TC07966

Income Tax – claim for repayment under UK-Bangladesh Double Tax Treaty - HMRC application for appeal to be struck out for lack of jurisdiction

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07226

BETWEEN

OMAR FOYJE **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

Sitting in public at Taylor House on 14 January 2020

M Hasan of MRKS solicitors for the Appellant

Mrs Helen Roberts, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an application by HMRC to strike out Mr Foyje's appeal against claims for double tax relief (made outside of tax returns) on the basis of lack of jurisdiction due to the absence of an appealable decision.

SUMMARY OF THE CLAIMS AND APPEAL

2. Mr Foyje is a Bangladeshi national who studied in the UK from 2009 to 2017. During the course of his studies he worked in a number of temporary part-time jobs in high street retail and restaurants on which he paid tax under PAYE.

3. Under Article 19 of the UK-Bangladesh double tax treaty (Article 19), a Bangladeshi resident person temporarily residing in the UK in order to study is exempt from tax in the UK on income from personal services rendered in the UK provided the income constitutes earnings reasonably necessary for maintenance and education.

4. This exemption is stated not to be available for more than five years.

5. Mr Foyje made a claim under Article 19 for repayment of the income tax he had paid through PAYE in his various jobs. The original claim was made by letter dated 26 August 2016, which included:

(1) A statement that Mr Foyje arrived in the UK on 10 August 2009;

(2) Details of two specific employments on which tax was reclaimed:

(a) £681.80 in 2016/17; and

(b) £1065.20 in 2015/16;

(3) A request to HMRC to ask them to assess their client's repayment "for those relevant years" because Mr Foyje had lost some tax related documents

6. Mr Foyje's representatives sent a further letter to HMRC dated 7 November 2016 – this letter was not in evidence, but was referred to in HMRC's letter of 1 December 2016 and therefore must have been received.

7. On 1 December 2016, HMRC sent a letter which cited Article 19 of the DTT and noted that "from the information provided, it seems that Mr Foyje has remained in the UK after his education has ended…" before concluding "Again, based on what little information we have, Mr Foyje he *(sic)* has not met the conditions laid out in Article 19 to allow exemption from UK tax. So, the claim is accordingly refused."

8. There appears to have been a further letter or letters on 2 and/or 6 October 2017 from HMRC to Mr Foyje's representatives, but they were not available in the bundle.

9. On 6 March 2018, Mr Foyje's representatives sent a letter to HMRC referring back to the 1 December 2016 and 6 October 2017 letters, confirming that Mr Foyje had been temporarily resident and had left the UK after the end of his studies. The letter goes on to s "request you [HMRC] to either accept or reject our client's claim and give us a decision so that we can take necessary steps and take the matter to the tribunal". The letter is headed "Notice of Appeal". At the hearing, Mr Foyje's representatives identified this letter as Mr Foyje's appeal to HMRC.

10. HMRC sent a letter dated 3 October 2018 which simply stated that the claim was refused on 1 December 2016 and that "As such the new 12 month rule guidance is not

applicable if no new information has been provided". It also referred to a letter dated 18 May 2018 which made the same confirmation. It was signed by an officer of HMRC.

11. Mr Foyje appealed to the Tribunal on 31 October 2018.

12. Subsequent to the appeal being lodged, HMRC conducted a further review, apparently of their own accord, and changed their position, deciding to allow claims under Article 19 in relation to tax years 2012/13 and 2013/14 on 18 December 2018, albeit that sums were not actually repaid, rather put as credits on Mr Foyje's self-assessment account in anticipation of the late submission of his 2014/15 tax return.

13. Following Mr Foyje's late submission of his 2014/15 tax return on 2 March 2019, HMRC calculated repayments, allowing the claims for 2012/13, 2013/14 and 2014/15.

14. To the extent set out in the hearing, it seemed that the outstanding issues that would be considered on a substantive appeal, if there were one, relate to:

(1) Which five years the claim for relief under the double tax treaty relate to, i.e. whether, as HMRC contend, the claim must relate to the first five relevant years 2010/11 to 2014/15; or, as the appellant contends, the claim should relate to the 5 years back from the date of claim, ie 2012/13 to 2015/16, with, in this regard further sub-questions as to whether:

(a) As a matter of fact the taxpayer made claims for the first 5 years or the last 5 years; and

(b) Whether there are provisions within with treaty and/or UK law that would stipulate the 5 years on which the relief can be claimed; and

(2) Whether the statutory 4 year time limit in section 43 of the Taxes Management Act 1970 applies to claims under double tax treaties which set out a period of 5 years for relief.

HMRC's submissions

15. HMRC submit that the Tribunal has no jurisdiction under rule 8(2)(a) of the Tribunal Procedure Rules, SI 2009/273 to hear the appeal because there is no appealable decision.

16. HMRC submit that no enquiry was opened and therefore no closure notice issued; and that it is only a closure notice that would represent an appealable decision in relation to an income tax claim made outside of a tax return.

17. HMRC submit that they have allowed 3 years of the claim and provided Mr Foyje with the details of the Mutual Agreement Procedure that he could use to make the further claims in relation to the disallowed years; and that this is the extent of their powers in relation to the claim.

18. HMRC submit that the letters sent by HMRC in which they refused the claims in relation to the tax years 2010/11 and 2011/12 and/or 2015/16 and 2016/17 are not decisions that are appealable.

Taxpayer's submissions

19. Mr Foyje's representatives did not make, either at the hearing or in response to HMRC's written submissions, any representations that were pertinent to the question of whether this Tribunal has jurisdiction to hear the case. They provided a timeline of the claims and sought to discuss the substantive questions.

20. Following enquiry, they asserted that the appealable decision was the decision not to allow the claim in full.

RELEVANT LAW

Tribunal's power to strike out

21. Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal must strike out the whole or part of the proceedings if the Tribunal:

> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another tribunal with jurisdiction in relation to the proceedings) in relation to the proceedings or that part of them.

Procedure for making a claim

22. Section 42 Taxes Management Act ("TMA") 1970 includes the following (summarised for relevance to the facts of this case):

> (1) Sub-section (1): Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim;
>
> (2) Sub-section (1A): a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made;
>
> (3) Sub-section (2): where notice has been given under s 8 TMA 1970, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included;
>
> (4) Sub-section (5): The references in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return; and
>
> (5) Sub-section (11): Schedule 1A TMA 1970 shall apply as respects any claim or election which is made otherwise than by being included in a return under s 8 TMA 1970.

23. Schedule 1A to TMA 1970 deals with claims not included in returns. The paragraphs most relevant to this application are:

> (1) Sub-paragraph 2(3) provides that a claim shall be made in such form as HMRC may determine.
>
> (2) Paragraph 5 provides that an officer of HMRC may enquire into a claim if, before the end of the period mentioned in sub-paragraph 5(2), he gives notice in writing of his intention to do so to the person making the claim.
>
> (3) Paragraph 7 provides that an enquiry under paragraph 5 is completed when an officer of HMRC by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions. In the case of a claim for discharge or repayment of tax, the closure notice must either:
>
> > (a) state that in the officer's opinion no amendment of the claim is required, or
> >
> > (b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess.
>
> (4) Under paragraph 9, an appeal may be brought against any decision in a closure notice as described immediately above.

Relevant case law

24. Neither party drew my attention to the decision of the Court of Appeal in *Raftopoulou* ([2018] EWCA Civ 818), however, given it represents binding authority on this Tribunal and is relevant to the question before me, I include a summary of its relevant sections.

25. The taxpayer in *Raftopoulou* had made a claim for overpaid income tax under Schedule 1AB to TMA 1970. HMRC replied by letter, refusing the claim on the basis that it was out of time. The Court of Appeal upheld the decision of the FTT, striking out the taxpayer's claim on the basis that there was no appealable decision. In coming to this conclusion, the Court of Appeal found that (paragraph numbers in brackets referring to paragraph numbers in the Court of Appeal's decision):

(1) the correct starting point for determining whether an enquiry has been opened is a consideration of the terms, context and purpose of Sch 1A to TMA 1970 (para 33);

(2) the provisions of Sch 1A to TMA 1970 suggest a procedure with a degree of formality and in particular, the closure notice has to satisfy certain requirements set out in paragraph 7 thereof (para 34); and

(3) there is no prescribed form for an enquiry notice or closure notice, but in order to be effective an enquiry or closure notice must be understood by a reasonable person in the position of the intended recipient as giving the relevant notice and whether an enquiry notice or closure notice has been issued is a question of law (para 36).

26. In *Raftopoulou* the basis on which the claim was refused was that it had been made out of time. At paragraph 40 of the judgment, Lord Justice David Richards stated:

> "In my judgment, in common with the view of the UT in *Portland Gas*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so. On the facts of this case, it is unnecessary to go further and consider what additional actions on the part of HMRC would constitute an enquiry. As earlier mentioned, HMRC does not accept that the UT was right in Portland Gas to hold that HMRC's subsequent actions did constitute an enquiry. I express no view on that question."

27. In another case considering whether or not an enquiry had been opened and a closure notice issued (*Jamie White v HMRC* [2018] UKUT 0257 (TCC)) (again not referred to by either party but binding on this Tribunal), the Upper Tribunal (to the extent relevant here) made the following observations:

(1) HMRC had conducted an informal consideration of the claim of a type that occurs before deciding whether to open a formal enquiry;

(2) The fact that HMRC had not requested any further information or considered the underlying facts, suggests an informal engagement that falls short of an enquiry;

(3) the lack of formal mention of enquiry or HMRC's statutory powers is, while not conclusive, given that there is no prescribed form for an enquiry or closure notice, an indicator of the informality of the process HMRC is engaged in;

(4) the taxpayer's subjective views as to whether an enquiry had been opened and then closed could not 'especially assist us in what is an objective test'; and

(5) a single letter, following the informal investigation, that set out to formalise a previously informal process could, in these unusual circumstances, represent both a notice of enquiry and a closure notice (thereby giving rise to an appealable decision).

DISCUSSION

28. This is an application by HMRC and therefore the burden is on HMRC to show that the conditions for its application have been met.

29. The taxpayer, on the other hand, has brought an appeal to the tribunal and, by defending the application to strike out, is asserting that the tribunal does have jurisdiction to hear the appeal.

30. Mr Foyje's representatives did not, in any effective way, address the legal issues in the application to strike out, even after being given an opportunity, after the hearing, to address the questions arising from the application of Schedule 1A to TMA 1970.

31. In considering whether the letters from HMRC to Mr Foyje's representatives constituted a notice of enquiry and a closure notice, this Tribunal is disadvantaged by the fact that a number of the relevant letters are not contained in the bundle.

32. I reach the following conclusions on the correspondence:

(1) Mr Foyje's original claim dated 26 August 2016 was a claim outside of a return made under section 42 of and Schedule 1A to TMA 1970 (this letter had not been in the bundle but a copy was provided at the hearing);

(2) HMRC's initial response to that letter (and apparently a second letter from Mr Foyje's representatives, which was not available), dated 1 December 2016, was a refusal of the claim based on the limited information available. It referred to a question of fact (Mr Foyje's length of stay not meeting the conditions of the claim) but my conclusion is that this letter represented nothing more than an initial assessment of the claim and there was nothing in the letter that would have given a reasonable person in the position of Mr Foyje the indication that a formal enquiry had been or would be commenced;

(3) I cannot make any assessment of the status of the subsequent letters from HMRC in October 2017 or May 2018 since they were not contained in the bundle; and

(4) The final letter from HMRC prior to the submission of the appeal, dated 3 October 2018, was nothing more than a reiteration of HMRC's original refusal of the claim.

33. On the basis of those conclusions, I find that no notice of enquiry was issued and (inevitably) no closure notice was issued. Therefore, there has not been an appealable decision against which Mr Foyje can bring an appeal to this Tribunal.

34. Therefore, I grant HMRC's application to strike out the appeal under Rule 8(2) of the Tribunal procedure rules on the basis of a lack of jurisdiction.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE