Neutral Citation: [2023] UKFTT 362 (TC)

Case Number: TC08786

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00938

INCOME TAX-DOUBLE TAX RELIEF-strike out application-claim for double tax relief-time limits-application of Taxes Management Act 1970-whether claim in time-whether Tribunal has jurisdiction to hear claim

Heard on: 24 March 2023
Judgment date: 5 April 2023

Before

TRIBUNAL JUDGE MARILYN MCKEEVER

Between

MOHAMMAD AZHARUL ISLAM SIKDER

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Md Eaftahkar Hassanuzzamn of Lexwin Solicitors

For the Respondents: Ms Farah Chaumoo, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video). All parties attended remotely and the hearing was held on the Tribunal's VHS platform. A face to face hearing was not held because it was considered in the interests of justice to hold the hearing remotely. The documents to which I was referred are a hearing bundle (including authorities) of 258 pages.

2. 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.

STRIKE OUT APPLICATION

3. HMRC apply, under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the Rules), to strike out the Appellant's appeal claiming relief under the Bangladesh/UK Double Tax Agreement (the DTA) on the grounds that the Tribunal has no jurisdiction to hear the appeal. The basis of the application is that HMRC have refused the Appellant's claim as being out of time under section 43 of the Taxes Management Act 1970 (TMA) and HMRC contend that there is therefore no appealable decision for the Tribunal to consider.

4. The Appellant contends that the DTA does not include any time limits and, accordingly, he is entitled to repayment of the tax he paid. The Appellant further contends that the time limits in the TMA apply only to British Citizens and do not apply to treaty claims.

THE FACTS

5. The facts are straightforward and are not in dispute.

6. The Appellant was a resident of Bangladesh who came to the UK to study. Whilst studying, he carried out part time work and paid tax and National Insurance Contributions on his earnings. The earnings were for the years 2006/7 to 2010/11 inclusive. The tax liability in 2006/7 was £73.80 and in 2007/8 it was £44.80. There was no income tax liability in the other years under appeal although the Appellant did make National Insurance Contributions. This case relates only to the income tax paid.

7. On completion of his studies the Appellant returned to Bangladesh.

8. The Appellant made a claim under Article 19(1)(a)(iii) of the DTA for a refund of tax for all the relevant years on 17 March 2020.

9. On 5 May 2020 HMRC replied stating that they were unable to accept the claim as "the time limit for claiming repayment has passed".

10. The Appellant appealed to HMRC on 1 June 2020. HMRC replied on 28 September 2020 reiterating that the claim was out of time and declining to accept the claim.

11. The Appellant appealed to the Tribunal on 11 March 2021. The grounds of Appeal were that HMRC had misinterpreted the provisions of Article 19 of the DTA and that the time limits in section 43 TMA did not apply to the DTA. He argued that those time limits applied only to UK nationals and not to citizens of the other treaty state ie Bangladesh. The DTA contains no limitation on the time for making a claim and this is not overridden by the TMA.

THE BANGLADESH/UK DOUBLE TAX AGREEMENT

12. Article 19 of the DTA is headed "Students" and provides

> "(1) An individual who is a resident of one of the Contracting States at the time he becomes temporarily present in the other Contracting State and who is temporarily present in the other Contracting State solely for the purpose of:
>
> (a) Studying in the other Contracting State at a university or other recognised educational institution; or
>
> (b) Securing training at a recognised educational institution required to qualify him to practise a profession; or
>
> (c) Studying or carrying out research as a recipient of a grant, allowance or award from a governmental, religious, charitable, scientific, literary or educational organisation;
>
> shall be exempt from tax in that other Contracting State on:
>
> (i) Remittances from abroad for the purpose of his maintenance, education, study, research or training;
>
> (ii) The grant, allowance or award; and
>
> (iii) Income from personal services rendered in the other Contracting State (other than any rendered by an articled clerk or other individual undergoing professional training to the person or partnership to whom he is articled or who is providing the training) provided that the income constitutes earnings reasonably necessary for his maintenance and education.
>
> (2) In no event shall an individual have the benefit of the provisions of this Article for more than five years."

13. It is acknowledged that the Appellant's earnings fell within this Article.

THE TIME LIMITS FOR A TREATY CLAIM

14. Neither Article 19, nor the DTA in general, set out any time limit on claiming the benefit of the treaty.

15. The reference in Article 19(2) to five years refers to the number of tax years in respect of which a claim can be made, not to the time within which any such claim may be made. The Appellant did not claim relief in respect of an excessive number of years.

16. In order for an individual to access the benefits of an international treaty, it must be incorporated into domestic UK law. Section 2(1) of the Taxation (International and Other Provisions) Act 2010 (TIOPA) gives effect to the DTA in UK law. Section 2(1) provides, so far as material:

> "**2 Giving effect to arrangements made in relation to other territories**
>
> (1) If Her Majesty by Order in Council declares
>
> (a) that arrangements specified in the Order have been made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to taxes within subsection (3), and
>
> (b) that it is expedient that those arrangements should have effect,
>
> those arrangements have effect. …

(2) If arrangements have effect under subsection (1), they have effect in accordance with section 6.

(3) The taxes are

(a) income tax…"

17. Section 3(2)(a) of TIOPA provides that section 2(1) gives effect to arrangements even if the arrangements include provision as to income that is not subject to double taxation. That is the case here as the employment income is taxable only in the UK.

18. Section 6 of TIOPA sets out the effect of section 2 and provides, so far as material:

"**6 The effect given by section 2 to double taxation arrangements**

(1) Subject to this Part and Part 18 of ICTA, double taxation arrangements have effect in accordance with subsections (2) to (4) despite anything in any enactment.

(2) Double taxation arrangements have effect in relation to income tax and corporation tax so far as the arrangements provide

(a) for relief from income tax or corporation tax,

(b) for taxing income of non-UK resident persons that arises from sources in the United Kingdom,…

(6) Relief under subsection (2)(a), … requires a claim."

19. Section 6(2)(b) allows a DTA to tax non-UK residents on their UK source income. Section 6(2)(a) provides for relief from such tax. The relief does not apply automatically, and section 6(6) requires the taxpayer to make a claim for such relief. TIOPA says nothing about time limits for such a claim.

20. I now turn to the TMA. Section 42(1) of the TMA sets out the procedure for making a claim for relief to be given under any provision of "the Taxes Acts" and section 43 provides that a claim for relief must be made within four years of the end of the tax year to which it relates:

"42 Procedure for making claims etc

(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….

43 Time limit for making claims

(1) Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than [4 years after the end of] the year of assessment to which it relates."

21. So a claim for income tax relief under the Taxes Acts must comply with sections 42 and 43 TMA.

22. Section 118 of the TMA defines the Taxes Acts as "this Act [i.e. the TMA] and (a) the Tax Acts…"

23. Schedule 1 of the Interpretation Act 1978 defines the "Tax Acts" as "the Income Tax Acts and the Corporation Tax Acts" and further defines the "Income Tax Acts" as "all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax."

24. We then go to Section 1 of the Income Tax Act 2007 which provides, so far as material:

1 Overview of Income Tax Acts

(1) The following Acts make provision about income tax

(a) …

(2) There are also provisions about income tax elsewhere: see in particular

(a) [Part 2 of TIOPA 2010] (double taxation relief),

…

(3) Schedule 1 to the Interpretation Act 1978 (c 30) defines "the Income Tax Acts" (as all enactments relating to income tax)."

25. Joining all these legislative provisions together, Part 2 of TIOPA, which includes sections 2 and 6 of TIOPA, is an enactment relating to income tax and therefore one of the "Income Tax Acts". By virtue of the Interpretation Act TIOPA is, accordingly, one of the "Tax Acts" and under section 118 of the TMA is included within "the Taxes Acts".

26. Sections 42 and 43 of the TMA apply to claims under the Taxes Acts and, therefore, the time limits in section 43 apply to a claim made under section 6(6) TIOPA for relief from income tax under the DTA.

27. The last year for which Mr Sikder made a claim for relief was 2010/11. The latest date by which a claim had to be made, applying the four year time limit in section 43 TMA, was 5 April 2015. Mr Sikder made his claim for all the relevant years on 17 March 2020 which was out of time. HMRC refused the claim as it was too late.

28. I find that the time limits in section 43 apply to the Appellant's claim.

RECONCILING THE CASE LAW

29. Although I gave my decision at the hearing, HMRC requested that I provide a full decision in order to reconcile two, apparently conflicting, First Tier Tribunal cases.

30. The issue in both cases was the same and was the same as the issue in this case: whether section 43 TMA applied to the Bangladesh/UK Double Tax Agreement. Both cases involved a strike out application by HMRC.

31. In *Mohammed Masbah Uddin v HM Revenue & Customs* TC/2019/06438 (*Uddin*), Mr Uddin was a Bangladeshi national who studied in the UK and worked part time. Income tax was deducted from his wages. He made a repayment claim in February 2018 for repayment of income tax for the tax years ended 5 April 2013 to 2017 inclusive. The claim was made under Article 19 of the DTA. HMRC repaid the tax for the years 2013/14 and 2014/15 but not that for 2012/13 on the basis that the claim was out of time. Mr Uddin appealed and HMRC applied to strike out his claim under Rule 8(2)(a) on the basis the Tribunal had no jurisdiction.

32. The Tribunal agreed with HMRC that the TMA time limit applied and struck out the appeal. Judge Redston said at [38] to [39]:

> "38. Under UK law, where a person has paid tax to which he is not liable, he is entitled to recover that money as long as he makes his repayment claim within the relevant statutory time limit. There is nothing in Article 19(2) which allows a person to override that time limit.
>
> 39. It follows that Mr Uddin's claim for a repayment of tax in relation to 2012-13 is out of time because it was made more than four years after the end of that tax year."

33. The material facts in *Mr Jewel Rana v The Commissioners for Her Majesty's Revenue and Customs* TC/2021/00709 (*Rana*) are identical except that the years in dispute were 2012/13 and 2013/14 and the claim was made in November 2018. Again, HMRC refused the claim on the basis it was made outside the TMA time limit, Mr Rana appealed and HMRC applied to strike out the appeal. The case was considered "on the papers". Mr Rana's contentions were similar to those made in the present case: that the time limits under the TMA are applicable only to persons subject to taxes under the UK national tax regime and are not applicable to a contracting state citizen claiming tax relief under an international treaty. Mr Rana argued that the provisions of the TMA had no application as Mr Rana was not claiming any relief on the basis of any UK national law.

34. HMRC submitted that section 43 TMA applied and relied on *Uddin*.

35. The Tribunal observed at [41]to [44]:

> "41. … this decision [*Rana*] was to be decided on the papers without representation for either party. It has therefore been impossible for this Tribunal to make further enquiry and test the submissions and contentions made by the parties. It could only consider the written submissions and evidence.
>
> 42. HMRC state in effect that the rules set out for UK taxpayers or anyone who is entitled to take the benefit of the Article are subject to the Taxes Management provisions of UK law. No legal basis of the link between Section 6(6) TIOP [sic] was provided as to why this should be for an individual who is "temporarily present in another Contracting State" under restricted purposes.
>
> 43. HMRC cite Section 6(6) and state that such a claim is "therefore subject to the time limits under section 43 TMA".
>
> 44. It is clear that section 6 (6) TIOP) requires a claim but it, like the Article, does not include any provision relating to the time limit for claims."

36. The Tribunal in *Rana* referred to the decision in *Uddin* and noted at [47] "Judge Redstone [sic] in *Mohammed Masbah Uddin* states that the Article [19 of the DTA] would have to specifically override the time limits in the TMA and found that section 43 TMA applied but no reasons for this were given".

37. The Tribunal went on to conclude, at [50] and [52]:

> "… the Tribunal does not believe that HMRC have sufficiently provided a legal basis as to why a claim, under the Article is "therefore" subject to section 43 TMA to allow the Tribunal to believe that there is "no reasonable prospect of success' or that it lacks jurisdiction. …
>
> 52. This Tribunal finds that, based on the papers before it, there is an arguable case that the time limit provisions contained in section 42 [sic] TMA do not apply to those making a claim under section 6 (6) and the Article."

38. The Tribunal in *Rana* therefore refused the strike out application.

39. The difference between the cases is this. In *Uddin*, Judge Redston accepted that the time limit in section 43 TMA applied to a claim under Article 19 of the DTA but no reasons were given as to why this was the case. In *Rana*, the Tribunal was not prepared to make the assumption that section 43 applied. Neither the DTA nor section 6(6) TIOPA specified any time limits. As the case was decided on the papers, the Tribunal could not ask HMRC to explain its contention that the time limit applied. As HMRC had failed to explain the legal

basis for that contention, the Tribunal was not prepared to conclude that Mr Rana had "no reasonable prospect of success" and refused the strike out application.

40. In the present case, HMRC *has* set out the legal basis for their contention that section 43 TMA applies to a claim under section 6(6) TIOPA in relation to Article 19 of the DTA. I have set out above the concatenation of legislation which links a claim under the DTA to the time limits set out in the TMA. I am satisfied that the links in that chain are robust and that the four year time limit does indeed apply to Mr Sikdar's claim for repayment under Article 19 of the DTA.

41. I therefore find that his claims are out of time.

JURISDICTION

42. Having found that Mr Sikdar's claims are out of time, it follows that this Tribunal has no jurisdiction to hear the appeal.

43. This is clear from the case of *Revenue and Customs Commissioners v Raftopoulou* [2018] EWCA Civ 818 (*Raftopoulou*) in the Court of Appeal. It is a trite comment that this Tribunal is a creature of statute and that it has only the jurisdiction conferred on it by statute. *Raftopoulou* held that a decision by HMRC to refuse a claim for double taxation relief solely on the ground that the claim is out of time does not, of itself, give the taxpayer an appealable decision within the jurisdiction of this Tribunal. The proper remedy is judicial review.

44. *Raftopoulou* involved a claim to repayment of overpaid income tax which was made outside the four year TMA time limit.

45. The Court of appeal made it clear at [40] that the mere rejection of an out of time claim did not constitute an enquiry or an intention to open an enquiry. The Court of Appeal concluded at [73]:

> "73. … the F-tT was right to decide that it lacked jurisdiction to hear the taxpayer's appeal, which should therefore be struck out. There are two grounds for this conclusion. First, the claim was made out of time, and accordingly could not be the subject of an enquiry leading to a closure notice against which an appeal to the F-tT would lie. Second, there was in any event no enquiry into the claim and therefore no appealable closure notice."

46. In the present case, there is no suggestion that HMRC have opened any inquiry into the claim. Mr Sikder appeals against the refusal of HMRC to entertain the claim on the grounds it is out of time.

47. I accordingly find that this case discloses no appealable decision within the jurisdiction of this Tribunal and I must strike out the appeal under Rule 8(2)(a) of the Rules.

DECISION

48. For the reasons set out above, I have decided that the Appellant's claims for repayment of income tax under the DTA were out of time and that this Tribunal has no jurisdiction to consider HMRC's refusal to accept the out of time claims.

49. I therefore allow HMRC's application and strike out the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 05th APRIL 2023