TC 08309V

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – strike out application – appeal against refusal to repay income tax (PAYE) and NICs – overpaid income tax: claim did not meet requirements of Schedule 1A TMA 1970 – consideration of whether HMRC exercised care and management powers to waive requirements – held: they did not – hence Tribunal did not have jurisdiction - overpaid NICs: HMRC made decision that precondition to regulation 52 Social Security (Contributions) Regs 2001 application (that NICs paid in error) not satisfied – decision was subject to appeal to Tribunal – Tribunal had jurisdiction – application for strike out allowed in part (income tax) and dismissed in part (NICs)

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03952

BETWEEN

FIELDMUIR LTD T/A CENTURION FREIGHT SERVICES — **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON

The hearing took place on 27 August 2021. The form of the hearing was V (video) on the Tribunal Video Hearing service platform. A face to face hearing was not held because of the pandemic. The documents to which I was referred were a hearing bundle of 161 pdf pages prepared by the respondents, and 7 pdf pages of supplemental documents from the Appellant. Further written submissions on matters requested by the Tribunal were received from the Appellant on 21 September 2021 and from the Respondents on 5 October 2021.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr P Simpson QC, counsel, instructed by John Lynch & Co, accountants, for the Appellant

Ms J Mackay, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. This decision relates to an application by the respondents ("**HMRC**") for the proceedings to be struck out on the grounds that the notice of appeal did not disclose an "appealable decision." The proceedings were an appeal against HMRC's refusal to repay income tax (PAYE) and national insurance contributions ("**NICs**") paid by the appellant in respect to £30 "overnight allowances" paid to the appellant's drivers during seven tax years (2010-11 to 2016-17 inclusive).

THE APPELLANT'S NOTICE OF APPEAL

2. The appellant sent a notice of appeal dated 7 October 2020 to the Tribunal (the Tribunal received it on 16 October 2020). It said (under "grounds for appeal"):

> "Fundamentally this appeal arose due to the Company incorrectly incorporating sage payroll procedures.
>
> The original bookkeeper set up the wages recording under Sage but did not correctly establish the overnight allowances under a tax free status as they ought to have been.
>
> All the drivers received their correct net pay in line with the net pay arrangements as per their employment contracts.
>
> Therefore they did not have any financial loss. However the mistake undertaken by the Company was that the Company has settled excess PAYE by grossing up the salary of each Driver.
>
> The allowances that are the subject of this amendment are;
>
> (1) A £5 per night allowance for each driver staying away from home in pursuit of their duties for incidentals such as mobile phone use et al.
>
> (2) A sleeper cab allowance of £26.20 per night for each driver working away from home whether that be in the UK or Europe. The sums involved cover the years 2011 through to 2017 all as per the attached document amounting to £220,662.39. HMRC are reviewing the affairs of the Company and in doing so we established that any overpayment for PAYE paid erroneously is appropriate to all years from incorporation i.e. 2011. HMRC acknowledged that statement, however they are presently disputing the claim that has been with them for some time.
>
> Whilst working in Europe the appropriate incidental sum is £10 per night as a result those drivers are entitled to £36.20 per night, in the case of UK drivers the sum is £5 plus £26.20 being £31.20 per night. In all instances a cap has been set at £30 per night. This repayment submission was calculated and the full summary presented to HMRC on or around 13 March 2019. HMRC have to date delayed repayment or chosen no to do so therefore this appeal is required to facilitate repayment of said sums now overdue.
>
> The claim was intimated in broad terms previously to preserve the repayment as per our letter of 30 May 2018, in that HMRC were reviewing the company's affairs from 2011 to date it is only proportionate and fair that this repayment be retrospective to the date of incorporation as the company's affairs are being analysed from that date.
>
> The schedule of 13 March 2019 is attached by driver and location indicating UK or Europe.
>
> HMRC have been called upon to repay this sum which to date they have refused."

3. Three letters were attached to the notice of appeal:

(1) HMRC's letter to the appellant dated 15 September 2020;

(2) the appellant's accountant's letter to HMRC dated 13 March 2019; and

(3) HMRC's letter to the appellant's accountants dated 15 September, enclosing the letter at (1) above

HMRC'S APPLICATION FOR STRIKE OUT

4. HMRC's application for strike out, dated 23 November 2020, said as follows:

> "This application is made on the basis that no appealable decisions have yet been issued to the Appellant and therefore they have no prospect of success in the appeal.
>
> **GROUNDS FOR STRIKE OUT**
>
> 1. The Respondents submit that no appealable decisions have been issued to the Appellant and therefore ask that the appeal be struck out.
>
> 2. The Appellant submitted their notice of appeal to the Tribunal on 7 October 2020.
>
> 3. The Appellant attached to their notice of appeal two letters issued by the Respondents dated 15 September 2020.
>
> 4. The Respondents contend that neither letter constitutes a decision letter which carries appeal rights.
>
> 5. Both letters state that it is the Respondents' intention to issue decision letters under Regulation 80 Income Tax (Pay As You Earn) Regulations 2003 and Section 8 Social Security Contributions (Transfer of Functions) Act 1999
>
> 6. On the date the Appellant submitted an appeal to the Tribunal, these decisions had not yet been issued.
>
> 7. The Respondents submit that as of the date of this application, the decision letters have still not yet been issued to the Appellant.
>
> 8. Section 31 Taxes Management Act 1970 sets out the decisions which an appeal may be brought against. The Respondents submit that none of these decisions have been issued to the Appellant and therefore, they have no prospect of success in the present case.
>
> 9. Should the Appellant disagree with the Respondents' decisions when they are issued, the Appellant may exercise their appeal rights by submitting an appeal to the Respondents in the first instance. The Respondents would then offer the Appellant a review of the decision and inform them of their right to appeal to the Tribunal.
>
> 10. The Respondents ask that the direction for a Statement of Case to be served by 13 January 2020 is no longer required.
>
> 11. The Respondents make this application under Rule 8(3) of The Tribunal Procedure (First- tier Tribunal) (Tax Chamber) Rules 2020.
>
> **CONCLUSION**
>
> 12. The Respondents respectfully request that the appeal is struck out as no appealable decisions have been issued to the Appellant and therefore, they have no prospect of success in the appeal."

FINDINGS OF FACT

5. The appellant's accountants said this in a letter to HMRC (Ms Shanks) dated 3 April 2018:

> "**Paye overpayment**
>
> The issue with the Paye overpayment continues, it is our view that a substantial claim is appropriate, an in year 2017/18 claim has been lodged via RTI.
>
> To preserve the early years formally I intimate a claim to cover 2013/14, 2014/15, 2015/16 and 2016/17. The sum is likely to be around £135,000 - £150,000 all as indicated previously and acknowledged by you.
>
> I presume that the formal claims for 2013/14 to 2016/17 inclusive have to be lodged with Angela Reilly at your office this will be done on or around 24 April 2018. A copy will be lodged with you".

6. In their letter to HMRC (Ms Young) dated 13 March 2019 (one of the attachments to the notice of appeal), the appellant's accountants said as follows:

> "… please find enclosed claim of £220.662.39 in respect of an overpayment of PAYE and NIC.
>
> This claim relates to the tax years 2011-2017 inclusive and is laid out as such. We have also included sample vouchers etc covering this period which demonstrate an indication of the routes and locations our client services.
>
> As you are aware our client now has a bespoke agreement in place with HMRC with regard to subsistence payments for drivers.
>
> You will be aware of my submission from our previous discussions, these Schedules are our formal submission with regard to this matter. In normal circumstances this is identified as an "overpayment claim" however as this is part and parcel of the inquiry it was confirmed by HMRC that no formal claim other than this analysis is required."

7. The schedules to the letter were:

(1) a "summary by year", summing up to £220,662.39, covering seven tax years, 2010-11 to 2016-17 inclusive; and

(2) a summary by employee covering the same years and summing up to the same figure.

8. HMRC's (Ms Young) letter to the appellant's accountants dated 17 April 2019 referred to the accountants' letter of 13 March 2019 and said:

> "I acknowledge receipt of your overpayment claim in respect of PAYE which I have referred to Mrs Reilly. My views on this claim are detailed below and I'm happy to discuss this matter further when we meet."

9. Later in the letter it said:

> "(c) <u>PAYE Over Repayment Claims</u>
>
> I refer to your overpayment relief claim in respect of PAYE deductions for Fieldmuir Ltd received 15 March 2019 for the tax years 2011-2017. I have passed this to Mrs Reilly who will discuss this during our meeting. You will note from previous meetings and correspondence that Mrs Reilly has already advised the payments to the drivers for earlier years are round sum allowances as payments were made to drivers regardless of how they were spent or whether any expenses were incurred. Mrs Reilly sought advice on this from

HMRC policy and they have confirmed the amounts are earnings and fall within legislation at S62 ITEPA 2003 and S (3) SSCBA 1992. Therefore HMRCs view is that these payments have been correctly treated for both tax and NICs and no refunds are due to Fieldmuir Ltd employees.

I appreciate you have provided some records of fuel receipts to establish employees travelled overseas. As you are aware no actual business receipts were requested or retained by the employees or employer to confirm the nature or value of the expenses incurred during these years. A new system was introduced from 2018/19 going forward as required by the bespoke agreement now in place.

Guidance on overpayment relief claims can be found at hmrc.gov.uk at SACM12035 – Self Assessment Claims Manual- HMRC internal manual - GOV.UK.

Another important factor in relation to Overpayment Relief claims for PAYE is that an employer cannot claim tax and primary class 1 NICs on behalf of and employee in closed tax years. The employer did not actually suffer these deductions, the only potential claim would be for Employers Secondary NICs which as stated Mrs Reilly will dispute. It is unclear why you consider the full repayment would be due to Fieldmuir Ltd. For the year 2017 /18 where an amended return has been made, can you please confirm and provide evidence that Fieldmuir Ltd actually refunded the Tax and Primary NICs direct to for each employee. Mrs Reilly will consider formal assessments for tax and NICs to make good the loss of tax in that year."

10. In a letter to HMRC (Ms Young) dated 29 July 2019, the appellant's accountants said this, under the heading "PAYE overpayment claim", after citing some extracts from HMRC's EIM manual:

> "Therefore provided the overnight stays can be supported, the claim is valid, as a firm we are fully of the opinion that our client's application for the overpayment of PAYE has been lodged on solid grounds and is perfectly correct and ought to be agreed. Any attempt to challenge this will be resisted. In the first instance I request an Independent review, in the event I am unsuccessful I will commence a formal appeal process, and I will go to the lengths of an ADR, and/or a First Tier Tribunal."

11. In a letter to the appellant's accountants dated 13 August 2019, HMRC (Ms Young) referred to a meeting held with them on 7 August and enclosed brief notes of the meeting. The letter then said this:

> "As agreed I have set a deadline for the additional information and response to the PAYE Overpayment claim as Friday 6 September 2019 and will contact you thereafter to agree a date for another suitable meeting."

12. The enclosed meeting notes said this ("MY" and "AR" were Ms Young and Ms Reilly of HMRC; "JL" was Mr Lynch, the appellant's accountant):

> "PAYE overpayment claim. MY noted JL`s comments regarding company`s claim and their intention to challenge HMRC position. MY advised AR had already taken advice on this from Policy team and they accept agreement will not be reached and the only recourse is for AR to issue Reg 80 and Section 8 for the 2017/18 tax year and formally disallow the earlier year claim and allow the appeal process to proceed.
>
> MY added that both she and AR had completed a further review following the claim and were unable to agree the repayment was due. MY suggested to

avoid any misunderstanding from both sides, that each party explain their position.

JL agreed and explained that they had looked at the driver`s contract of employment and that drivers were given an agreed net pay. The deductions were an administrative error and the SAGE payroll was re run to show the correct deduction from the basic pay and then the allowance was added. The sage reconciliation was then used to determine the overpayment of tax. MY noted, simply preparing a re run of the Sage payroll does not confirm employees didn`t personally suffer the deductions on the round sums.

MY accepted that drivers in the haulage industry expected a certain level of net pay, however MY and AR have reviewed some drivers P60 for each year going back to 2010 and deducted the tax and primary class 1 NICs to establish the net pay due to them. This was compared to the actual weekly bank transfer made to the employee from the Fieldmuir Ltd Clydesdale bank business account. This confirmed the net pay received via the bank reconciled with the net pay per the P60 calculations and therefore confirms the driver did actually suffer the deductions correctly on gross pay including the allowance. This in AR`s view is the correct calculation of the Tax and NICs and no refund is due.

MY also noted that the allowance is intended to be fully expended on subsistence when away from home overnight and therefore would have no profit element available for private expenditure. Therefore the actual rate of pay for the driver to support their personal and family life is well below the average for a haulage driver at around £16K- £18K. Also the driver appears to receive this allowance for 52 weeks including holiday periods when they are not actually at work. This is another indicator that this is a round sum allowance. JL suggested the level of pay used as an example may have been for a part time driver but MY asked why they would receive the allowance for 5 nights if they only worked 3. MY noted that overall if the drivers didn’t suffer deductions on the allowance and this was an administrative error by the payroll clerk, each of the employees would have received a higher net pay which from their review was not the case.

JL requested AR hold off the issue of the assessments under Reg80/S8 until he has time to review this matter again. AR agreed.”

13. The appellant’s accountants wrote to HMRC (Ms Reilly) as follows on 6 September 2019:

> “You will be aware from our previous discussions that you asked that we evidence our calculations in more depth to support the overpayment claim appropriate to the erroneous taxing of subsistence (overflight sleeper cab allowances et al).
>
> You were concerned that the overpayment claim may not accurately verify the position and as a consequence I took it that you were minded to suggest that the claim was incorrect.
>
> As an initial summary we have reviewed wholly the wages and salaries paid to each member of staff over the full year to 5 April 2018.
>
> We have also been able to determine when an individual takes their breaks, therefore as you can evidently see from the numbers produced there are times quite clearly when the basic salary is all that the members receive.
>
> To vouch completely all the years would be fairly time consuming particularly that the principle adopted is exactly the same in all years and has already been advised to you in general terms. Accordingly our schedules being numbers 1-

14 highlight an overpayment sum for 2017/18 in the amount of £60,955.28. In practical terms it is possible that Fieldmuir did not pay a couple of months PAYE for 2017/18.

This is one year alone, if needs be we are content to do all years, the choice is yours. We have checked each and every bank withdrawal per week to each employee and whilst it seems in total that individual employees may have "lost" in some instances modest funds and others may have gained the overall loss to the staff is less than £1,000 and is indeed highlighted in the schedule as £986.31.

We trust this goes some way assisting you with the PAYE overpayment, as noted above if you insist that it be done for each year we will do so."

14. HMRC (Ms Reilly) wrote to the appellant's accountants as follows on 23 March 2020:

"As discussed during earlier meetings, you were still of the opinion that Tax and Class 1 NIC suffered by the employees was repayable to the company. Having considered what you have told me, which included reviewing the paperwork provided, I am still of the view that the round sum payments were treated correctly as round sum payments, which has also been agreed by HMRC's Policy Team on two occasions.

In this instance, there will be no repayment being made to the company and it will be my intention to prepare Reg 80s and Section 8 Decisions for tax year 2017-18 incorrectly claimed back by the company.

If you don't agree with my decision, you can ask for my decision to be reviewed by an HMRC Officer not previously involved in the matter. If you still do not agree after the review, you can appeal to an Independent Tribunal.

If you would like a review, you should write within 45 days of the date of this letter, giving your full reasons why you do not agree with my decision.

However, if you feel that a further meeting is more appropriate, please let me know and we can consider a suitable date."

15. HMRC (Ms Reilly) then wrote to the appellant's accountants as follows on 6 July 2020:

"Overpayment relief under Sch1AB TMA 1970 applies when a person has paid an amount by way of income tax or capital gains tax (or has been assessed to such an amount) but the person believes that the tax was not due.

You supplied revised figures asserting employees did not suffer the deductions and that Tax/NIC was overpaid in error. I have reviewed the information provided and do not agree with your figures as it was clear the resultant net pay figures did not agree with the sums paid through the Bank. As you stated, your analysis of gross to net including the allowance agree with the net actually paid and confirms this to be the case.

As discussed during our last meeting held at your premises on 7 August 2019, you were advised that a sample of driver's P60s for each tax year going back to 2010 had been reviewed along with the deducted tax and primary Class 1 NICs to establish the net pay due to them. You were also told that this had been compared to the actual weekly bank transfer made to each employee from Fieldmuir Ltd.'s Clydesdale Bank Business Account.

This review confirmed that the net pay paid to employees by bank transfer did reconcile with the net pay per the P60 calculations. This confirms that the drivers suffered the deductions personally, from their gross pay, which included the round sum allowance, which was correct. As you will recall, we discussed the fact that all round sum payments are liable to Tax and NIC. This

being the case, I explained to you that my view remained the same and the calculation of Tax and NICs were correct, therefore, no refund is due to be paid.

Your letters dated 29 July 2019 and 6 September 2019 stated that the company wanted to claim the Tax and NIC you believe has been overpaid. You also advised that the company made an adjustment for tax year 2017-18 totaling £60,955.28 by not paying the first couple of months PAYE. You were told that I would be considering raising Regulation 80s and Section 8 Decisions to recover this amount, however, it was agreed following your request, to hold off meantime until further clarification is received.

I can confirm that following further clarification being received from HMRC's Technical Team and what we discussed during our meeting of 7 August 2019, the company cannot claim Tax and NIC an employee has suffered. It would be for an employee to submit a formal Overpayment Relief Claim as they are the only person who can claim relief in respect of overpaid tax not the employer.

In this instance, a formal claim has not been made so there is nothing that we can enquire into at present

Overpayment relief claims must be made in writing and

- must clearly state that the person is making a claim for overpayment relief
- identify the tax year or accounting period for which the overpayment or excessive assessment has been made
- state the grounds on which the person considers that the overpayment or excessive assessment has occurred
- state whether the person has previously made an appeal in connection with the payment or the assessment
- if the claim is for repayment of tax, you must have documentary proof of the tax deducted or suffered in some other way as you may be required to provide this at a later date
- include a declaration signed by the claimant stating that the particulars given in the claim are correct and complete to the best of their knowledge and belief
- state the amount that the person believes they have overpaid.

Please provide me with a full breakdown of the Tax and Class 1 NIC totaling £60,955.28 as Regulation 80s and Section 8 Decisions will have to be raised as the company should not have withheld the first few months Tax and Class 1 NIC whilst this matter continued to be under dispute.

Please also note that the time limits for any employees who consider their tax to be overpaid, claims for overpayment relief is 4 years from the end of the year of assessment to which the overpayment relates. Tax year 2016 and earlier are out of date."

16. The appellant's accountants wrote back to HMRC (Ms Reilly) on 21 August 2020, expressing their disagreement. Towards the end of the letter they said:

> "We do not consider A regulation 80 is appropriate. Any such assessment will be subject to an appeal process. Indeed we now have to advise we intend to consider citing this case for a first tier Tribunal as it seems our client is being deprived the refund they are entitled to.

> Given this matter is not time sensitive, as agreed by your colleagues on numerous occasions we await hearing from you, can we suggest you advise your position within 42 days, thereafter if we hear nothing further, we will lodge an application for a hearing."

17. HMRC (Ms Reilly) wrote to the appellant as follows on 15 September 2020, under the heading "Warning letter" (this letter was attached to the notice of appeal):

> "Further to our earlier correspondence, I am writing to you again about the round sum amounts paid to your employees, which were correctly added to gross pay for Tax/NIC purposes prior to the company applying for a Bespoke Agreement. However, your Agent, Mr Lynch remains of the opinion that a refund is payable from 2013 through to 2017 resulting in the first few payments of Tax/NIC during tax year 2017-18 being withheld..
>
> **Our decision**
>
> HMRC's decision remains the same in that the round sum amounts are caught by legislation at S62 ITEPA 2003 and S3(1) of the Social Security Contributions and Benefits Act 1992.
>
> This is because £30 was paid to each driver when working overnight, regardless of how much they spent. At this time, no receipts or checks had been carried out prior to the Bespoke Agreement application, although your Agent contends the amounts should have been paid free of Tax/NIC. A copy of this letter has been issued to Mr Lynch for his records.
>
> **What happens next**
>
> If we don't hear from you by 16 October 2020, we'll take action to recover the money you owe.
>
> We'll issue:
>
> • Income Tax determinations under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003 No 2682)
>
> • National Insurance contributions (NICs) decisions under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999
>
> We issue PAYE Regulation 80 determinations when employers don't deduct tax under the PAYE system. We use Regulation 80 determinations to make a legal assessment of the tax that we believe is due and to give details about your rights to appeal. We only do this when we're unable to agree the amount.
>
> We issue NICs decisions so that we can collect the NICs we believe are due and to give details about your rights to appeal. We only do this when we're unable to reach an agreement by other means. NICs decisions that you can appeal against are listed at Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999. This includes decisions about NICs and statutory payments. The decision we'll issue will show what NICs you are liable to pay.
>
> If you want to avoid this please phone me before 16 October 2020. If I don't hear from you by then, I'll send you the tax determination(s) and the NICs decision notice(s)."

18. The appellant's accountants emailed HMRC (Ms Reilly) on 14 October 2020 (at 12:46) saying:

> "Following on from my telecon yesterday regarding [the appellant] I would confirm we are now preparing our papers for a First Tier Tribunal and plan to lodge this imminently.

In this instance we also wish to apply for Alternative Dispute Resolution therefore would be obliged if you can review this and confirm acceptance"

19. HMRC's self-assessment claims manual said as follows:

> "**SACM12150 - Overpayment relief: Form of claims**
>
> The person applying for overpayment relief must make a claim to HMRC for repayment or discharge of the amount of tax which they believe they should not have paid, or should not be due. Any existing self-assessment should be left unchanged.
>
> A person cannot make an overpayment relief claim by including it in an individual, trust, partnership or company tax return. Claims should not be accepted if they are made on an SA return form (SA100) or equivalent, such as the Trust and Estate Tax Return SA900.
>
> Overpayment relief claims must be made by the person who is due the relief except for overpayment relief claims arising from mistakes in partnership returns - see SACM12045.
>
> Overpayment relief claims must be made in writing and
>
> - must clearly state that the person is making a claim for overpayment relief
> - identify the tax year or accounting period for which the overpayment or excessive assessment has been made
> - state the grounds on which the person considers that the overpayment or excessive assessment has occurred
> - state whether the person has previously made an appeal in connection with the payment or the assessment
> - if the claim is for repayment of tax, you must have documentary proof of the tax deducted or suffered in some other way as you may be required to provide this at a later date - see SACM3015
> - include a declaration signed by the claimant stating that the particulars given in the claim are correct and complete to the best of their knowledge and belief
> - state the amount that the person believes they have overpaid.
>
> Overpayment relief claims should be sent to
>
> PAYE Self-Assessment
> BX9 1AS
>
> **Para 1(4) Schedule 1AB TMA 1970**
>
> **Para 51(4) Schedule 18 FA 1998 as amended**
>
> **Para 31 Schedule 1 FA 2010**"

SUMMARY OF RELEVANT LAW

Striking out proceedings

20. The Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them (this is assuming the Tribunal does not exercise its power to transfer the proceedings (or part of them) to another court or tribunal): rule 8(2)(a) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009/273.

21. The Tribunal may strike out the whole or apart of proceedings if the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding; but it must first give the appellant an opportunity to make representations in relation to the proposed striking out: rule 8(3)(c), (4) of the above rules.

Claims for the recovery of overpaid income tax

22. Section 33 Taxes Management Act ("**TMA**") 1970 provides that Schedule 1AB contains provision for and in connection with claims for the recovery of overpaid income tax.

23. Paragraph 1 Schedule 1AB applies where a person has paid an amount by way of income tax but the person believes the tax was not due; it provides that the person can make a claim to HMRC for repayment of the amount.

24. Section 42 and Schedule 1A TMA 1970 ("**Sch 1A**") make further provision about the making and given effect to claims under Schedule 1AB.

25. Under paragraph 2 Sch 1A:

(1) every claim shall be to an officer of HMRC

(2) a claim shall be in such form as HMRC may determine (paragraph 2(3))

(3) the form of the claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim (paragraph 2(4))

26. Under paragraph 5 Sch 1A, an officer of HMRC may enquire into a claim made by any person if he gives notice in writing of his intention to do so (by no later than the quarter date next following the first anniversary of the making of the claim).

27. Under paragraph 7 Sch 1A, 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 repayment of tax, the closure notice must either

(1) state that in the officer's opinion no amendment of the claim is required, or

(2) 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.

28. Under paragraph 9 Sch 1A, an appeal may be brought against any conclusion stated or amendment made by a closure notice; notice of the appeal must be given in writing within 30 days after the date on which the closure notice was issued, to the officer of HMRC who issued it. If the appeal is notified to the Tribunal under s49D, 49G or 49H TMA 1970, the Tribunal may vary the amendment appealed (whether or not the variation is to the advantage of the appellant)

29. Under s49D TMA 1970, where notice of appeal has been given to HMRC, the appellant may notify the appeal to the tribunal (if HMRC have not carried out a review of the matter in question under s49B or offered such a review under s49C). Under s49H TMA, where HMRC have offered such a review but the appellant has not accepted the offer, the appellant may notify the appeal to the tribunal within 30 days (starting with the date of document offering the review of the matter in question).

Applications for the return of NICs paid in error

30. Regulation 52 Social Security (Contributions) Regulations 2001 SI 2001/1004 ("**regulation 52**") applies if NICs other than a Class 4 NICs have been paid in error; it provides that an application may be made to HMRC for the return of the NICs paid in error; and that on

the making of an application, HMRC shall return the NICs paid in error. Applications have to be made in writing and within the time permitted (six years from the end of the period in which the contribution was due to be paid), although HMRC must admit a later application if satisfied that the applicant had a reasonable excuse for not making the application within the permitted period, and the application was made without unreasonable delay after the excuse had ceased.

31. Under s8(1) Social Security Contributions (Transfer of functions etc) Act ("**Transfer Act**") 1999, it shall be for an officer of HMRC to decide (inter alia) (i) whether a person is or was liable to pay NICs and the amount he is or was liable to pay (s8(1)(c)); and (ii) other issues relating to NICs as may be prescribed by regulations (s8(1)(m)). Under ss11-12, a person in respect of whom such a decision is made shall have a right of appeal to the Tribunal; and any appeal against a decision must be brought by a notice of appeal (which shall specify the ground of appeal) in writing given (to the officer of HMRC) within 30 days after the date on which notice of the decision was issued. Under regulation 7 Social Security Contributions (Decisions and Appeals) Regulations 1999 SI 1999/1027, s49D and s49H TMA (with modifications) apply to these appeals; under regulation 10 of those regulations, if, on an appeal under the provisions of the Transfer Act cited above, it appears to the Tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but shall otherwise stand good.

HMRC's care and management powers

32. Under s1 TMA 1970, HMRC are responsible for the collection and management of income tax. Under s5 Commissioners for Revenue and Customs Act 2005, HMRC are responsible for the collection and management of revenue (including NICs) for which the Inland Revenue and HM Customs & Excise were previously responsible. Under s9 of that Act, HMRC may do anything that they think necessary or expedient in connection with the exercise of their functions, or incidental or conducive to the exercise of their functions.

33. In *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681 (a Court of Appeal case about claims for group relief), Sir Thomas Bingham said (at p685):

> "Section 6 of the Income and Corporation Taxes Act 1988 (the 1988 Act) provided that corporation tax should be charged on the profits of companies. Section 393(2) of the 1988 Act provided (subject to qualifications not here relevant) that where in an accounting period ending after 5 April 1988 a company carrying on a trade incurred a loss in the trade, the company might make a claim requiring that the loss be set off for the purposes of corporation tax against profits of whatever description of that accounting period. Section 42 of the Taxes Management Act 1970 empowered the Board of Inland Revenue to prescribe the form in which such a claim should be made, but it has never done so. Section 393(11) of the 1988 Act does, however, provide that 'a claim under subsection (2) above must be made within two years from the end of the accounting period in which the loss is incurred.'
>
> At the relevant time the Revenue enjoyed no express statutory power to extend or waive that two-year time limit, which on its face bound both the Revenue and companies seeking to set off losses against profits in the same accounting year. But s 1(1) of the Taxes Management Act 1970 provided that corporation tax should be under the care and management of the Commissioners of Inland Revenue, and it is common ground on these appeals that the Revenue had a discretion under that section to accept late claims for loss relief."

34. In *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2006] STC 270 at [20-21] (House of Lords), Lord Hoffmann said:

> "[20] … The commissioners are a statutory body created by the Inland Revenue Regulation Act 1890. They are charged by s 13(1) of that Act to

> 'collect and cause to be collected every part of inland revenue'. Section 1 of the 1970 Act gives them what Lord Diplock described in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260 at 269, [1982] AC 617 at 636, as:
>
> > 'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection.'
>
> [21] This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under s 1 of the 1970 Act. It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women."

PARTIES' ARGUMENTS IN BRIEF

35. HMRC contended that there was no appealable decision as regards income tax or NICs paid during the seven tax years in question.

36. As regards striking out on grounds that the appeal had no reasonable prospect of success, HMRC presented arguments based on the following contentions as regards the seven tax years:

(1) the appellant did not seek a dispensation to pay the £30 amount free of tax and NICs; no bespoke agreement existed.

(2) no evidence (such as receipts, driver or vehicle log sheets or tachograph data) had been provided to HMRC by the appellant to show that the employees necessarily incurred expenses as a result of a night spent away. The only records provided so far by the appellant to HMRC were fuel receipts and sales invoices. HMRC contended that these records cannot be directly attributed to individual drivers and do not give any indication that expenses were incurred and paid by each of the drivers.

(3) the appellant had no systems or controls in place to check that the £30 had actually been spent on employment expenses.

(4) the appellant paid their employees the £30 "overnight allowance" for 52 weeks per year, including during holiday periods when their employees were not working. HMRC submitted this is a further indicator that the amount is a "round sum" allowance.

37. HMRC contended that the £30 "overnight allowance" was a taxable emolument and therefore had correctly been added to gross pay and subject to deductions of tax and NICs.

38. The appellant said that following four "new grounds" for striking out (in addition to the grounds in HMRC's application of 23 November 2020) had been first raised by HMRC in their skeleton argument (sent 14 days before the hearing) – and that this was procedurally unfair:

(1) no valid overpayment relief claim was made;

(2) if the appellant's accountants' letter dated 13th March 2019 was a valid claim, it was out of time as regards tax years 2013-14 and earlier;

(3) the £30 "overnight allowance" was a round sum allowance that attracted income tax and NICs; and

(4) if income tax has been overpaid, only the employee can reclaim the tax.

39. The appellant submitted that, so far as it concerned income tax, HMRC's letter of 15 September 2020 fell within paragraph 5 Sch 1A (power to enquire into claims), and was therefore appealable under paragraph 7 (completion of enquiry into claim); and so far as it concerned NICs, the letter fell within s8(1) Transfer Act 1999, and was therefore appealable under s10.

40. The appellant submitted that, based on HMRC's conduct, HMRC's care and management powers had been exercised so as to treat the appellant's claim for repayment of overpaid income tax as a valid claim for Sch 1A purposes. They had similarly used those powers to admit any of the claims that were "late".

41. As to what it called HMRC's third "new ground" - saying that the £30 "overnight allowance" was not subject to adequate checks / record-keeping as regards whether drivers in fact spent that amount – the appellant submitted this was one of the main factual issues in dispute; given that documentary evidence and witness statements had not yet been required to be exchanged, it was premature to seek strike-out on this ground; the same applied to HMRC's fourth "new ground".

DISCUSSION

42. There are two potentially relevant powers to strike out proceedings under the Tribunal's procedure rules:

(1) lack of jurisdiction in relation to the proceedings: rule 8(2)(a); striking out is mandatory under this heading;

(2) no reasonable prospect of appellant's case succeeding: rule 8(3)(c); here, the Tribunal has a discretion to strike out such proceedings.

43. I shall deal with these in order.

Strike out for lack of jurisdiction in relation to the proceedings

44. These proceedings are appeals against HMRC's refusal to repay income tax (PAYE) and NICs paid in respect of seven tax years: 2010-2011 to 2016-17 inclusive.

45. I shall consider separately the Tribunal's jurisdiction in respect to appeals against refusals to repay (i) income tax and (ii) NICs.

Claims for the recovery of overpaid income tax – Tribunal's jurisdiction

46. The Tribunal has jurisdiction, on an appeal, to vary amendments made by HMRC, in a closure notice, to a claim for the recovery of overpaid income tax made by the appellant: paragraph 9 Sch 1A.

47. It is clear that if no such claim was made, no enquiry can have been opened and no closure notice can have been issued – and, consequently, the Tribunal's jurisdiction is not engaged.

48. The statute stipulates (paragraph 2 Sch 1A) that claims for the recovery of overpaid income tax must be in such form as HMRC determine; and the form of such claims must provide for a declaration of correctness. HMRC set out the form in their self assessment claims manual, including the declaration of correctness.

49. The appellant's accountant's letter of 13 March 2019 was a "claim" (in the colloquial sense) for recovery of overpaid income tax; but it did not meet the requirements of a claim under Sch 1A because it did not state the grounds on which the appellant considered that the overpayment had occurred, nor did it contain the required declaration of correctness.

50. The appellant argues that HMRC, by their conduct (prior to their letter of 6 July 2020), exercised their care and management powers so as to accept the appellant's "claim" as a valid claim for Sch 1A purposes, despite not meeting the statutory requirements. In my view there are two aspects to this argument which need to be analysed separately:

(1) an argument that, in fact, HMRC exercised those powers so as to waive certain requirements for a claim under paragraph 2 Sch 1A;

(2) an argument that, even if HMRC did not in fact exercise those powers in that way, their conduct led the appellant to believe that they had, or would, so exercise them.

51. If the first of the above arguments were to prevail, as a factual matter, then I accept, as a legal matter, that HMRC's care and management powers could be used to waive certain requirements for a claim under paragraph 2 Sch 1A (see in particular the dictum at [33] above); and, if they were so used, then it was possible that HMRC opened a Sch 1A enquiry into that claim and issued a Sch 1A closure notice – in which case, it is possible that the Tribunal's jurisdiction could be engaged.

52. However, if only the second of the above arguments were to prevail, I do not think it would assist the appellant in engaging the jurisdiction of this Tribunal, as there would have been no claim, enquiry, or closure notice for Sch 1A purposes. Such circumstances might give the appellant grounds for judicial review, but that is not a matter for this Tribunal.

53. Given my analysis above, I will consider the first argument in [50] above, only – there is no point my considering the second argument, as it would not affect the analysis of the Tribunal's jurisdiction.

54. The first argument in [50] above rests on the following contemporaneous documentary evidence:

(1) the appellant's accountants' letter of 13 March 2019 stated that "it was confirmed by HMRC that no formal claim other than this analysis is required" (as it was "part and parcel" of ongoing enquiries);

(2) in correspondence and notes of meeting following that letter, HMRC referred to the appellant's overpayment "claim";

(3) HMRC's note of the 7 August 2019 meeting with the appellant refers to their formally disallowing the "earlier year claim" and allowing "the appeal process to proceed";

(4) it was not until their letter of 6 July 2020 that HMRC spelled out the requirements of a Sch 1A claim and expressly stated that no "formal" claim had been made by the appellant.

55. The following suggest that, on the contrary, HMRC did not in fact use their care and management powers to waive certain requirements for a claim under paragraph 2 Sch 1A:

(1) the absence of any written statement by HMRC to that effect;

(2) HMRC's letter of 17 April 2019 referred the appellant to HMRC's guidance on making overpayment relief claims in HMRC's self assessment claims manual (SACM12035) (which contained the detailed requirements for a Sch 1A claim);

(3) HMRC's letter of 6 July 2020 stated that a "formal claim" for overpayment relief had not been made (and set out the requirements for such a claim).

56. I would ordinarily regard the absence of any written statement by HMRC to the effect that they were exercising their discretion to waive statutory requirements, as decisive: to waive statutory requirements is a serious and significant decision, and so one that should be recorded in writing. Here, however, I need to consider the statement in the appellant's accountants' letter of 13 March 2019 that HMRC had "confirmed" that a formal claim was not required, which could be interpreted as indicating that HMRC had decided to use their care and management powers to waive certain requirements of paragraph 2 Sch 1A. In my view, however, that interpretation is scotched by the fact that, in their letter in response, HMRC referred the appellant to the manual article that set out the detailed paragraph 2 Sch 1A requirements. It seems to me most unlikely that HMRC would have put this in their letter, had they already decided to exercise their care and management powers to waive those requirements. As for the fact that HMRC referred to the appellant's overpayment "claim" – this in my view is far from sufficient to demonstrate that HMRC had used their care and management powers to waive statutory requirements.

57. In all the circumstances, significant (and decisive) weight is to be attached to the absence of a written statement by HMRC to the effect that they had exercised their care management powers to waive statutory requirements. I do not therefore accept the appellant's first argument at [50] above.

58. I conclude that the Tribunal has no jurisdiction over the part of the proceedings consisting of an appeal against HMRC's refusal to repay overpaid income tax; and so the appeal must be struck out in relation to that part of the proceedings.

59. I have had regard to the overriding objective of the Tribunal's rules – to deal with cases fairly and justly – in making this decision on the evidence and submissions before the Tribunal at the half-day hearing on 27 August 2021, as well as the Tribunal's special expertise in tax law. I do not accept that there was unfairness to the appellant in the Tribunal hearing the arguments based on the validity of the claim for Sch 1A purposes found in HMRC's skeleton argument (circulated 14 days before the hearing) and oral submissions: it was clear that their strike out application of 23 November 2020 was grounded in an argument that there had been "no appealable decision" – and, in the context of an appeal against HMRC's refusal to repay overpaid income tax, that inevitably leads to consideration of Sch 1A and its requirements. In terms of the evidence relevant to those arguments – the hearing bundle contained copies of the (extensive) correspondence between the parties, which has been quoted extensively in my findings of fact above; neither party put forward oral evidence at the hearing; in my view, the likelihood of oral evidence being materially relevant to the matters at hand (which I consider to be low, given the very full documentary record and the greater weight inevitably to be put on contemporaneous documentary, as opposed to oral, evidence) was outweighed by the delay, inefficiency and cost of arranging a further hearing for oral evidence.

Decisions with respect to NICs – Tribunal's jurisdiction

60. The Tribunal has jurisdiction to vary certain decisions by HMRC relating to NICs.

61. The background to what I view as the relevant decision by HMRC is as follows:

(1) it is a precondition to the making of a regulation 52 application, that certain NICs have been paid in error. This explains why, on the making of a validly-made application, HMRC must return the subject-matter NICs (subject to exceptions that are not relevant here).

(2) the appellant's accountants' letter of 13 March 2019 was a purported application under regulation 52: from the appellant's perspective, the precondition for such an application was satisfied, because the NICs in question had been paid in error (I use the word "purported" only because the issue of the permissibility of the application has yet to be determined – the word is not intended to prejudge the matter);

(3) HMRC's letter of 23 March 2020 was, in the light of the above, their decision that the application could not be made, since (in their view) the NICs in question were not paid in error and so the precondition was not satisfied. In my view this was a decision of the kind described in s8(1) Transfer Act 1999, under (c) or (m) of that subsection (or both). The decision in that letter was, however, was qualified by:

(a) the offer of a review by another HMRC officer (which, for the avoidance of doubt, I do not regard as an offer to review a "matter in question" under s49A or s49C TMA 1970, as there was no appeal at this stage, and therefore no "matter in question"); and

(b) the offer of a further meeting;

(4) HMRC's letter of 15 September 2020 was an (unqualified) decision by an officer of HMRC as regards the purported application (and consequently expressed in terms of HMRC's decision "remaining the same" i.e. the same as in the (qualified) decision letter of 23 March 2020). Hence, it was this letter that contained the decision under s8(1) Transfer Act 1999.

62. It was not in contention between the parties that, if the Tribunal found (as I have) that HMRC's 15 September 2020 letter was a decision under s8(1) Transfer Act 1999, then the appellant's accountants' email to HMRC of 14 October 2020 was a valid notice of appeal against that decision.

63. It follows that the appellant's notice of appeal to the Tribunal was permissible under s49D TMA 1970.

64. As they did not accept the appellant's regulation 52 application could be made (as, in their view, no NICs had been paid error), it was unnecessary for HMRC to decide whether they were satisfied as to the appellant having a reasonable excuse for including two tax years (2010-11 and 2011-12) outside the time permitted in its (purported) application. I do not accept the appellant's contention that HMRC, by their conduct, exercised their care and management powers to admit regulation 52 applications in respect of the two late tax years – I find it clear on the evidence that HMRC treated the purported applications for all seven tax years as impermissible.

65. The consequence is that if the Tribunal, on the substantive hearing of this appeal, were to decide to use its powers to vary HMRC's decision on the appellant's purported regulation 52 application, and so to find that the application *could* be made (as NICs had been paid in error), then the Tribunal will have to go on to consider whether HMRC was required by regulation 52 to admit the two late tax years i.e. decide if HMRC should have been satisfied that the appellant had a reasonable excuse for the late application with respect to the two tax years. This is not, in my view, a matter outside the Tribunal's jurisdiction to vary HMRC's decision "in a particular manner."

66. I therefore decline to strike out that part of the proceedings consisting of an appeal against HMRC's refusal to repay overpaid NICs for all seven tax years in question.

Strike out where no reasonable prospect of appellant's case succeeding

67. Given my conclusions above as regards striking out for lack of jurisdiction, I will only deal with the NIC part of the proceedings in considering striking out for no reasonable prospect of the appellant's case succeeding.

68. The relevant principles are set out in *The First De Sales Ltd Partnership v HMRC* [2019] STC 805 at [33].

69. In my view HMRC's arguments have not demonstrated that either the law, or the facts, at issue in the appeal are sufficiently clearly identified, and in HMRC's favour, to justify striking out under this heading. Many of HMRC's arguments revolve around the alleged evidential inadequacy of information about the £30 "overnight allowances" provided to HMRC before the proceedings commenced; however, it seems to me reasonable to expect the possibility of further evidence being put forward by the appellant about these allowances during the course of the proceedings, including witness evidence. Hence I consider that reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available at the hearing and so affect the outcome of the case.

70. In my view HMRC have not demonstrated that the prospects for the appellant's case succeeding at a full hearing are 'fanciful' (as opposed to 'realistic').

71. I decline therefore to strike out the proceedings on the grounds that there is no realistic prospect of the appellant's case (as regards NICs) succeeding.

CONCLUSION AND DIRECTIONS

72. The part of the proceedings consisting of an appeal against HMRC's refusal to repay income tax is struck out. The part of the proceedings relating to HMRC's refusal to repay NICs is not struck out.

73. It is directed that HMRC send a statement of case (as regards the surviving part of the proceedings) to the appellant and the Tribunal so that it is received within 60 days after the date of issue of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 01 NOVEMBER 2021