



TC04706

Appeal number: TC/2015/02748

*INCOME TAX – procedure – application to strike out under Rule 8(2)(a) –
Tribunal’s jurisdiction over late payment interest charged and HMRC
administration and behaviour – appeal struck out.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JANAK SHAH

Appellant

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

**Sitting in public at the Tribunal Centre, 185 Dyke Road, Brighton on 10
November 2015**

The Appellant in person

Mr Neil Nagle, Presenting Officer, for the Respondents

DECISION

1. This was an application by the Commissioners for Her Majesty's Revenue and
5 Customs ("HMRC") asking that the Tribunal exercise its powers under Rule 8(2)(a)
of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI
2009/273) (the "FTT Rules") to strike out the appellant's appeal on the basis that the
Tribunal has no jurisdiction to entertain it.

2. Having heard HMRC's submissions and the appellant's response and having
10 read the skeleton arguments provided by both parties, I decided to strike the appeal
out.

3. In this decision I am doing two things. I firstly set out the background to the
appeal and the arguments by the parties on the application, and then my reasons for
striking the appeal out. Second, I add some observations based on my reading of the
15 documents in the case and the answers to questions I asked of both parties. These
observations are undoubtedly what used to be called *obiter dicta* – they are not part of
my reasons for the decision and do not have any legal effect on the parties. I make
them for two reasons. Mr Nagle very properly undertook to ensure that my
observations were conveyed to the appropriate person in HMRC, and I want to make
20 sure that there can be no doubt about what they are: something not always possible
when remarks are made orally.

4. I also want to ensure that Mr Shah understands them. The reason this is a full
decision is that Mr Shah indicated when I announced the decision that he wished to
appeal against it. It is not my responsibility to advise Mr Shah for or against
25 appealing: but I hope that what I say will help him when he comes to make that
decision.

The background to the appeal

5. Mr Shah made income tax returns including a self-assessment for the four tax
years 2007/08, 2008/09, 2009/10 and 2010/11.

30 6. For 2007/08 Mr Shah's self-assessment ("SA") showed that he owed £380.58.
No enquiry or other action has been taken by HMRC in relation to the SA or return
for that tax year.

7. For 2008/09 Mr Shah's SA showed that he was due a repayment of about
£1,580 as a result of a claim in the return that he had sustained losses in a trade and to
35 set those losses against his employment income resulting in a claim for repayment of
tax suffered under PAYE. The repayment was made on 11 December 2009.

8. For 2009/10 Mr Shah's SA showed that he was due a repayment of about
£1,388 for the same reasons as applied for 2008/09. The repayment was made on 17
January 2011.

9. For 2010/11 Mr Shah's SA showed that he was due a repayment of about £1,520 for the same reasons as in 2008/09. But this time HMRC began an enquiry into the return under s 9A Taxes Management Act 1970 ("TMA") and did not make any repayment beyond, apparently, an amount of £31.65.

5 10. The outcome of that enquiry was that HMRC amended Mr Shah's return for that year to show no repayment but a small liability. They also made "discovery" assessment under section 29 TMA (presumably under s 29(1)(c)) for 2008/09 and 2009/10 to recover what they now claimed to be over-repayments in those years.

10 11. Mr Shah asked for a review and as a result of the review the amounts due to be paid by Mr Shah were reduced somewhat. Mr Shah then notified his appeal to this Tribunal.

15 12. His appeal was heard by the Tribunal on 9 January 2014 (Judge Malcolm Gammie CBE QC and Miss Sandi O'Neill). On 6 May 2014 the decision of the tribunal was released and is cited as *Janak Shah v HMRC* [2014] UKFTT 432 (TC). It upheld HMRC's contentions that there was no trading loss and confirmed the amendment and the two assessments as reduced on review.

20 13. On 16 June 2014 Mrs Sexton of HMRC's Local Compliance Directorate wrote to Mr Shah, referring to the Tribunal's decision. She said that she had amended the assessments and had released for collection the tax which had been suspended pending the appeal outcome. She also enclosed a copy of Mr Shah's "SA Statement" showing "what you need to pay", together with details of the calculations.

25 14. I have not seen either the amended assessment or the calculations referred to. The SA Statement is however in evidence. There are 43 lines in it, and the last, headed (mysteriously in my view) "Balance before allocation to sums becoming due" is in the amount of £3,412.15. The letter enclosing the statement added that "interest is running".

15. In correspondence with HMRC Mr Shah referred to the reviewing officer's letter to him which, as he said, the Tribunal had agreed with. This letter showed that the tax he owed was:

30 "2008/09 £1580.50
2009/10 £1389.40
2010/11 £0 (overpayment £31.70 but repaid already £31.65)"

35 16. Mr Shah sent two cheques to HMRC, one for £1,580.50 and one for £1,389.40. As can be readily calculated those two totalled £2,969.90 whereas the SA Statement showed £3,412.15 as due.

17. When Mr Shah received his next SA Statement dated 1 December 2014 it showed an amount due of £447.31, which can be seen to be very slightly more than the difference between £3,412.15 and £2,969.90. Mr Shah paid this amount "under protest" and has since endeavoured to establish with various departments of HMRC

including Complaints units, that he should not have been required to pay that amount and that it should be repaid. He has also sought a full explanation of how the figure of £447.31 was made up. On 21 April 2015 Mr Palfrey, a Complaints Officer, gave Mr Shah a breakdown of the figures that made up the amount, as follows (I have rearranged Mr Palfrey's order):

	Interest 07/08	62.00
	Interest 08/09	18.62
	Interest 09/10	12.17
	Interest 10/11	7.45
10	Balancing payment 09/10	106.00
	Balancing payment 10/11	87.80
	Bal. of o/repayment 09/10	121.62
	Over repayment made 10/11	31.65

Mr Palfrey's letter concluded that the amounts shown on the SA Statement were properly due and he explained the rules relating to interest to Mr Shah. In particular Mr Palfrey did not accept Mr Shah's assertion that HMRC had accepted his cheques for £2,969.90 in full and final settlement.

18. Before he received Mr Palfrey's letter Mr Shah had lodged a Notice of Appeal with the Tribunal on 30 March 2015. In the form he had entered in the box asking "The amount of tax" "£447.31" (the balance of his December SA statement which he had paid under protest). The box asking for the date of the appeal said "24 March 2015" (this is the date of a letter in Mr Shah's bundle from him to the Assistant Director Local Compliance)). The grounds of appeal in section 7 of the Appeal Notice were extensive and included that:

(1) HMRC are currently demanding an unreasonable and fictitious amount which they cannot substantiate or provide me with a reasonable explanation as to how they have computed the figures.

(2) The payment of £2,969.90 was in full and final settlement as agreed and accepted by HMRC. A letter of 16 September showed the up to date position and showed no amounts owing. But all of a sudden HMRC in December demanded back tax amounting to £447.31 with no explanation where the figures came from.

(3) The amount shown as due is 15.06% of the £2,969 and if it represents interest is at an excessive rate.

19. The "Result" that Mr Shah asked for in Section 8 of the Notice of Appeal was that "I should be refunded £447.31 with interest at the Tribunal Adjudication".

20. Mr Shah will realise that I have not mentioned every piece of correspondence that was in the bundles and I have not set out the grounds of his appeal in full. But I have read all the correspondence and have made what I consider to be an appropriate selection both of that correspondence and of his grounds of appeal, sufficient to make

it clear what he is asking the Tribunal to do. I add here that is his skeleton argument that he prepared for this hearing he said that HMRC has used “bullying tactics” and had behaved unprofessionally.

HMRC’s application

5 21. HMRC wrote to Mr Shah on 10 August 2015 explaining that in their view the Tribunal had no jurisdiction over the matters in his ground of appeal. It asked him to consider other avenues of redress such as HMRC’s complaints procedures and the Adjudicator, and they told him that if wished to pursue his appeal, HMRC would ask for it to be struck out under Rule 8(2)(a). Mr Shah objected strenuously to the idea of
10 a strike out and so the application came before the Tribunal.

22. For HMRC Mr Nagle argued that in matters of income tax a right of appeal arose against an amendment of a self-assessment or an assessment which is not a self-assessment such as a discovery assessment (s 31(1)(b) and (d) TMA). Mr Shah had exercised those rights when he appealed for the years 2008/09, 2009/10 and 2010/11
15 and his appeals had been determined by the Tribunal in Judge Gammie’s decision.

23. The amounts shown on the SA statement as relating to those years were the balance of any amounts Mr Shah owed after the decision had been reflected in revised assessments etc. They could not now be challenged.

24. As far as interest was concerned there was no right of appeal against an interest
20 charge. Mr Nagle cited the Upper Tribunal decision of *HMRC v Neil and Megan Gretton* [2012] UKUT 261 (TCC) (Judge Timothy Herrington) at [12] “There is no discretion on the part of the First-tier Tribunal to determine that interest should not be payable”. Mr Nagle referred me to s 86 TMA and the use of the word “shall” and the absence of an appeal right there.

25 25. Mr Shah essentially repeated his grounds of appeal and said he should not be deprived of the chance to convince the Tribunal he was right. He expanded on his claim of “bullying tactics”. These he said consisted of debt collectors knocking on his door at the end of 2014 and demanding of Mrs Shah that she pay the tax due.

Discussion

30 26. I first remind myself of something I told the parties. It is not open to me on a Rule 8(2)(a) application to fail to strike out just because I think the appellant has at least an arguable case. I have to decide whether or not the Tribunal does in fact have jurisdiction, and, if I consider it does not, I must strike the case out (see *Spring Capital Ltd v HMRC* [2013] UKFTT 31 (TC) (Judge Barbara Mosedale) at [23]).

35 27. I agree with HMRC that none of the individual amounts going to make up the amount of £447.31 arises as the result of an action by HMRC that gives a right of appeal under s 31 TMA. The years concerned are settled as a result of the decision of Judge Gammie.

28. As far as the items of interest are concerned I also agree that s 86 TMA contains no appeal right, at least not to this Tribunal. It is possible (and I say no more than that) that the amount of interest or the way it has been calculated could be challenged in collection proceedings in the County Court, but Mr Shah has paid the interest.

5 29. I will mention here one point about interest. HMRC referred only to s 86 TMA and its lack of appeal rights. Section 86 has however been replaced by s 101 Finance Act 2009 so far as “self-assessment amounts” are concerned, with effect for any day after 30 October 2011. By virtue of regulation 4 of the Finance Act 2009, Sections 101 to 103 (Income Tax Self Assessment) (Appointed Days and Transitional and
10 Consequential Provisions) Order 2011 (SI 2011/701):

“4.—(1) In relation to any self-assessment amount payable by a person to HMRC and outstanding immediately prior to 31st October 2011—

- 15 (a) section 86 of the Taxes Management 1970 (interest on overdue income tax and capital gains tax) has effect up to and including 30th October 2011, and
- (b) sections 101 and 103 of the Finance Act 2009 have effect on and after 31st October 2011.”

“Self-assessment amount” is defined in regulation 2 relevant as:

“any tax or other amount in relation to which, for any tax year--

- 20 (a) a return falls to be made under--
- (i) section 8(1)(a) of the Taxes Management Act 1970 (personal return),
- ..., or
- (b) an assessment is made under section 29 of that Act (assessment
25 where loss of tax discovered),
- ...”

Thus in this case, where the amounts are “self-assessment amounts”, interest accruing after 30 October 2011 falls within s 101 FA 2009 and not s 86 TMA. But s 101 does not contain an appeal right either.

30 30. As there are no appeal rights in relation to any of the amounts on the SA statement on 1 December 2014, I do not have jurisdiction to determine whether they are correct or not or to change them in any way. It follows that under Rule 8(2)(a) of the FTT Rules I must strike Mr Shah’s appeals out. But I must first be satisfied that, to quote from Rule 8(4), that “the appellant has been given an opportunity to make
35 representations in relation to the proposed striking out”. In my view Mr Shah has been given that opportunity and has made full use of it by providing to the Tribunal his own skeleton argument and bundle of documents and in addressing the Tribunal. He has also made representations to HMRC and to the Tribunal Service.

Decision

31. The appeal is struck out under Rule 8(2)(a) of the FTT Rules.

Observations

5 32. It is not just Mr Shah who is confused by SA Statements. I am confused by them, and Mr Nagle agreed they were confusing, at least in Mr Shah's case where as I have mentioned there were 43 entries on the Statement issued in June 2014 and where I have counted that there were 65 entries on the 1 December 2014 Statement, which is the one Mr Shah has taken such exception to.

10 33. In Mr Shah's case his SA Statements have shown on several lines that he owes an amount described on them as "Repayment Issued on [dd/mmm/yy]". Any ordinary person, especially one who has in fact had repayments of tax as a result of a claim in an SA return, would, I suggest, be extremely puzzled by this. My tentative conclusion is that what HMRC really mean by this is that this is the amount and date of an earlier actual repayment which they are seeking to recover in a discovery assessment made
15 under s 29(1)(c) TMA on a later date.

20 34. The treatment of 2007/08 was baffling to Mr Shah. An SA Statement in the papers dating well before the previous Tribunal decision in Mr Shah's case showed that what HMRC call the "balancing amount" (by which they really mean the amount shown on the SA as payable as described in s 59B(1) TMA) was £380.58. When Mr Shah's return for 2008/09 was submitted showing a repayment due to him of £1,580 (under s 59B(1) TMA), HMRC made the repayment, but in doing so first allocated £380.58 plus £10.68 to clear the 2007/08 balancing amount and the interest that had accrued on it. So the 2007-08 balancing amount, Mr Shah's liability for that year, had been paid in full on 11 December 2009 and with interest added.

25 35. When the discovery assessment for 2008/09 was made it would have shown at its foot that an amount of £1,580 was due *for that tax year*. But the SA Statements that were issued following that assessment show that the 2007/08 balancing payment of £380.58 suddenly reappeared and that interest was accruing on the amount. When Mr Shah paid £1,580.50 in June 2014, £380.58 was allocated to the reappearing
30 2007/08 balancing amount, but not to the interest which by 1 December had accrued to £62.00, the first item in the list in paragraph 17 above going to make up the disputed £447.31.

35 36. Thus in relation to 2007/08, where the balancing payment was paid in full on 11 December 2009 by way of using a repayment legally due to Mr Shah, interest of £10.68 was also paid by him in this way. In addition £62 in interest has been charged, apparently on the same amount. From researches I have done on HMRC's website (not, I should add, from the current "gov.uk" website which does not have the data on interest rates and dates of change, but through the National Archives) it seems to me that almost certainly the £62 has been calculated from 31 January 2009. Section
40 86(1) TMA provides that a s 59B amount of tax shall carry interest from the "relevant date" until payment. By s 86(2)(b) the relevant date is the date mentioned in s 59B(4) TMA, which in turn is 31 January "next following the year of assessment". Thus for

2008/09 (the tax year of the over-repayment and the discovery assessment) the relevant date is 31 January 2010, and it is for 2007/08 that the relevant date is 31 January 2009. Using a repayment that arises of year 2 to clear a debt otherwise due in relation to Year 1 does *not* change the repayment into a repayment for Year 1, and interest should have started accruing from the relevant date for Year 2.

37. Finance Act 2009 is to the same effect. Section 101 refers not to the “relevant date” but to the “late interest start date” and that is succinctly defined in s 101(4) as the date the tax became due and payable (though it is subject to rules in Part I Schedule 53 FA 2009 providing for special cases, of which this is not one).

10 38. If I am right so far it seems that Mr Shah has been charged interest twice in relation to the 2007/08 balancing amount, and that he is due back just over £10. Mr Nagle undertook to ensure that this issue was fully investigated. I hope that includes HMRC finding out why it could have happened and what procedures are or should be put in place to stop it happening.

15 39. I add here for Mr Shah’s benefit what I told him at the hearing when he complained that no one had told him that interest would be running during the appeals process. Whether he was told or not about interest and what if anything he was told (and I make no comment about either matter) the law is clear that, whatever and whenever a person pays tax included in their income tax return and self-assessment, where HMRC take action that results in further tax becoming due, as it did in this case
20 following the previous decision of this Tribunal, interest will run on that amount from 31 January in the year after the tax year concerned to the date of payment. Neither suspension of tax collection nor the fact that the amount was only finally ascertained several years after the tax year can alter that.

25 40. Finally I would reiterate what Mr Nagle and many other HMRC officers have said to Mr Shah. In relation to interest his avenue of complaint is to an interest review unit in HMRC, but I trust that Mr Nagle will be making sure that the interest position is sorted out. In relation to the way he has been treated by HMRC then he has already corresponded with at least one Complaints unit. If he is not satisfied with their replies
30 he can apply to the Adjudicator (though I believe he has to seek redress from a Complaints unit twice before he can go to the Adjudicator).

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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.

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RICHARD THOMAS

TRIBUNAL JUDGE

RELEASE DATE: 12 NOVEMBER

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