



TC06009

Appeal number: TC/2015/06547

PROCEDURE – appeal lodged by bankrupt – whether appeal should be struck out where trustees in bankruptcy do not consent to bankrupt representing their interests – yes – appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEPHEN JONES

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers after all parties had had the opportunity to make written representations

DECISION

Chronology

1. The following chronology does not appear to be in dispute and I find as follows:

22 March 2010	HMRC assessed Mr Jones to £5,655.20 in respect of capital gains in tax year 2005/06
8 July 2010	HMRC closed an enquiry amending Mr Jones self assessment to increase it by £16,109.40 in respect of capital gains in tax year 2006/07.
12 June 2013	HMRC petitions for Mr Jones to be made bankrupt
24 September 2014	Mr Jones was made bankrupt on HMRC's petition.
9 October 2015	Mr Jones was discharged from the bankruptcy order; On the same day he purported to lodge an appeal with this Tribunal against the above mentioned tax liabilities and some penalties for late filing
7 December 2015	Leonard Curtis are appointed trustees in bankruptcy
10 December 2015	HMRC apply to the Tribunal to strike out the appeal
22 Feb 16	Hearing in this Tribunal of HMRC's application to strike out the appeal, which was refused.

5 *The original hearing*

2. HMRC's application to strike out the appeal was made on two grounds:

(a) That no appeal had been lodged with HMRC by Mr Jones at all or in time and time should not now be extended;

10 (b) Mr Jones was bankrupt and without the standing to bring the appeal to the Tribunal.

3. Although HMRC's application to strike out the appeal was quite clearly made on the basis that Mr Jones was bankrupt, a Judge proceeded to set down the appeal for hearing without requiring the Tribunal to notify the hearing to Mr Jones' trustees in bankruptcy. The hearing took place on 22 February 2016 without any contact
15 having taken place between the Tribunal and Mr Jones' trustees in bankruptcy.

4. The Judge at that hearing issued a very short decision recording that HMRC's strike out application was 'denied'. The Judge did not explain why he considered that the hearing had been properly convened nor did he explain why he thought an appeal lodged by a bankrupt without the consent of his trustees in bankruptcy could be
20 accepted by the Tribunal. The Judge also failed to deal with the issue of the late

appeal, although HMRC then proceeded on the basis that the Tribunal had given Mr Jones permission under s 49 Taxes Management Act 1970 to lodge an appeal out of time and filed a statement of case.

5 5. The Judge also did not take the opportunity to clarify exactly what the appeal concerned: Mr Jones considers that various penalties are included in the appeal but the only evidence of any penalties being imposed on him was a statement of liabilities enclosed with the notice of appeal which recorded various penalties having been imposed between 2006-2010. There is therefore doubt whether any appeal was properly lodged in respect of any penalties.

10 *Clarification of the Trustees' stance*

15 6. The file came before me to issue directions after the statement of case was received. On my instructions, the Tribunal then wrote to HMRC, Mr Jones and the trustees in bankruptcy to discover if the trustees consented to either or both the filing of the proceedings and Mr Jones's representation of the trustees in bankruptcy in the hearing on 22 February.

20 7. The trustees' reply was not entirely helpful in that while stating 'under no circumstances' would they allow Mr Jones to represent their interests, they also said that they considered the tax dispute to be between HMRC and Mr Jones. It was, however, a view which from what evidence Mr Jones has now produced (see §14), they had expressed before. The Tribunal, however, required this somewhat ambiguous response to be clarified, so I instructed the Tribunal to write again to the parties. In their reply of 24/11/16, the Trustees clarified their position to explain that they did not consent to Mr Jones acting on their behalf and they would not pursue the appeal.

25 8. On 18 March 2017, I instructed the Tribunal to write to the parties to explain my preliminary view that the appeal should be struck out. The letter explained that the appeal related to assessments which pre-dated the date on which Mr Jones was made bankrupt. The assessments were therefore debts in the bankruptcy as defined by s 382(1) Insolvency Act 1986. S 281 of the same Act discharged the former bankrupt from liability for those debts: Mr Jones was therefore no longer liable to pay them while, at the same time, Mr Jones' estate in bankruptcy remained liable for those debts. S 305 of the same Act made the trustees in bankruptcy liable to get in and distribute the estate for the benefit of the creditors and therefore it was only the trustees in bankruptcy who had a legal interest in challenging the assessments. The trustees had said that they would not pursue the appeal and did not appoint Mr Jones to lodge the notice of appeal nor act as their representative in the appeal.

40 9. The letter explained that it was therefore my preliminary conclusion that the Tribunal had no jurisdiction to entertain the appeal as no one who had any legal interest in the appeal wished to pursue it. The parties were informed that I proposed to strike out the appeal on the grounds that the Tribunal had no jurisdiction to hear it. All parties including Mr Jones were given 14 days to respond.

10. Mr Jones' reply of 28 March 2017 objected to the striking out on the basis, he said, that the appeal was not against the assessments but against how HMRC had

handled his tax affairs. Specifically he said: ‘this appeal is about the abuse of power by HMRC and the discrimination shown by HMRC’. A further email of 29 March from Mr Jones stated that I was (wrongly, he implied) seeking to go behind the order of the Tribunal made at the hearing of 22 February 2016.

5 11. On the same date, the trustees in bankruptcy wrote to the Tribunal consenting to the appeal being struck out. HMRC has also stated their opinion that the appeal should be struck out.

12. Mr Jones wrote again on 1 April 2017 complaining that HMRC were getting a second attempt at having the appeal struck out and stating his view that it should not
10 be struck out because the Insolvency Service had not objected to his lodging the appeal with the Tribunal.

13. The Tribunal wrote again on 11 May 2017 explaining that it remained my preliminary view that the appeal ought to be struck out for lack of jurisdiction because:

15 (1) In so far as the appeal was against HMRC’s exercise of their statutory powers and duties (in other words, allegations that they abused their power) it was beyond the jurisdiction of the tribunal;

(2) In so far as it was against the assessments referred to above, even if the Official Receiver had consented to Mr Jones lodging the appeal (and there
20 was no evidence to that effect), the trustees in bankruptcy were the only persons with an interest in pursuing the appeal and they had notified the Tribunal that they did not intend to pursue it;

(3) In so far as striking out the appeal amounted to effectively setting aside the Tribunal’s decision of 22 February 2016, I considered that I had the
25 jurisdiction to do so and indeed ought to do so because:

(a) The hearing was called improperly as the trustees were not notified of it;

(b) The judge’s decision was obviously erroneous in law as the Tribunal had no jurisdiction to entertain the appeal where the
30 Trustees had not consented to the bankrupt lodging and pursuing the appeal on their behalf

14. The parties were given a further 14 days to respond.

15. Mr Jones replied on 18 May 2017. He still opposed the strike out. His grounds in summary appeared to be:

35 (1) There was no evidence until recently that either the Official Receiver or Trustees in Bankruptcy objected to the appeal proceeding;

(2) He attached an email from the Trustee in Bankrupt’s solicitors to himself dated 9/2/16 referring to a Tribunal hearing on 22/2/16 and suggesting the hearing be adjourned;

40 (3) He suggested that HMRC represented the interests of the Trustee in Bankruptcy at the hearing of 22/2/16;

(4) He considered the subject of the appeal to be clear (but did not state what it was);

(5) He attached an excerpt of a report by the Trustees in Bankruptcy referring to the fact that Mr Jones was pursuing an appeal with the Tribunal.

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16. I now need to decide this matter.

Decision made with no hearing

17. The rules permit me to decide this matter without a hearing. While a strike out finally disposes of proceedings, Rule 29(3) states that the Tribunal may strike out an appeal without a hearing. The only question is whether it is right to do so. I consider that if I am in any doubt about the correct decision, I should hold a hearing to give parties the chance to explain their position fully.

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18. However, for the reasons explained below, and despite the volume of paperwork generated, and the passage of time, the point is an extremely short one and the answer to which is quite clear and the subject of binding authority. A hearing is quite unnecessary and a waste of the Tribunal's and parties' resources.

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Jurisdiction

19. The only matters which could be within the jurisdiction of the Tribunal are the above referred to assessment, closure notice and penalties. However, the taxpayer became bankrupt after these were raised and they are therefore all debts in the bankruptcy. The only persons with any legal interest in pursuing the appeals against them are therefore the trustees in bankruptcy. The trustees in bankruptcy have stated that they have not and do not consent to Mr Jones acting for them, they do not intend to pursue the appeal, and they agree to it being struck out.

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20. In these circumstances, the appeal must be struck out as there is no jurisdiction as there is no one with any proper interest in the appeal who wishes to pursue it. This is quite clear from the binding authorities, in particular *R (oao) Singh v HMRC* [2010] UKUT 174 (TCC) and *McNulty v HMRC* [2012] UKUT 509 (TC).

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21. Mr Jones does not agree: his position is that it was enough that, in knowledge that he had lodged the appeal, the trustees in bankruptcy did not object to his pursuing it. I agree with Mr Jones that the evidence indicates that the trustees did not object to the appeal proceeding and just intended to await the outcome (see §14 above). But I do not agree with Mr Jones that that is enough to give him standing to bring the appeal.

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22. It is not enough that the trustees in bankruptcy took no steps to object to his pursuing the appeal. The only persons who could pursue the appeal are the trustees in bankruptcy so the only way Mr Jones could pursue the appeal would be if the trustees actively permitted him to pursue it on their behalf. And there is no evidence that at any point the trustees actually consented to his acting on their behalf and, crucially, they have now categorically stated that they do not consent to his acting on their behalf.

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23. So the present position, which is all that matters, is that there is no one who has any standing who wishes to pursue this appeal, and so the Tribunal has no jurisdiction to entertain it.

Effect for Mr Jones

5 24. Mr Jones clearly does not accept the law that he can have no interest in this appeal once he was made bankrupt as his liability for the debt ceased at that date. This must seem unfair to him as he was made bankrupt on the petition of HMRC and he clearly sees the trustees in bankruptcy as acting on behalf of HMRC (even though in law they act on behalf of all the creditors).

10 25. Nevertheless, there is logic and fairness in the legal position, which must weigh the interests of the bankrupt against those of his creditors. A person against whom a bankruptcy petition is laid can object to it on the basis (if true) that he is appealing the debt; and the bankruptcy court may stay the petition pending the appeal, although they presumably would only do so if satisfied the appeal against the debt had a reasonable
15 prospect of success. Even if the bankrupt fails to successfully challenge the petition, the bankrupt may also apply to have the bankruptcy annulled.

26. However, if the bankrupt does not successfully challenge the bankruptcy order, control of his assets passes to an independent third party and it is that person who then has the right to decide whether or not it is in the interests of the creditors as a whole to
20 pursue an appeal against a debt. The trustees would need to weigh the cost in time and money of taking action against the likelihood of a successful appeal. They are not bound to pursue an appeal just because the bankrupt wishes them to do so. Nor can the bankrupt unilaterally pursue an appeal as the decision on whether to hold up the distribution of the estate to the creditors pending resolution of an appeal has
25 passed to the trustees in bankruptcy.

27. So, while I understand Mr Jones' desire to challenge the bankruptcy order is probably at the root of his desire to bring this appeal, the law is that the decision on whether to bring this appeal is not his to make. For whatever reason, he either did not challenge the bankruptcy order or his challenge was unsuccessful; either he did not
30 apply to annul the bankruptcy order or his application was unsuccessful. And despite having many years to do so, he did not appeal the assessments either. His former estate has now vested in the trustees in bankruptcy and only the trustees can decide whether or not to pursue this appeal. They have decided not to pursue it, nor to permit Mr Jones to pursue it on their behalf.

35 28. Mr Jones' only option at this point is to take legal action against the trustees in bankruptcy if he thinks they are carrying out their duties as trustees improperly; so Mr Jones could have initiated proceedings with the object of compelling the trustees to pursue the appeal in this Tribunal. It appears he did not do so and I suspect that any such action would have been doomed to failure unless he was unable to demonstrate
40 the tax appeal had good prospects of success, as it would be reasonable for a trustee not to waste money and delay winding up of the estate for an appeal with poor prospects of success.

29. However, whether the Trustees' decision not to pursue this appeal is right or wrong is not for me to say and I do not have the information to assess the matter in any event. The significant point for this Tribunal is that the trustees have decided not to pursue this appeal. Mr Jones' clear desire to pursue the appeal is irrelevant as he has no legal standing to bring the appeal and has not been appointed the trustees' representative to pursue the appeal on their behalf.

Set aside of 22 February 2017 decision?

30. Mr Jones may well be right in saying a decision now to strike out this appeal is effectively setting aside the decision of this Tribunal on 22 February 2016 that it should not be struck out. But that does not mean that the appeal should not be struck out now.

31. Indeed, there can be only two possibilities here, either of which would permit me to set aside the decision of 22 February 2016.

32. One possibility is that the Tribunal in February 2016 found as a fact that the Trustees had given Mr Jones authority to represent them (and it is possible that, at a stretch, the information produced by Mr Jones at §14 could have been presented to that tribunal and interpreted to that effect). The Tribunal's refusal to strike out the appeal would then have been on the basis they found that Mr Jones was a representative of the trustees. However, if that was the reason for the Tribunal's decision, the facts have now clearly changed. The Trustees have now stated categorically that Mr Jones does not represent them, they do not intend to pursue the appeal and they wish it to be struck out.

33. I am entitled to make a different direction to the one given in February 2017 where there has been a change in circumstances: *DDR* [2012] UKFTT 443 (TC) at [22]. Indeed, I am compelled to do so as the tribunal cannot entertain an appeal where it has no jurisdiction (Rule 8(2)(a)) and even if the decision of the Tribunal in February 2016 was that it had jurisdiction, the Tribunal clearly does not have jurisdiction now.

34. The other possibility is that the Tribunal in February 2016 did not address the question of jurisdiction and mistakenly thought that a bankrupt had standing to bring the appeal even without the Trustees' consent to him acting as their representative. If the Tribunal made its decision on that basis, then that Tribunal was patently in error of law. In such circumstances, I am entitled to set aside and re-make their decision (see *DDR* [2012] UKFTT 443 (TC) at [22]).

35. Either way the decision of 22 February 2016 can no longer stand. The appeal must be struck out for lack of jurisdiction.

Other comments

36. I have dealt with Mr Jones' points §14(1), (2) and (5) at §22. His suggestion at §14(3) that HMRC represented the trustees in bankruptcy at the February 2016 is quite erroneous. HMRC represented their own interests as the tax authority at that hearing; the trustees in bankruptcy are the person with the liability to pay the

assessments out of the estate and their interests are therefore opposed to that of HMRC. They could not be represented by HMRC in so far as the tax debt is concerned. I accept that the position looks confusing to Mr Jones as, at the same time, the trustees in bankruptcy represent HMRC to some extent as the trustees have a
5 duty to protect the interests of the creditors, who of course include HMRC. Indeed, HMRC is presumably the largest creditor in the estate.

37. In any event, the point is irrelevant because, as I have said, what really matters is the current position and not the position in February 2016. The current position is that there is no one with any legal standing who wishes to pursue this appeal.

10 38. The last issue mentioned by Mr Jones (§14(4)) was the subject matter of the appeal. The position is as I have already stated it. The Tribunal does have jurisdiction to entertain appeals against assessments to tax, although only where they are brought by persons with legal standing. If and to the extent Mr Jones was seeking redress for HMRC's exercise of their statutory duties powers and discretion, the
15 Tribunal does not have jurisdiction to entertain the appeal, whoever purports to bring it: see for a recent statement of this principle, *BT Pension Trustees* [2015] EWCA Civ 713 at [142-143].

39. My last comment reverts to §5 and the penalties. The failure to comply with the rules to provide a copy of the penalty assessments under appeal might be yet one
20 more ground on which that part of the appeal could be struck out but it is irrelevant to consider it as it is clear that the entire appeal should be struck out as no one with legal standing desires to pursue it.

Conclusion

40. The appeal is struck out.

25 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

35 **BARBARA MOSEDALE**
TRIBUNAL JUDGE

RELEASE DATE: 17 JULY 2017