[2015] UKUT 0218 (TCC)

Tribunal ref: FTC/140/2014

PROCEDURE — permission to appeal given by First-tier Tribunal — FA 2008 Sch 36 taxpayer notice — statutory restriction on right of appeal — extent and effect of restriction — application by respondents to strike out appeal — UT Rule 8 — whether appeal should be struck out — whether decision of Administrative Appeals Chamber in* LS v London Borough of Lambeth *relevant — only indirectly — appeal struck out

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CARMEL JORDAN **Appellant**

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 28 April 2015

Dr Robert Milton, of Milton & Co, for the appellant

Mr John Brinsmead-Stockham, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

CROWN COPYRIGHT © 2015

DECISION

1. The appellant, Miss Carmel Jordan, is in business as a taxi driver. In April 2013 the respondents, HMRC, wrote to her to say that they wished to undertake what they referred to as a Business Records Check. The format of the check, as it was explained in the letter, was a 15 minute telephone conversation in which the appellant's record-keeping would be discussed. If the information obtained was not considered satisfactory, a visit might follow. The appellant declined to participate in the check and some further correspondence between HMRC and her appointed agent, Dr Robert Milton, followed. The appellant continued to refuse to participate and on 16 January 2014 HMRC issued an information notice, exercising or (Dr Milton maintains) purportedly exercising the powers conferred on them by Sch 36 to the Finance Act 2008.

2. Paragraph 1 of that Schedule provides:

> "(1) An officer of Revenue and Customs may by notice in writing require a person ('the taxpayer')—
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this Schedule, 'taxpayer notice' means a notice under this paragraph."

3. Paragraph 29 of the Schedule confers a restricted right of appeal:

> "(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.
>
> (2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.
>
> (3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3."

4. The notice had not been approved in advance by the tribunal, and Miss Jordan exercised her right of appeal. Her grounds were, in essence, that there is no statutory basis for a Business Records Check, that there was no good reason why she should participate in such a check, and that HMRC were abusing their Sch 36 powers in order to compel her to do so. Her appeal came before the First-tier Tribunal ("the F-tT") (Judge Barlow and Mr Brown) on 15 August 2014.

5. Further provisions relating to appeals against such notices are contained in para 32 of the Schedule. Those relevant here are as follows:

> "(3) On an appeal that is notified to the tribunal, the tribunal may—
>
> (a) confirm the information notice or a requirement in the information notice,
>
> (b) vary the information notice or such a requirement, or
>
> (c) set aside the information notice or such a requirement.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final."

6. Paragraphs 29 and 32 are both within Part 5 of the Schedule.

7. The F-tT concluded that the notice was valid in principle, but allowed the appeal in part by removing from the list of required documents and information attached to it four items which, they said, duplicated other items and by removing one further item which they said was not reasonably requested. In other words, they did as sub-para (3)(b) permits. In the course of so doing the F-tT mentioned para 29(2), and observed at para 15 of their decision that "We need to consider which if any of the items requested were for statutory records and for those items no appeal lies". The F-tT went on to identify which of the documents requested were statutory records (by reference to s 12B(3)(a) of the Taxes Management Act 1970), and made it clear that the appellant was required to provide them, but they did not strike out that part of the appeal. They also did not go on to specify a period for compliance, in accordance with sub-para (4)(a). In addition, the F-tT evidently overlooked para 32(5) of Sch 36 since they referred, in the final paragraph of the decision, to the appeal rights normally available to an unsuccessful litigant in that tribunal without any qualification.

8. I need at this point to digress slightly. Following the release of the F-tT's decision in September 2014 HMRC issued what at first sight appears to be a further notice. Closer examination shows that it was intended to reflect what the F-tT had decided, and to specify, as the F-tT had not, a date for compliance. It was in substance, even if not expressly identified as such, an amended notice in the same form as the first save that the items the F-tT had decided need not be supplied were omitted. There was no need for HMRC to adopt that course; as para 32(4)(b) makes clear, when the tribunal has not specified a date for compliance all that is necessary is written notice from HMRC of a reasonable date. Some of the wording was also questionable, in particular the statement that the tribunal had approved the notice (a procedure for which para 3, but not paras 29 and 32, of the Schedule provides) when in reality it had largely dismissed an appeal against the original notice. However, although HMRC were misguided in serving a further notice and in their choice of words, it does seem to me that what was intended is perfectly clear, and if it was not clarification could easily have been obtained by correspondence. Instead, Dr Milton treated the second notice as one superseding that which had been the subject of the appeal, and on his client's behalf submitted a further appeal to the F-tT. All I need to record for the purposes of this decision is that I agree with Mr Brinsmead-Stockham, who appeared before me for HMRC, that the further notice does not supersede the earlier notice which, subject to any success the appellant might achieve before this tribunal, remains in effect as

varied by the F-tT. Indeed, it does not seem to me that the further notice, unnecessary as it is, is a separate notice at all; it is merely the original notice re-issued with amendment. The further appeal to the F-tT is in my judgment misconceived.

9. Dr Milton sought permission from the F-tT, on his client's behalf, to appeal to this tribunal against its decision in respect of the earlier notice. Evidently still overlooking the restriction on appeals imposed by para 32(5), Judge Barlow gave permission, and the appellant duly lodged her notice of appeal with this tribunal. HMRC now seek to strike out the appeal on the ground that the tribunal has no jurisdiction to hear it. Their application is based upon rule 8(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008, which states that the Upper Tribunal must strike out an appeal if it "does not have jurisdiction in relation to the proceedings". Dr Milton, unsurprisingly, resists the application.

10. The right of appeal from the F-tT to this tribunal is conferred, as para 32(5) indicates, by s 11 of the Tribunals, Courts and Enforcement Act 2007 (s 13 relates to appeals from this tribunal to the Court of Appeal, and is not material to this decision). The relevant parts of s 11 are as follows:

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission …."

11. It is common ground that the F-tT's decision is not an excluded decision and that sub-s (8) is of no relevance.

12. Read alone, those subsections indicate that there is a right of appeal to this tribunal on any point of law arising from a First-tier Tribunal decision, the only limitation being the requirement of permission. Mr Brinsmead-Stockham's argument is the simple one that the right, in a case of this kind (that is, in an appeal brought in accordance with para 29), is overridden by para 32(5). That provision, contained in primary legislation later in date than the 2007 Act, must prevail for ordinary reasons of statutory construction. The meaning of the later provision is perfectly clear, and the policy objective behind it is equally readily identified: it is to enable the taxpayer to secure judicial scrutiny of a notice served by HMRC, but to ensure that such judicial scrutiny may take place at only one stage in order that the information gathering process is not unduly delayed.

13. For completeness, and lest it should be thought that I have inadvertently overlooked the judgment of the Court of Appeal in *R (ToTel Ltd) v First-tier Tribunal (Tax Chamber)* [2013] STC 1557, I should interpose some comments about the fact that para 32(5) has been amended. As originally enacted, it read "A decision by the First-tier Tribunal on an appeal under this Part of this Schedule is final." The original wording was replaced, by operation of para 471 of Sch 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, by the words set out above. The amendment took effect from 1 April 2009, the date on which Sch 36 came into force (see SI 2009/404, art 2). Thus the replacement wording is the only wording which has ever been in force.

14. The question in *ToTel* was whether an amendment, also effected by the 2009 Transfer of Functions Order, which had the effect of removing a right of appeal which had previously existed was permitted by the enabling legislation. The Court of Appeal decided that it was not, and that the right of appeal remained in place. That is not the position here: the effect of the amendment is not to remove, restrict or otherwise cut down a pre-existing right of appeal, but to clarify the exclusion of a right of appeal which had, to that point, not come into existence. The original version assumed that all appeals pursuant to para 29 would come before the F-tT, whereas the 2009 Order, with other provisions, made it possible in certain circumstances for such an appeal to be transferred for hearing from the F-tT to this tribunal. The amended wording caters for that possibility, and by its reference to the 2007 Act makes it clear, should there have been any room for doubt, that the restriction overrides s 11. I do not, myself, think that there is any real room for doubt; it is plain from either version of para 32(5) that the legislative intention is that there should be one appeal only. I do not see how the provision can be read in any other way.

15. Pausing there, it appears that HMRC are right: there is no right to appeal from the F-tT's decision, the F-tT should not have referred in their decision to appeal rights, Judge Barlow should not have given permission to appeal and I must accede to HMRC's application and strike out this appeal.

16. Dr Milton seeks to overcome that conclusion by, first, identifying several passages in the F-tT's decision containing propositions of law which he says are susceptible of challenge, and by then arguing that the F-tT itself described them, not as "decisions", but as "findings". In my judgment there is nothing in this argument. However the F-tT may have expressed itself, the document it produced following the hearing is described (by rule 35(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) as a "decision notice", which "states the Tribunal's decision". It is perfectly clear that what is meant by "decision" is the tribunal's overall conclusion, allowing an appeal in whole or in part, or dismissing it, and it is that conclusion which the decision notice conveys. Moreover, rule 35(2) and (3) makes it possible, with the parties' agreement, for the F-tT to issue a decision notice which does no more than set out the conclusion and the appeal rights, if any.

17. "Decision" is also the term used in s 11 of the 2007 Act, which confers a right of appeal against "any point of law arising from a decision". That must mean, if the plain purpose of the legislation is to be respected, the tribunal's overall conclusion. It would be absurd if a would-be appellant were permitted, or required, to mount a separate appeal against the F-tT's decision in respect of each individual point leading to its overall conclusion. It also does not assist the appellant to argue that she wishes to challenge something which is a "finding" but not a "decision" since s 11 does not confer a right of appeal against a "finding".

18. Dr Milton also argues that while para 32(5) refers to s 11 of the 2007 Act, it does not refer to, and therefore does not exclude, the right of appeal conferred by the F-tT Rules themselves. He points to rule 39(1), which provides that "A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal". I agree, however, with Mr Brinsmead-Stockham that this argument too must fail because neither that rule nor any other confers a right of

appeal; they merely regulate the manner in which a right of appeal, if there is one, must be exercised. It is impossible to conclude from the absence of a reference in rule 39 to the possibility that no right of appeal may exist in a particular class of case that a right of appeal must exist.

19. There is, however, one further argument with which I need to deal. It will be apparent from what I have said that, even if it did not put it in exactly this way, the F-tT determined three things: that there was no right of appeal in respect of the appellant's statutory records; that certain of the items requested were, and others were not, statutory records; and that part of the request which related to non-statutory records should be disallowed. As I have said, although the F-tT's decision makes it plain that they recognised that there was no right of appeal in respect of the appellant's statutory records, and they stated that she must comply with that part of the notice, they did not strike out any part of her appeal.

20. In *LS v London Borough of Lambeth* [2010] UKUT 461 (AAC) the Administrative Appeals Chamber of the Upper Tribunal ("the AAC") was required to deal with a case in which the First-tier Tribunal judge, sitting in the Social Entitlement Chamber, had concluded that, as the appeal before him was irredeemably out of time, he had no jurisdiction to consider its merits. The AAC, with the agreement of the parties, treated that conclusion as the equivalent of a direction striking out the appeal, a direction which the relevant rules permitted the judge to make. The primary question before the AAC was whether the deemed striking out of the appeal could be challenged by way of statutory appeal, or only by way of judicial review. The appellant had taken the precaution of seeking relief by both routes, and had secured the necessary permission in each case; her two applications then came together before a three-judge panel of the AAC, including its then President.

21. At [81] the AAC identified a number of differences between the two remedies, making it clear that the answer to the question was of considerably more than academic significance. They then embarked on an examination of the relevant case law, beginning with *Secretary of State for Work and Pensions v Morina* [2007] EWCA Civ 749, [2007] 1 WLR 3033, in which the Court of Appeal decided that a decision by a social security tribunal (the forerunner of the Social Entitlement Chamber) by which it refused to admit an appeal on the ground that it lacked jurisdiction was not a "decision" within the meaning of s 14(1) of the Social Security Act 1998, which conferred a right of appeal "from any decision of an appeal tribunal". In reaching that conclusion the court referred to the distinction drawn by Laws LJ, in *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33, between "a decision (that is, a decision on the actual question whether a claimant is entitled to a particular benefit or not) and what may conveniently be called a determination (that is, a determination of any matter along the way leading to a decision, including a determination of a procedural issue such as an application for an adjournment". I add, parenthetically, that this distinction is essentially the same as the distinction Dr Milton sought to draw: see para 16 above.

22. The AAC also mentioned the comment of the Master of the Rolls in *Morina* that

> "…the question is entirely one of statutory construction … In some contexts the word 'decision' might well include an interlocutory decision such as a refusal of an adjournment or an order to disclose documents."

23. It also pointed out that in several cases, including at least two before this tribunal—*Connect Global Ltd v HMRC* [2010] UKUT 372 (TCC), [2011] STC 51 and *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (TCC), [2011] STC 617—it has been assumed without argument or even comment that an appeal lies against an interlocutory decision. I might add that in *Revenue and Customs Commissioners v Atlantic Electronics Ltd* [2013] STC 1632 the Court of Appeal made the same assumption in an appeal from this tribunal, which had decided an appeal from the First-tier Tribunal in respect of a case management decision.

24. At [90] the AAC said this:

> "We are satisfied that the word 'decision' in both s 11(1) and s 13(1) [of the 2007 Act] must be read broadly. That is the natural reading of the word. This is particularly so where the structure of the section is to give a right of appeal generally, but then to carve out particular types of 'excluded decision' in relation to which there is to be no right of appeal. It is not a question of granting a right of appeal in relation to particular types of pronouncement which are then classified as 'decisions', but rather taking the general run of decisions, and identifying particular types of excluded decision so that the right of appeal applies to all that are not excluded."

25. They then went on to conclude that in the case before them the appellant did have a right of appeal against the decision of the First-tier Tribunal judge that her appeal was out of time. That right of appeal was an adequate remedy, and the application for judicial review was, consequently, dismissed.

26. I was shown three decisions of the Tax Chamber in which reference was made to the AAC's decision in *LS v Lambeth*: *Lee v HMRC* [2012] UKFTT 312 (TC), *Beckwith v HMRC* [2012] UKFTT 181 (TC) and *Thompson v HMRC* [2013] UKFTT 103 (TC). In each case the tribunal stated that there was no right of appeal against its decision upholding or varying the information notice so far as it did not relate to statutory records, because of para 32(5), but that there was a right of appeal, subject to permission, against its decision striking out that part of appeal which related to statutory records. I use the term "decision" here to mean the conclusion relating to each of those issues as it is set out in the decision notice.

27. As Mr Brinsmead-Stockham pointed out, that approach leads to the seemingly absurd result that there is no right of appeal against a decision on the merits which the F-tT has made in respect of non-statutory material, but there is a right of appeal against its decision to strike out so much of an appeal as relates to an information notice requiring the production of statutory records, not after consideration of the merits but on the ground that there is no right of appeal to the tribunal against such a requirement. I am now asked to determine whether that is the correct outcome upon the basis, derived from *LS v Lambeth*, that the F-tT's statement in this case that there is no right of appeal against an information notice requiring the production of statutory records, and its refraining from dealing with that part of the appeal, or purported appeal, are to be deemed to amount to a direction striking out that part of the appeal.

28. As I have already indicated, at para 19 above, there are (at least in case of dispute) three elements to a decision of the F-tT in a case of this kind. Taking them in reverse order, it is plain from what I have already said that there is no right of appeal to this tribunal against so much of the decision as relates to non-statutory records, as long as both parties agree that they are non-statutory records. Although it is not quite so obvious, I am satisfied that the same is true of documents identified by the tribunal as non-statutory in a decision determining a disagreement about whether a particular item does, or does not, form part of a taxpayer's statutory records, including a decision by which, in order to segregate the taxpayer's statutory records from other material, the tribunal amends the description adopted in the information notice, or divides an item into two parts. In this case too there would be no right of appeal in respect of the requirement to produce material not forming part of the taxpayer's statutory records.

29. The next question is whether the tribunal's decision that an item is, or is not, part of the statutory record is susceptible of further appeal. Mr Brinsmead-Stockham argues that it is not, because the appeal which led to the F-tT's determination must have been made in accordance with para 29—there being no other provision conferring a right of appeal against an information notice—and, since paras 29 and 32 are in the same Part of the Schedule, para 32(5) is engaged. Dr Milton did not address this point separately, but relied on the arguments he pursued in respect of the decision as a whole.

30. In my judgment Mr Brinsmead-Stockham is right. I agree with him that the only avenue of appeal to the F-tT is that contained in para 29(1) and, since sub-para (2) precludes an appeal so far as the notice relates to statutory records, any appeal by a taxpayer against an information notice must be based on the premise that any document identified in the notice as part of his statutory record has been wrongly so identified, that the tribunal should determine that issue and, if he is right in his contention that the item does not form part of his statutory record, he should not be required to provide it, for one reason or another. A decision of the F-tT on the identification point, whichever way it falls, must therefore be a decision given on an appeal within para 29(1), and para 32(5) is accordingly engaged.

31. The final question is whether there is any right of appeal to this tribunal against a decision of the F-tT to strike out (or, which amounts to the same thing, to refuse to deal with) an appeal, or part of an appeal, against an information notice because it relates to statutory records. It does not seem to me that any distinction is to be drawn for this purpose between items agreed to be statutory records, and those determined by the tribunal, after resolution of a dispute, to be statutory records, because the issue is not whether the tribunal was correct in that determination, but whether it should have struck out the appeal, or the relevant part of it. In my judgment there is no right of appeal, and for three reasons.

32. The first is the same as one I have already explored: the appeal must have been brought in accordance with para 29(1) since there is no other possibility. The F-tT's striking out of the appeal, or part of it, is in substance the implementation of its decision that the appeal, though brought pursuant to para 29(1), is excluded from its jurisdiction by virtue of para 29(2). That decision, as I see it, is "a decision of the tribunal on an appeal under this Part", which engages para 32(5). I

am not persuaded that the alternative proposition, that an appeal precluded by para 29(2) must be an appeal under some other provision, can be valid when there is no other such provision; if the appeal is not brought pursuant to para 29(1) it must be a nullity. I do not see how there can properly be an appeal against a decision striking out what, if the appeal is even to be argued, must be acknowledged by the would-be appellant to fall within para 29(2).

33. The second reason arises if my view on the first is wrong. This tribunal could allow an appeal against the striking out of an appeal by the F-tT only if it were to conclude that the F-tT was wrong to strike it out. The F-tT would be wrong only if it was incorrect in its view that the items in question were statutory records. But, as I have explained, a decision on that issue is one which gives rise to no right of appeal. This is not a case in which the F-tT has a discretion susceptible of review on appeal. If the relevant items form part of the taxpayer's statutory records it has no jurisdiction, and no discretion to exercise; if they do not it must go on to consider the appeal on its merits and it would not be open to it to strike out the appeal on the ground of lack of jurisdiction.

34. The third reason is that in my judgment *LS v Lambeth* deals with a quite different question, and what was said in that case, far from undermining it, supports the conclusion that when a purported para 29(1) appeal is struck out for lack of jurisdiction there is no right of appeal.

35. I need to begin with a little more detail about *LS v Lambeth*. The appellant wished to challenge an award of housing benefit which, she said, was based on a mistaken understanding of her circumstances. The relevant statutory provision gave a person in her position a right of appeal, which had normally to be exercised within one month of notification by the local authority of the award. Provided certain conditions were satisfied, the tribunal might extend that period, but by a maximum of one year; there was no power to extend it any further, in any circumstances. The underlying issue in the appeal to the AAC was whether the relevant notification had been validly given; if it had the 13-month maximum period had already expired when the appeal was brought, if it had not time had not begun to run. The judge at first instance decided that the notification was valid, that in consequence the appeal was out of time, and that he had no jurisdiction to hear it.

36. That case and this are similar in that the tribunal at first instance concluded in both cases that it did not have jurisdiction, but they differ in that, in *LS v Lambeth*, there was no equivalent to para 32(5). Thus the question was not whether any right of appeal which might otherwise have existed was precluded by a statutory bar, but whether there was a right of appeal at all. As I have said, the AAC decided that there was, and their conclusion was consistent with the assumption of this tribunal in *Connect Global* and *Capital Air Services* that there is ordinarily a right to appeal to this tribunal against interlocutory decisions of the Tax Chamber of the First-tier Tribunal.

37. At para 24 above I set out what the AAC said at [90]. I respectfully agree with that analysis. In essence, the AAC said that s 11(1) of the 2007 Act confers a general right of appeal to the Upper Tribunal from decisions of the First-tier Tribunal, from which certain decisions may be excluded. Paragraph 32(5) identifies a class of excluded decisions and, for the reasons I have given and do

not repeat, a decision striking out a purported para 29(1) appeal to the extent that the material to which it relates falls within para 29(2) is within that class.

38. For all those reasons I have concluded that there is no right of appeal to this tribunal against any part of the F-tT's decision, and that this appeal must be struck out: I so direct. That conclusion is, moreover, consistent with what I perceive to be the legislative purpose: to exclude any appeal against a requirement to produce those records a taxpayer is obliged to keep and, as Mr Brinsmead-Stockham said, to restrict judicial scrutiny to one stage. It is perhaps worth pointing out that para 32(5) applies to HMRC as well as to a taxpayer.

39. I add for completeness, first, that in my judgment the statements in *Lee*, *Beckwith* and *Thompson* to the effect that the appellant in those cases could appeal, with permission, against the striking out of parts of their appeals were incorrect and, second, that if the appellant in this case has any remedy at all it must be sought by way of judicial review.

Colin Bishopp
Upper Tribunal Judge

Release date 7 May 2015