the matter for its clients through negotiation and HMRC having failed to engage, HMRC has sought to either issue closure notices or take enforcement action against a number of the clients. What has been problematic is, as already noted, often appeals against the former are unable to address all the relevant issues, simply because all the relevant claims and self-assessment returns are not under enquiry. This is the case in the current instance, HMRC having not enquired either into the amended self-assessment return for 2009/10 or the 2011/12 self-assessment return, both being key. It was for similar reasons Mr Derry chose to challenge HMRC's view in his case through judicial review and not through the-tax tribunal. The former having jurisdiction to consider all the issues."

20. One of his firm's clients has filed a claim seeking declaratory relief in the High Court as to the validity and effect of a demand for tax issued by HMRC. The relevant facts (which are extracted from the claim form filed by this claimant on 26 July 2023) are described as follows:

> "(i) After filing his Year 1 self-assessment return, by letter dated 10th April 2001 (the "Amendment Letter") the Claimant amended the return to include tax relief for a loss of £87,500 (the "Loss") incurred in Year 2, consequent to membership of a partnership (the "Partnership"). The Amendment Letter also amended the self-assessment tax calculation for Year 1 to a tax repayment of £35,000.

(ii) HMRC have not disputed the amendment to the Year 1 return was within the statutory time allowed.

(iii) No notice of enquiry was issued under s 9A Taxes Management Act ("TMA") 1970 into the Year 1 self-assessment tax return, or the amendments made by the Amendment Letter.

(iv) The Claimant reported the Loss in his Year 2 self-assessment return. However, tax relief for the Loss was not included in the self-assessment tax calculation for that year, relief already having been given in the Year 1 self-assessment tax calculation, as amended by the Amendment Letter.

(v) HMRC wrote to the Claimant on 16 May 2022 (the "Demand") and asserted:

a. An amendment was made to the Partnership return for Year 2 and a consequent amendment was made to the loss allocated to the Claimant in the Partnership statement.

b. Consequent to the amendment of the Partnership losses, the Claimant was due to pay additional tax for Year 2 in the amount of £26,993.78 (the "May Additional Tax").

c. The Claimant could not appeal against the decision of HMRC to collect the May Additional Tax."

21. The remedies being sought are:

"(i) A declaration that the Claimant's letter of 10 April 2001 constituted an amendment to the self-assessment return for Year 1 and the calculation of the tax due and payable for that year.

(ii) A declaration that in respect of the Year 1 return, where tax relief for a loss incurred in Year 2 is included in the self-assessment calculation, in the absence of an enquiry under s 9A TMA 1970 into the Year 1 return, an amendment to the Year 2 return cannot affect the tax self-assessed as due and payable for Year 1.

(iii) A declaration that in respect of the Year 2 return an amendment to a loss incurred in that year cannot affect the tax payable for that year, where tax relief for the loss has been included in the self-assessment calculation of the tax due and payable for Year 1 and not Year 2.

(iv) Declarations that to the extent the letter of 10 April 2001 constituted a standalone claim for the purposes of Sch 1A TMA 1970:

a. It did not affect the self-assessment tax calculation or the tax due and payable for Year 1;

b. It did not affect the self-assessment tax calculation or the tax due and payable for Year 2; and

c. In the absence of HMRC altering the amount chargeable to income tax for Year 2, the tax due and payable remains as originally self-assessed.

(v) A declaration that because of (i), (ii), (iii) and (iv) no further tax is due and payable for Year 2 and the Demand is invalid and should be reduced to nil."

22. I was told that 16 pre-action letters have been served on HMRC asserting that their view on Derry Ground 2 is wrong. Injunctive relief is also being sought to prevent HMRC seeking to collect the amounts they say are owing pending resolution of these issues.

23. Clearly, there are a number of cases pending in the High Court where it would appear that the correctness (or not) of the decision of the Court of Appeal on Derry Ground 2 will

likely turn out to be very important. However, my attention was not drawn to any case where the particular issue in this case (the effect of a closure notice under paragraph 7 of Schedule 1A TMA as outlined in [16](3) above) arises.

THE APPROACH TO BE TAKEN TO THE STAY APPLICATION

24. The approach to be taken to an application to stay proceedings pending (in that case) the conclusion of HMRC enquiries and another appeal (in that case involving a partnership of which the appellant was a member) was set out by this Tribunal in *Badzyan v HMRC*, [2017] UKFTT 0439 (TC), where (at [11]-[12]) Judge Scott observed:

> "11. Under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal has certain case management powers. In particular, and without restricting its general case management powers, under Rule 5(3)(j) the Tribunal may stay proceedings. In deciding whether to do so, the Tribunal must have regard to the overriding objective. This includes dealing with the case in ways which are proportionate to its importance, the complexity of the issues, the anticipated costs and the resources of the parties, and "avoiding delay, so far as compatible with proper consideration of the issues".
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> 12. The approach to be adopted in deciding whether to stay proceedings is that set out by Judge Berner in *Coast Telecom Limited v HMRC* [2012] UK FTT 307 (TC), where he stated, at paragraph 5:
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> > "I start by reminding myself of the proper approach to the adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would be of material assistance (not necessarily determinative) in resolving issues before the tribunal or court in question, and that it is expedient to do so." "

25. In that case the other decision which might arguably be of "material assistance" in determining Mr Badzyan's appeal was an appeal by a partnership of which he was a member against an assessment on it. No such appeal had yet been filed with the Tribunal, as HMRC's enquiries were continuing. HMRC expected to uphold the partnership's assessment on review, and then the partnership would appeal that decision. Judge Scott considered that a decision in relation to the partnership assessment might well not resolve all the issues in Mr Badzyan's appeal, but it would be of material assistance. In addition, it would "expedient" to stay Mr Badzyan's case. The case against Mr Badzyan raised the same factual and legal issues as the case against the partnership, although Mr Badzyan had some additional arguments. Litigating the same issues in parallel proceedings would not be dealing with the case in a way that was "proportionate" within the overriding objective, as parallel litigation would entail HMRC and the Tribunal using considerable resources unnecessarily.

THE TAX EXCLUSIVITY PRINCIPLE

26. The final issue we need to explore is the "tax exclusivity principle". This was raised by Mr Hopkins but not really replied to by Mr Avient. The "tax exclusivity" principle starts from the premise that it is for this Tribunal to determine the matters allocated to it by Parliament and in consequence it is an abuse for a taxpayer to seek to have a matter allocated to the Tribunal decided in the courts. The classic expression of this approach is to be found in the speech of Lord Nicholls in *Autologic Holdings plc and others v IRC*, [2005] UKHL 54, at [11]-[13]:

> "11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998. Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA.
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> 12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.
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> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation."

27. There are limits to this approach, most obviously where for some reason an appeal to this Tribunal is not open to the affected person or an appeal does not provide an adequate remedy. The many cases where companies have sought to enforce directly effective EU rights provide examples of this. The tax exclusivity principle was explored in some detail with extensive reference to numerous cases by Master Dagnall in *Donatis Labeikis and others v HMRC*, [2021] EWHC 237 (QB). Looking just at domestic law he observed (at [128]-[130]) as follows:

> "128. Considering England and Wales law further, it does seem to me that *Autologic* and *Knibbs* make clear that the exclusivity rule, at least where

> there is not an open assessment to challenge by way of appeal, is only a general one and is also subject to special circumstances. Those special circumstances, it seems to me, include European law, and I will come back to that. However, it does also seem to me that a potential special circumstance is simply an inability in tax procedural law to go to the FTT and have one's assertion determined there. The case law makes clear that, if it is impossible to go to the FTT because there is an existing time bar, or some other reason why the FTT will not accept the case whatever happens, then that is a special circumstance. That is precisely what both *Autologic* and *Knibbs* say.
>
> 129. The more difficult question in pure England and Wales law is the question as to whether the fact that the tax procedure has not yet reached the stage which in ordinary taxes management law would enable the taxpayer to appeal to the first tier tribunal is enough to be such a special circumstance as to open the door to an ordinary civil claim for a declaration or a judicial review. That is a situation which is not directly dealt with in the cases, although some of them suggest that, if the taxpayer has a means of seeking to try to persuade the Revenue to take steps (including by inviting an agreement), then that may be a reason for refusing the declaration process.
>
> 130. It does not seem to me that this particular question of whether a taxpayer can bring proceedings for a declaration or whether it is simply, and only, for the Revenue to decide when to institute an inquiry and raise an assessment has actually been the subject matter of any specific England and Wales case. Nonetheless, it seems to me at first sight that the scenario of the taxpayer having to wait for the Revenue is unlikely to be a sufficient special circumstance justifying the declaration route. I say that because in my view it is a matter which Parliament has effectively stated by the fact that Parliament has laid down in the Taxes Management Act the inquiry and assessment procedure as being the preliminary course before a taxpayer can appeal. That procedure effectively contemplates that it is up to the Revenue to decide when, if ever, to start things. It seems to me that Parliament has laid that down as being a general situation where it is for the Revenue to decide whether to take matters forward or not. At first sight, it seems to me that Parliament has potentially valid public policy objectives in doing that. The position may be different where there is a specific penalty in play, such as **possibly** if accelerated payment notices or similar were being served, but that situation, it seems to me, is not presently this case. In my judgment that outcome is at least consistent with the analysis in such cases as *Autologic*."

28. The important point noted by the Master in [129] is that it is not always possible to bring a tax-related dispute before this Tribunal, as the Tribunal is a creature of statute and only has the jurisdiction Parliament has conferred on it. While it may be an abuse to seek to challenge an existing or anticipated tax assessment outside the Tribunal, because that would be to ignore the allocation of such disputes to the Tribunal by Parliament, it would clearly not be an abuse to seek to litigate a tax-related dispute with HMRC elsewhere if the matter is one which cannot be entertained by the Tribunal.

29. Park J explained the position in *The Claimants under the Loss Relief GLO v IRC*, [2004] EWHC 3588 (Ch) like this (at [24] and [25]):

> "Thus there can be, and not infrequently there are, High Court proceedings between taxpayers and the Revenue on disputes concerning administrative aspects of the tax system. A common example is a challenge to the manner in which the Revenue wish to exercise one of the numerous information gathering powers which they possess. ... Another example is *Balen* v *IRC* [1997] STC 148, a case about whether the Revenue had tripped

> up in operating the elaborate machinery of the anti-avoidance provisions in ICTA 1970 ss.460 et seq. (They had not.)
>
> I am not going to go through the judgments in the cases which were cited to me. They are all consistent in the result: the courts did not decide questions of principle which went to liability. Such questions (as opposed to questions of machinery) were properly the subject of appeals to the General or Special Commissioners. I would accept that the precise reasoning which led the courts to that result has varied between some of the judgments. Some observations are to the effect that there is a simple rule of law that the court has no jurisdiction at all in such matters, …. Other observations are to the effect that there might in theory be a jurisdiction to decide questions of tax principle in cases begun in the High Court, but that, given the existence of the statutory jurisdiction of the Commissioners, it would be wrong for the High Court to exercise any such original jurisdiction as it might possess."

30. As Robert Walker J put it in *Glaxo Group Ltd v IRC*, [1995] STC 1075:

> "It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment; but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction."

31. Mr Derry took his case to the High Court, claiming judicial review of HMRC's demand for tax allegedly due. The Administrative Court transferred his claim to the Upper Tribunal. Morgan J (in the Upper Tribunal, [2015] UKUT 0416 (TCC),) considered that Mr Derry should have sought declaratory relief rather than judicial review and proceeded to make appropriate declarations. The "tax exclusivity" principle was not at issue in that case as HMRC had not raised an assessment or issued a closure notice; they had simply demanded payment of tax allegedly due. I understand that this is the case in the Parallel Proceedings too; none of the taxpayers in that case has an assessment or a closure notice to appeal against and bring their dispute within the jurisdiction of this Tribunal. Their only remedy is to seek declaratory relief (and an interim injunction to put a stop HMRC's collection activities) in the High Court. Their dispute is essentially about whether tax is due from them, but there is nothing which would bring their dispute into this Tribunal (which is where Parliament ordinarily expects disputes about the amount of tax owed to be heard).

32. That, of course, is not the case with Mr Henley. HMRC have issued him with a closure notice which purports to prevent him carrying back his trading losses to 2009/10. That closure notice was issued under paragraph 7, Schedule 1A TMA and paragraph 9 of that Schedule allocates appeals against such closure notices to this Tribunal.

THE PARTIES' SUBMISSIONS

33. Mr Avient's arguments as to why the proceedings should be stayed are broadly as follows. He says that the factual differences between this case and the Parallel Proceedings are immaterial, the remedies sought in the Parallel Proceedings mirror the grounds of appeal in Mr Henley's case and will result in declarations of law applicable to the issues in this appeal. Any decision in the Parallel Proceedings (being a decision of the High Court) will be binding on the Tribunal and will, therefore, be of material assistance, whether or not necessarily determinative of the appeal.

34. In that light, he said that it would be expedient to stay the appeal in this case because litigation in the High Court is a more appropriate and efficient method of dealing with what he described as the complexity of the multiple issues covering multiple years and enforcement as well as assessment. He accuses HMRC of seeking to overturn Derry Ground 2 and that the absence of cost shifting in the Tribunal means that Mr Henley would necessarily suffer the costs of HMRC seeking to overturn Derry Ground 2 at least at the level of this Tribunal, even if he were to prevail elsewhere.

35. Any delay in the conduct of the appeal is he says entirely compatible with superior courts considering the issues at stake here and a stay would avoid the danger of the Tribunal reaching a different conclusion to superior courts. HMRC would not suffer prejudice as they are the party trying to reverse a binding precedent (Derry Ground 2) and they must accept that this is going to take a lot of effort and a long time.

36. Mr Hopkins says that HMRC are not trying to overturn Derry Ground 2 at all. He says that another decision of the Supreme Court, *R (oao de Silva) v HMRC*, [2017] UKSC 74, is more relevant. He did, however, raise the applicability of the tax exclusivity principle.

DISCUSSION

37. As we have already identified, Derry Ground 2 is potentially relevant to Mr Henley. Not knowing the full details of all of the Parallel Proceedings, I do not know for sure that the correctness (or not) of Derry Ground 2 is relevant in all of those cases, but I will assume for present purposes that it is.

38. There is, as we have seen, a difference between Mr Henley's case (where HMRC have issued him with a closure notice in relation to his claim) and the facts of *Derry* and the Parallel Proceedings, so that Derry Ground 2 may not be determinative in Mr Henley's case.

39. It may also be the case that the dispute with HMRC in the Parallel Proceedings ranges more widely than a narrow, technical discussion and extends to much broader questions such as whether HMRC can assert and seek to collect a tax liability outside the assessment machinery in TMA.

40. I do not regard the question of costs in this Tribunal as being relevant one way or the other. If the Parallel Proceedings had not been started, Mr Henley would have been at risk of costs in this Tribunal in any event. Mr Henley lodged his notice of appeal on 4 April 2019, whereas the first (and, as far as I know, the only) claim form to be filed in any case in the Parallel Proceedings was only filed on 26 July this year. This case was listed for a three-day hearing before me and a member beginning on 8 August. It was only turned into a hearing to consider the stay application on 27 July, the day after the first claim form was filed. Mr Henley has been living with the costs risk of his appeal for a considerable time. If his appeal is stayed behind the Parallel Proceedings and the position on Derry Ground 2 is finally determined, this will take away his costs risk so far as arguing Derry Ground 2 is concerned, but it will not take the costs risk away completely as HMRC might still seek to run an argument based on the closure notice even if Derry Ground 2 continues to be determined against them.

41. Mr Avient says that a decision in the High Court would be binding on this Tribunal, which is of course correct. However, so far as Derry Ground 2 is concerned, the High Court, as well as this Tribunal, is already bound by the decision of the Court of Appeal in *Derry*. In effect, what Mr Avient is saying is that this appeal should be stayed until the Parallel Proceedings have produced a final determination of Derry Ground 2 one way or another. In the context of a case which is ready for trial, that could be a very long stay indeed.

42. Mr Avient says that litigation in the High Court is more appropriate to deal with what he describes as the complexity of the issues raised. As we have already noted, the Parallel

Proceedings may come to raise issues which go beyond those raised in Mr Henley's case. This is because there is no question here of HMRC seeking to collect tax from Mr Henley outside the TMA machinery. The fact that the Parallel Proceedings may raise wider issues that go beyond those raised by the appeal is not a ground for staying the appeal.

43. We are concerned with a technical dispute about a closure notice. It is not obvious what 'enforcement' or other wider issue is presented in this case. In *Knibbs v HMRC*, [2019] EWCA Civ 1719, the Court of Appeal considered that this Tribunal's jurisdiction extends to procedural issues around matters such as the issue of closure notices and similar acts, commenting:

> "21. … Mr Ewart submitted that, if HMRC are not entitled to open an enquiry under sections 9A and 12AC, a closure notice is a nullity and its conclusions or amendments cannot be the subject of an appeal to the FTT. It seems to us that the FTT is competent on an appeal to decide whether HMRC had the statutory power to invoke the procedure which led to the closure notice under appeal. A lack of power to issue a closure notice is as much a ground of appeal against its conclusions or amendments as any other ground of challenge."

44. If, by "enforcement" Mr Avient means no more than working out how much tax is payable (see the final passage from the extract of Mr Rogers' witness statement at [17]), that is exactly what this Tribunal does every day; it determines appeals which are to do with how much tax is payable. As far as Mr Henley's appeal is concerned, the conclusions it reaches and the amendments it proposes, as well as the process by which it was issued, are well within the scope of this Tribunal's jurisdiction.

45. HMRC have issued Mr Henley with a closure notice and Parliament has allocated appeals against such closure notices to this Tribunal. It would be an abuse of process for Mr Henley to seek to challenge the closure notice in the High Court. By asking for this appeal to be stayed, he is effectively seeking to do this by proxy. Mr Henley would not be allowed to abandon his appeal in this Tribunal and commence proceedings in the High Court designed to achieve a similar outcome (challenging the closure notice). That would be an abuse. It is equally abusive for Mr Henley to seek a stay of these proceedings whilst another party prosecutes proceedings in the High Court which are designed to have a similar effect.

46. As far as timing is concerned, as I have mentioned, this case was listed for a three-day substantive hearing before me and a member beginning on 8 August. HMRC expressed surprise and disappointment when they realised that the substantive hearing was not going ahead. They are clearly ready for a substantive hearing. Mr Henley has, of course, already abandoned any attempt to justify his claim for trading losses; his appeal is concerned only with the narrow (but important) tax administration procedural points outlined in this decision. The fluency with which Mr Avient took the Tribunal through his arguments on those issues makes me sure that Mr Henley too is ready for a substantive hearing.

47. Bearing in mind that questions of liability to tax (including procedural issues around the issue of closure notices) are allocated by Parliament to this Tribunal and that the parties to this appeal are ready for a substantive hearing on the focused issues it presents, I consider that, rather than waiting for the High Court to consider the Parallel Proceedings, it would be more expedient for all concerned if Mr Henley's appeal proceeded in this Tribunal and the High Court determined the Parallel Proceedings with the benefit of that decision. I accept that this may require determination of the Parallel Proceedings to wait on any appeal to the Court of Appeal or the Supreme Court. One set of proceedings (this appeal or the Parallel Proceedings) needs to go first and be the vehicle for resolving the question of tax liability in the light of the procedures in TMA for assessing and collecting tax. It seems to me that a set of proceedings which begins in a specialist tax tribunal is not only likely to be more helpful, but (more importantly) is in line with the will of Parliament. To the extent that the Parallel Proceedings

raise other, wider issues, these can, if necessary, be dealt with once the tax technical issues presented by this appeal have been resolved.

48. For all of these reasons I have concluded that not staying the appeal and proceeding to a substantive hearing of this appeal as soon as possible would both avoid delay in dealing with this appeal and be wholly compatible with a proper consideration of the issues it presents. One set of proceedings needs to go first. This appeal is ready to be heard. It will not put Mr Henley to any greater cost than if the Parallel Proceedings had not come along, which they have only done very recently. This approach enables the special expertise of the Tribunal to be used effectively (indirectly for the benefit of the claimants in the Parallel Proceedings too).

49. I understand that the claimants in the Parallel Proceedings are seeking interim injunctive relief to stop HMRC's premature collection activities. Assuming they can obtain this, and there was no suggestion before me that any difficulty had been encountered or was expected here, they should not be prejudiced by waiting behind Mr Henley.

50. I do not, of course, know what position the High Court will take as regards the Parallel Proceedings and whether they will agree with my approach, but I consider that the decision I have reached, so far as not staying this appeal is concerned, best gives effect to the will of Parliament and to the overriding objective in the Rules and that is the question I am concerned with.

DISPOSITION

51. For the reasons set out above, this application is dismissed and the proceedings in this appeal will not be stayed.

52. I direct that, within five business days of the release of this decision, the parties are to notify the Tribunal of their dates to avoid for a two-day substantive hearing of this appeal in the window Monday, 4 September 2023 to Friday, 22 December 2023.

53. I will ask the Tribunal administration to try to list the substantive hearing as soon as possible. Much as I have enjoyed and learned from Mr Avient's and Mr Hopkins' submissions and our discussions, I think it better that they should start the substantive hearing afresh. Although the 8 August substantive hearing was listed before me, I will ask the Tribunal to list the new substantive hearing before another judge.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 17 August 2023