



Neutral Citation: [2022] UKFTT 00457 (TC)

Case Number: TC08662

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2022/00110

Procedure – Referral under s 12ABZB(3) Taxes Management Act 1970 – Preliminary hearing to determine whether Tribunal has power to admit a late referral, whether the referral was made late and whether referral invalid as being in substance about the amount (before sharing) of partnership’s profits or losses

Heard on: 30 November 2022

Judgment date: 06 December 2022

Before

TRIBUNAL JUDGE BROOKS

Between

JAMES ANDERSON

Appellant

and

PRICEWATERHOUSECOOPERS

Respondents

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Third Party

Representation:

For the Appellant: David Whiscombe of Chiltern & Cambridge Consultants Limited

For the Respondents: Imran Afzal, counsel, instructed by PricewaterhouseCoopers LLP

For the Third Party: Natasha Henshaw litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. On 20 April 2022 the Tribunal (Judge Kempster) issued the following directions:

Background

1. These proceedings concern a referral by Mr Anderson to the tribunal under s 12ABZB(3) of the Taxes Management Act 1970 (“**the Referral**”). ...
2. I have considered correspondence from the Parties, and the Tribunal’s case file generally.
3. I consider that it would be appropriate and useful to hold first a preliminary hearing to consider the following matters (which are an expansion of the points set out in the Tribunal’s email dated 16 March 2022):
 - (a) Whether the Tribunal has the power to admit a late referral.
 - (b) Whether the Referral was made late.
 - (c) Whether the Referral is invalid as being in substance about the amount (before sharing) of the partnership’s profits or losses.

This is my decision following the preliminary hearing, listed pursuant to those directions, on 30 November 2022.

2. The appellant, James Anderson (“Mr Anderson”), was represented by David Whiscombe of Chiltern & Cambridge Consultants Limited. Imran Afzal, of counsel, appeared on behalf of the respondents, PricewaterhouseCoopers LLP (“PwC”) and the third party, HM Revenue and Customs (“HMRC”) was represented by Natasha Henshaw of its Solicitor’s Office. I am most grateful for their full and helpful submissions, both written and oral. However, although carefully considered, it has not been necessary to refer to each and every argument advanced on behalf of the parties in reaching my conclusions in relation to each of the issues set out in the directions.

BACKGROUND

LAW

3. Unless otherwise stated, all subsequent statutory references are to the provisions (the material parts of which are set out in the appendix) of the Taxes Management Act 1970 (“TMA”).
4. A partnership may be required, under s 12AA, by notice given by HMRC to “make and deliver” a partnership return.
5. Such a partnership return is required, by s 12AB(1), to include a “partnership statement” showing, addition to the amount of income, loss, consideration received and tax deducted or treated as deducted from any income of the partnership, the amount, in the case of each of the partners, “taking into account any such relief or allowance, is equal to his share of that income, loss, consideration or tax.”
6. Under s 12ABZB(1) a partnership return is, for tax purposes, “conclusive” in relation to whether a person has a share in the profits or losses of that partnership for any period and also what that person’s share in those profits or losses is.
7. If there is a dispute between that person and any one or more partners of the partnership as to whether what is stated in the partnership return is correct, it may be referred to the Tribunal for determination under s 12ABZB(3).

8. Section 12ABZB(5) provides that such a referral “must” be made before the “end of the period of 12 months” beginning with the day after the day on which the partnership return was “delivered” or, (which is not applicable in the present case) if the return was amended, within 12 months from the day after the day the amendment was made.

9. However, s 12ABZB(4) provides that a referral under s 12ABZB(3) does not include a dispute “to the extent that is in substance about the amount (before sharing) of the partnership’s profits or losses for a period.

FACTS

10. Before considering the issues, and to put them in context, I have summarised the circumstances in which they arose. However, I should make it clear that what follows is solely for this purpose and anything I say should not be taken as a finding of fact in relation to any further proceedings in this matter.

11. Mr Anderson was a partner in PwC from 1 July 2016. In May 2018 he was told that the decision had been taken to serve notice requiring his compulsory retirement. Although, under the terms of the LLP agreement Mr Anderson was entitled to be given six months’ notice of termination, he retired from PwC on 30 November 2018.

12. Mr Anderson claimed that in requiring him to retire, PwC had had unlawfully discriminated against him by reason of a pre-existing medical condition which had been aggravated by their actions. The claim was settled on the basis of a payment by PwC to Mr Anderson comprising two distinct elements:

(1) a payment described as “the balance of profit share” for the period 1 July 2018 to 30 November 2018; and

(2) a payment described as “an additional payment of an amount equal to 12 months’ profit share” (the “Additional Payment”).

13. Both elements were included as profit share allocated to Mr Anderson in the partnership return for the accounting period from 1 July 2018 to 30 June 2019 which was filed by PwC on 26 October 2020 (the “Partnership Return”).

14. While he accepts that the first element was correctly treated as a share of profit chargeable to income tax, Mr Anderson contends that the Additional Payment was compensation in settlement of his claim for damages which should not have been included as a share of profit allocated to him in the Partnership Return. Paragraph 5 of the Referral states:

“5. It is not disputed that the first element is correctly treated as a share of profit chargeable to Income Tax. However, JA [Mr Anderson] considers that the Additional Payment is not as a matter of fact a share of profit but compensation in settlement of his damages claim; and that he is not liable to pay Income Tax in respect of it.”

15. Mr Anderson became aware of how the Additional Payment had been treated on receipt of an email from PwC, dated 5 January 2021. This stated that the details of his profit share were available and that the computation had been finalised and submitted to HMRC.

16. On 10 December 2021 Mr Anderson made the Referral, under s 12ABZB(3), to the Tribunal. Although Mr Anderson now contends that the Referral was made in time it included an application for an extension of time for its admission.

THE ISSUES

17. I now turn to the issues.

Power to admit late referral

18. It is common ground that there is no provision within the Taxes Management Act 1970 (“TMA”) under which the Tribunal may extend the time in which a referral under s 12ABZB(3) can be made. It is therefore necessary to consider whether there is any other provision under which the Tribunal may do so.

19. On an appeal from the Social Entitlement Chamber of the First-tier Tribunal in *VK v HMRC* [2016] UKUT 331 (AAC) (“*VK*”) the Administrative Appeals Chamber of the Upper Tribunal (Judge Jacobs, Judge Wikeley and Judge Mitchell) observed, at [2], that legislative provisions that confer authority to extend time do not have to be contained in an Act but may also be contained in secondary legislation:

“... if its enabling powers permit such provision to be made.”

The Upper Tribunal continued, at [3], noting that paragraph 4 of Schedule 5 to the Tribunals Courts and Enforcement Act 2007 (“TCEA”):

“... properly interpreted, authorised rules of tribunal procedure to confer power on the First-tier Tribunal to extend time..

20. The authorised rules of procedure in the Tax Chamber of the First-tier Tribunal are the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 of which the rule 21 provides:

(1) Where an enactment provides for a person or persons to make an originating application or reference to the Tribunal, the appellant must start proceedings by providing an application notice or notice of reference to the Tribunal within any time limit imposed by that enactment.

(2) ... [not applicable]

(3) If the appellant provides the application notice or notice of reference to the Tribunal later than the time required by paragraph (1) or by any extension of time under rule 5(3)(a) (power to extend time)—

(a) the application notice or notice of reference must include a request for an extension of time and the reason why the application notice or notice of reference was not provided in time; and

(b) unless the Tribunal extends time for the application notice or notice of reference under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application notice or notice of reference.

(3A) The power of the Tribunal under these Rules to extend time for starting proceedings shall not apply in a CAA case.

(4) When the Tribunal receives an application notice or a notice of reference it must send a copy of the notice and any accompanying document to any respondent.

21. Rule 5(1), which deals with the Tribunal’s case management powers, provides that, subject to the provisions of the TCEA “and any other enactment”, the Tribunal may regulate its own procedure.

22. Rule 5(3)(a), to which rule 21(3) refers, provides that the Tribunal “may by direction”:

extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit; ...

23. Therefore, the starting point is that a referral under s 12ABZB(3) “must not” be admitted unless it is either within the time limit imposed by s 12ABZB(5) which, for present purposes,

is the “end of the period of 12 months” beginning with the day after the day on which the partnership return was “delivered” or the Tribunal, if it is able to do so, extends the time for it to be admitted under rule 5(3)(a).

24. Although the parties agree that the Tribunal may extend the time for complying with a statutory time limit, either as an extension of time under rule 21 or an extension of the statutory time limit as envisaged in *VK* (see paragraph 19, above), they part company in relation to whether it has the power to grant such an extension in the case of a referral under s 12ABZB(5) and whether such an extension would conflict with a provision of another enactment.

25. Mr Whiscombe, for Mr Anderson, raised the argument that as the time limit was contained in the TMA, “another enactment” must refer to a statute other than the TMA. In the absence of any provision in another statute he contends that there is nothing to preclude an extension of time being granted by the Tribunal under rule 5(3)(a).

26. Mr Afzal, for PwC, contends that the reference to “another enactment” in rule 5(3)(a) refers to an enactment other than the Procedure Rules and that, as such, there is a conflict with the time limit in s 12ABZB(5) with the result that the Tribunal does not have the power to grant an extension of time for a referral under s 12ABZB(3). Ms Henshaw, for HMRC, agrees with Mr Afzal that an extension of time is precluded but contends that the reference to “another enactment” is a reference to the TCEA.

27. Given the reference to the TCEA and “any other enactment” in rule 5(1), I consider Ms Henshaw’s to be the better construction of rule 5(3)(a) and agree with her that the reference to “another enactment” is to the TCEA. However, for present purposes, it does not matter whether the other enactment is in fact the Procedure Rules or the TCEA as in both cases it would appear that the Tribunal is precluded from extending the time for a reference under s 12ABZB(3).

28. However, the Upper Tribunal in *VK*, having considered rule 21(3) of the Tax Chamber Procedure Rules (which it set out in full), noted, albeit *obiter*, that:

“43. There is some jarring here with the wording of rule 5(3)(a), which ostensibly prevents an extension of time if that would conflict with an enactment setting a time limit. But the specific provision for extending time in rule 21 must have been intended to operate as an exception to the rule 5(3)(a) restriction.”

29. Mr Whiscombe contends that, although *obiter*, the approach in *VK* should be adopted in the present case with the effect that the Tribunal may extend the time limit in rule 21 “as an exception to the rule 5(3)(a) restriction.

30. However, I do not agree. As Mr Afzal submits, not only is the view expressed by the Upper Tribunal, which is not supported by any reasoning, *obiter* and therefore not binding, rule 5(3)(a) and rule 21 are silent as to the existence of any exception. Moreover, if the Upper Tribunal in *VK* were right it would render the restriction in rule 5(3)(a), “unless such extension ... would conflict with the provision of another enactment setting down a time limit” otiose.

31. It therefore follows that as an extension of time would conflict with a provision of another enactment, namely s 12ABZB(5), the Tribunal does not have the power under rule 5(3)(a) to grant an extension of time to make a referral under s 12ABZB(3) with the result that any referral that is not made in time “must not” be admitted.

Whether Referral late

32. It is not disputed that the partnership return was submitted to HMRC on 26 October 2020 and that the Referral was made, more than 12 months later, on 10 December 2021.

33. Although accompanied by an application for an extension of time when it was made, Mr Whiscombe now contends that the Referral was in fact made within the s 12ABZB(5) time limit of “12 months beginning with the day after the day on which the partnership return was delivered” and, as such, an extension of time is not required. Neither Mr Afzal nor Ms Henshaw agree.

34. In essence this issue concerns the interpretation of s 12ABZB(5), in particular to whom the partnership return is to be “delivered” pursuant to paragraph (a) of that subsection.

35. Mr Afzal, with whom Ms Henshaw agrees, says it is HMRC whereas Mr Whiscombe, who accepts that delivery to HMRC is the most obvious interpretation of s 12ABZB(5), contends that time runs from when the partnership statement, which is required by s 12AB(1) to be included with a partnership return, is delivered to the individual partner making the referral under s 12ABZB(3).

36. Mr Whiscombe points out that as there is no statutory obligation on a partnership to notify each partner of the amount of taxable profit allocated to him or her it is possible that the time for making a referral under s 12ABZB(3) could already have started running or may even have expired before a partner is aware of a dispute to be referred to the Tribunal. Such a situation could arise through error or carelessness by a partnership that fails to timeously provide the individual partners details of their profit allocations. It could, Mr Whiscombe argues, even be abused by a partnership where a partner has left in acrimonious circumstances. He contends that such issues would not arise if his construction of s 12ABZB were to be adopted. He does concede, however, that to construe s 12ABZB(5) as meaning delivery of the partnership statement to the partner making the referral does require “some gymnastics”.

37. Given that Mr Anderson first became aware of his partnership allocation on 5 January 2001 the effect of such an interpretation in the present case would be that the Referral, on 20 December 2021, was made within 12 months from the day after the day the partnership statement was delivered to him and no extension of time is required for it to be admitted.

38. However, rather than engage in the gymnastics required for Mr Whiscombe’s construction of s 12ABZB, I prefer that advanced by PwC and HMRC (which Mr Whiscombe also accepts as being the more natural and obvious interpretation) that the use of “delivered” in s 12ABZB(5) refers to the partnership return being delivered to HMRC. Such a construction is, in my judgment, clearly consistent with the TMA provisions regarding the filing of a partnership tax return.

39. For example, where a partnership is required by a notice issued by an “officer of the Board” of HMRC under s 12AA to “make and deliver” a partnership return, s 12AA(2) requires that partnership return to be delivered to that “officer”, ie it must be delivered to HMRC. It therefore follows that the phrase used in s 12ABZB(5) “the day on which the partnership return was delivered” must refer to the day on which it was delivered to HMRC.

40. Additionally, although s 12AB(1) provides that a partnership return “shall include” a partnership statement”, s 12ABZB(5) expressly refers to the delivery of a “partnership return” not a “partnership statement”. In my judgment, had s 12ABZB(5) been intended to refer to a “partnership statement” as opposed to a “partnership return” it would have said so. Also, given the reference to both a “partnership return” and “partnership statement” in the legislation the two terms cannot be interchangeable or one mean the other. Had that been intended it would not have been necessary for the legislation to refer to both.

41. Accordingly, as it was made on 10 December 2021, more than 12 months after the partnership return was delivered to HMRC on 26 October 2020, the Referral cannot have been

made before the end of the period of 12 months beginning with the day after the day on which the partnership return was delivered as required by s 12ABZB(5).

Whether Referral invalid

42. In essence this issue concerns whether the dispute between the parties was “in substance” about the nature of the Additional Payment, ie whether it was a profit share (as contended by PwC) or compensation (as contended by Mr Anderson), or about the amount (before sharing) of the partnership’s profits.

43. Mr Whiscombe says that the dispute is essentially about the nature of the Additional Payment. However, he accepts that, as payment of compensation is an expense deductible in computing profit, it does have a “knock on” effect on the amount of partnership profits. Mr Afzal, with whom Ms Henshaw agrees, contends that because of that effect on the amount of partnership profits the dispute is, in substance, directly about the amount of partnership profits.

44. Although initially attracted by the argument advanced by Mr Whiscombe, on balance, given the potential effect of any determination by the Tribunal on the partnerships profit, I agree with Mr Afzal that the dispute is, in substance, about the amount of the partnership’s profits whether directly, as PwC and HMRC contend, or indirectly, as Mr Whiscombe accepts. This is apparent from the description of the dispute at paragraph 5 of the Referral itself (see paragraph 14, above) from which the issue to be determined by the Tribunal if the Referral were to be admitted is whether the Additional payment is as “a matter of fact a share of profit”.

45. Accordingly the Tribunal is precluded from admitted the Referral, which is “in substance” about the amount of the partnerships profits, by s 12ABZB(4).

CONCLUSION

46. For the reasons above I have concluded that:

- (1) The Tribunal does not have the power to admit an referral out of time;
- (2) The Referral was made out of time; and
- (3) The Referral is invalid as being in substance about the amount (before sharing) of the partnership’s profits or losses.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

Release date: 06 DECEMBER 2022

APPENDIX
Provisions of Taxes Management Act 1970

Section 12 AA Partnership Return

(1) Where a trade, profession or business is carried on by two or more persons in partnership, for the purpose of facilitating the establishment of the following amounts, namely—

- (a) the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such partner, and
- (b) the amount in which each partner chargeable to corporation tax for any period is so chargeable,

an officer of the Board may act under subsection (2) or (3) below (or both)

...

(2) An officer of the Board may by a notice given to the partners require such person as is identified in accordance with rules given with the notice or a successor of his—

- (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and
- (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(3) An officer of the Board may by notice given to any partner require the partner or a successor of his—

- (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and
- (b) to deliver with the return such accounts and statements as may reasonably be so required;

and a notice may be given to any one partner or separate notices may be given to each partner or to such partners as the officer thinks fit.

...

(10A) in this Act a “partnership return” means a return in pursuance of a notice under subsection (2) or (3) above.

Section 12AB Partnership return to include partnership statement

(1) Every partnership return shall include a statement (a partnership statement) of the following amounts, namely—

- (a) in the case of the period in respect of which the return is made and each period of account ending within that period—
 - (i) the amount of income or loss from each source which, on the basis of the information contained in the return and taking into account any relief or allowance a section 42(7) claim for which is included in the return, has accrued to or has been sustained by the partnership for the period in question

- (ia) the amount of the consideration which, on that basis, has accrued to the partnership in respect of each disposal of partnership property during that period,
- (ii) each amount of income tax which, on that basis, has been deducted or treated as deducted from any income of the partnership, or treated as paid on any such income, for that period,
- (b) in the case of each such period as is mentioned in paragraph (a) above and each of the partners, the amount which, on that basis and (where applicable) taking into account any such relief or allowance, is equal to his share of that income, loss, consideration or tax.

Section 12ABZB Taxes Management Act 1970

Partnership return conclusive as to partnership shares

- (1) A partnership return is conclusive for tax purposes as to—
 - (a) whether a person does or does not have a share in the profits or losses of the partnership for any period, and
 - (b) what the share of any person in those profits or losses is.
- (2) That applies even where the person would not otherwise be chargeable to tax on profits of the partnership.
- (3) If there is a dispute between the person mentioned in subsection (1)(a) or (b) and any one or more partners in the partnership about whether what is given in a partnership return is correct as to the matters mentioned in that subsection, a party to the dispute may refer it to the tribunal for determination.
- (4) That does not include a dispute to the extent that it is in substance about the amount (before sharing) of the partnership's profits or losses for a period.
- (5) A referral under subsection (3) must be made before the end of the period of 12 months beginning with the day after—
 - (a) the day on which the partnership return was delivered, or
 - (b) if the dispute relates to an amendment to the return made under section 12ABA (amendment of partnership return by taxpayer), the day on which the amendment was made.
- (6) Where a dispute is referred to the tribunal under subsection (3)—
 - (a) the party referring it must at the same time give notice of the referral to—
 - (i) HMRC, and
 - (ii) the reporting partner, and
 - (b) the reporting partner must give notice of the referral to—
 - (i) every other partner in the partnership, and
 - (ii) any other person appearing to the reporting partner to be a party to the dispute.

But notice need not be given under this subsection to anyone who referred the dispute.

- (7) Where the tribunal determines that what is given in the partnership return as to the matters referred to in subsection (1)(a) or (b) is not correct—
 - (a) the tribunal must determine what the return should have given, and

(b) HMRC must amend the return accordingly.

(8) Where a partnership return is amended under subsection (7)(b), HMRC must by notice to any party to the proceedings or any partner in the partnership amend—

(a) their return under section 8 or 8A of this Act, or

(b) their company tax return,

if the amendments are necessary to give effect to the consequences of the amendment of the partnership return.

(9) Where at any time after a referral is made under subsection (3) but before the tribunal determines the dispute the reporting partner gives notice to HMRC that all the partners in the partnership (whether or not party to the proceedings) have agreed in writing that the partnership return—

(a) is correct without variation, or

(b) requires correcting in a particular manner,

the like consequences shall ensue for all purposes as would have ensued if, at the time the agreement was made, the tribunal had determined the dispute in accordance with the terms of the agreement.

(10) Subsection (9) does not apply if—

(a) within the period of 30 days beginning with the date of the agreement, a party to the agreement gives notice to the other parties to the agreement that the party wishes to repudiate or resile from the agreement, or

(b) within the period of 30 days beginning with the date on which it receives notice of the agreement, HMRC gives notice to the reporting partner of its objection to the agreement.

(11) A partnership return which has been the subject of a referral under subsection (3) may not be the subject of another referral under that subsection, unless that other referral—

(a) relates to a dispute arising in consequence of an amendment of the partnership return under section 12ABA (amendment of partnership return by taxpayer), and

(b) is the first referral following the amendment.

(12) In this section—

“reporting partner” means the partner who made and delivered the partnership return or that partner’s successor;

references to a partner in a partnership are to a person who was a partner in it at any time during the period in respect of which the partnership return was made.