TC03023

Appeal number: TC/2012/03534

FIRST-TIER TRIBUNAL
TAX CHAMBER

RENNIE SMITH & CO **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
HELEN M DUNN, LLB

Sitting in public at George House, 126 George Street, Edinburgh on Friday 1 November 2013 (papers only)

DECISION

1. The application for set aside (the "application") dated 10 October 2013 is refused.

2. The Decision dated 24 September 2013 disposing of this appeal related to the hearing on 19 July 2013 and the application appears to be based on the premise the appellant had not received a fair hearing. An application for set aside can only be granted if one or more of the conditions set out in Rule 38 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the Rules) are met. That reads:

> "38—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
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> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

3. It seems that the only possibility in this instance is Rule 38(2)(c).

4. The appellant has made no reference to the Rules and has not identified the specific procedural irregularity on which the application is founded, or any other basis for set-aside in terms of that Rule. Certainly evidence as to what the appellant may or may not have done since the Tribunal Hearing cannot be a procedural irregularity (the second paragraph on the second page of the application). Similarly, perceived defects in the Full Decision are a matter for review and appeal and not set aside.

5. It seems that the basis for the application is set out at the second paragraph of the first page when it was stated that "….it is unfortunate that we were not advised at the meeting as to which evidence could and which evidence could not be taken into account." That is quite simply inaccurate. It is my invariable practice when dealing with appellants who do not have a legal representative (in terms of the Rules), and sometimes even when they are so

represented, to explain precisely what the Tribunal can and will consider in the course of the proceedings. In this Hearing which certainly was not treated as a meeting, although some considerable latitude was extended to the appellant, we repeatedly made it explicit which evidence could and could not be led and the limits of our jurisdiction.

6. On previewing the appeal papers, we had identified that the appellant had produced paperwork relating to other taxpayers who were clients and paperwork relating to other tax years. It also seemed quite clear that the appellant would be arguing that the Tribunal should look at whether HMRC had behaved reasonably unfairly. That was the case and indeed the third paragraph of the application again points to the appellant's wish to advance arguments about the Taxpayers Charter and failures in HMRC's systems. HMRC had produced the print out of the online information relating to the wrong year.

7. I explained at the outset, and we both repeated frequently thereafter (when Mr Smith attempted to talk about his clients), that the Tribunal had jurisdiction only to consider his appeal for the partnership taxpayer and what had happened for that taxpayer in the year in question. He was very clearly told that we could not, and would not, look at extraneous matters. He expressed disappointment and questioned that, unsuccessfully, at the time.

8. It was made explicit that we had no jurisdiction to consider "fairness" in the abstract or in particular where penalties are involved. Reference was made to the Upper Tribunal decision in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) which re-affirmed the First Tier Tribunal's limited jurisdiction in respect of penalty appeals, and in particular emphasised that it had no statutory power to adjust a penalty on the grounds of fairness. The appellant is a firm of Chartered Accountants and should have been aware of this but it seemed necessary to repeatedly reiterate both the powers, and the limitations, of the Tribunal.

9. HMRC were told that the admissible evidence of the information online could only be that available for the tax year in question. However, it was also not in dispute that the current information differs very little to that available in previous years.

10. There is an implicit suggestion in the application that there was bias on the part of the Tribunal when looking at what HMRC had to prove; for example, the suggestion that the Tribunal gave "oral evidence". In terms of Rule 2(2)(b) of the Rules, both members of the Tribunal must ensure that they are "using any special expertise of the Tribunal effectively….". We did. For that reason it was explained to the appellant that HMRC's oral argument that the online information was largely the same in the year in question and currently was accepted because we knew that to be the case having dealt with numerous similar appeals. Similarly, it was also explained that we were familiar with the fact that logging onto third party providers of software is not the same as logging on to the Government Gateway since it is effectively an interface. Lastly, we did indicate that we were aware that a Return, whether a P35 or otherwise can only be successfully lodged once. In every case where the Tribunal deploys their own expertise it is essential to articulate exactly what that expertise or knowledge might be in order to give both parties an opportunity to address any issues that might arise therefrom. To do otherwise would be to breach the over-riding objective.

11. Rule 2(2)(c) of the Rules provides that the Tribunal should ensure that "….so far as practicable, that the parties are able to participate fully in the proceedings…". Mr Smith was given considerable latitude in a situation where (a) he told the Tribunal that if we did not find in his favour he would appeal to the Upper Tribunal and that he had done so successfully for an appeal which he had conducted precisely three years previously (in fact we subsequently ascertained that he withdrew the appeal), (b) he frequently interrupted his wife, Mr Kelly and the Tribunal when they were speaking, to the extent that the Member of the Tribunal, who is an experienced Judge in another jurisdiction, also intervened more than once to reiterate what we could and could not consider and (c) he demanded that the Tribunal should tell him how long he should wait for an email from HMRC (see paragraph 42 of the decision) and was told that it was not for the Tribunal to advance any argument on that point. We could only state that we were aware that an email should be sent.

12. Notwithstanding the clear intimation at the outset that evidence about other taxpayers could not be led, Mr Smith argued that in an identical case for one of his clients HMRC had waived the penalty. Quite apart from the fact that neither this Tribunal nor HMRC are bound by how HMRC deal with other taxpayers, it would have been quite unfair to HMRC to have allowed Mr Smith to lead evidence about taxpayers which HMRC had no means of testing. It is **both** parties who have to be able to participate fully.

13. Each appeal turns on its facts and circumstances and is decided on its own merits. That is clearly set out in *TL Watson t/a Kirkwood Coaches* [2013] UKFTT 553, a decision of the First-tier Tribunal which does not bind us but with which we entirely agree. (Incidentally, that decision also makes it clear that a P35 can only be filed electronically once.)

14. The application also enclosed an Application for permission to appeal to the Upper Tribunal. That cannot be considered. In terms of Rule 39 of the Rules an application for permission to appeal to the Upper Tribunal must be received no later than 56 days after the latest of the date the Tribunal sends out the full written reasons, or the notification of amendments or correction of decision or notification that an application for set aside has been unsuccessful. Accordingly, the application for permission to appeal to the Upper Tribunal is incompetent at this juncture and does not fall to be decided.

15. The other issues raised in the application relate to the substance of the full Decision and may fall to be considered when, and if, the Decision is reviewed in terms of the Rules. Rule 41(1) reads:

> "(1) The Tribunal may only undertake a review of a decision:-
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> (a) pursuant to rule 40(1) (review on an application for permission to appeal); and
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> (b) if it is satisfied that there was an error of law in the decision."

Rule 40(1) reads:

"(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into the account the overriding objective in Rule 2, whether to review the decision in accordance with Rule 41 (review of a decision)."

16. Clearly a review is not possible until a competent application for permission to appeal is lodged which must be no later than 56 days after notification of this decision in terms of Rule 39(2).

17. 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.

ANNE SCOTT, LLB, NP
TRIBUNAL JUDGE

RELEASE DATE: 1 November 2013