TC06045

Appeal number: TC/2012/04959
TC/2012/07259

PROCEDURE– whether FTT has power to reconsider decision in principle relation to PAYE Regulation 80 determination and NICs s8 decision applying ex p Hay and Larner v Warrington (cases decided prior to inception of current tribunal framework set in TCEA 2007 and Tribunal Rules) – yes – whether power should be exercised to take account of caselaw not before the tribunal – no – taking account of provisions for review in current tribunal framework – application to reconsider refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

OCO Limited **Appellants**
Toughglaze (UK) Limited

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Decision in chambers following written representations of parties

RPC for the Appellants

General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This decision concerns an application from HMRC to the First-tier Tribunal (FTT) for the tribunal to reconsider a decision in principle which it issued to the parties on 1 July 2017[1]. The application raises contested issues as to whether 1) the FTT has power to reconsider a decision it has made in principle in relation to PAYE and National Insurance Contributions (NICs) liabilities after the decision was issued to the parties and 2) if it does whether the decision in principle should be reconsidered. In order to put HMRC's application in context it is necessary to briefly outline the issues raised in the substantive appeals.

2. The substantive appeals dealt with appeals against PAYE Regulation 80 determinations[2] in respect of underpaid PAYE, and "s8 decisions" (under the relevant NICs legislation[3] in relation to underpaid NICs arising from the appellant's use of a scheme. The arrangements involved the setting up an employee benefit trust (EBT), and the subsequent creation of sub-funds for the benefit of particular employees and their families. Benefits were provided to the employees and their families mainly by the trustees advancing interest free loans to the employees. In summary HMRC invited the tribunal to uphold the determinations and decisions on three broad alternative bases 1) that contributions to the EBT were a redirection of earnings ("the redirection argument"), 2) that the trusts purporting to confer discretionary powers in reality bare trusts applying the case law in *Antoniades / Autoclenz* ("the *Antoniades / Autoclenz* argument") 3) that under the *Ramsay* approach, when viewing the facts realistically and applying the legislation purposively, the appellants received "earnings" when amounts were paid into the sub-trusts ("the *Ramsay* argument").

3. The FTT's decision upheld the PAYE determinations and NICs decisions in principle on the basis that if the parties could not settle the amounts of the determinations and decisions they could revert to the tribunal. The Tribunal rejected the redirection and *Antoniades /Autoclenz* arguments but found in HMRC's favour on the *Ramsay* argument.

4. The current decision deals with HMRC's subsequent application of 18 July 2017 for the FTT to reconsider its decision on principle on the redirection issue in the light of the Supreme Court's decision in *RFC 2012 PLC (in Liquidation) (formerly The Rangers Football Club PLC) v Advocate General for Scotland* [2017] UKSC 45. The FTT's decision did not take account of the Supreme Court's decision which was published at 9.45am on 5 July 2017 and which had been released to the parties in that case on embargo to the parties on 28 June 2017.

5. Following release of the FTT's decision on 1 July 2017, HMRC set out its view in a letter of 5 July 2017 that there appeared to be an error of law in the FTT's decision

[1] *OCO Ltd and Toughglaze (UK) Ltd v HMRC* [2017] UKFTT 0589 (TC)

[2] Income Tax (PAYE) Regulations 2003

[3] Social Security Contributions (Transfer of Functions etc.) Act 1999 ("SSC(TF)A 1999")

in not taking account of the Supreme Court's decision and that HMRC wished to make an application for review of its decision and that the application would be set out fully within 14 days together with proposed directions for submissions. HMRC's subsequent letter of 7 July accepted that they were unable to rely on Rule 41 as an application for permission to appeal had not been submitted to the Tribunal.

6. HMRC now submit that there is no doubt that the tribunal has jurisdiction to reconsider the redirection issue given that its decision was a decision in principle relying on two authorities which are set out in more detail below. They refer to *R v St Marylebone General Commissioners ex p Hay* 57 TC 59 (at 62-63 and 74). It is plain, they submit, that the jurisdiction is not limited to determination of the figures but also allows the tribunal to reconsider its conclusions of fact or law. While inappropriate in the great majority of cases they say it is appropriate here given the authoritative statement of the relevant law handed down after the decision in principle and before the final determination of the assessments (referring to *Larner v Warrington* [1985] STC 442 at 448). HMRC suggest the FTT's reconsideration of its decision on the redirection issue in the light of the *Rangers* decision is likely to be of great assistance, both to the parties in deciding how to proceed, and to the Upper Tribunal should the appeals go any further.

7. The appellants submit that while the tribunal could deal with quantum if the parties were unable to reach agreement, there is no basis for it revisiting its decision of principle. They point out that both *ex p Hay* and *Larner* pre-date the Tribunal Rules which now exclusively govern the position and that in any event *ex p Hay* positively undermines HMRC's argument because (at pg 73) it makes it clear that attempting to re-open a decision once made is "contrary to the best interests of justice and the due administration of justice."

8. Turning to the authorities HMRC rely on, *ex p Hay* concerned a judicial review action against the General Commissioners. (Before the present systems of appeals to the FTT was set up, the General Commissioners were one of the bodies charged with hearing appeals in relation to tax and later NICs – the other body being the Special Commissioners). The appeal concerned the question of whether certain sums were trading profits and therefore taxable or remittances of family funds. The General Commissioners had issued a decision in principle stating that they were not satisfied that the sums were not trading income and adjourned for the figures to be agreed. However agreement on figures could not be reached. The appellant wanted to make further submissions and bring more evidence relating to the issue of principle; the General Commissioners refused. In the High Court McNeil J held the General Commissioners were not unreasonable in refusing to allow the application to call further evidence and make further submissions on the in principle decision.

9. The Revenue did not argue the case was final and it was common ground that the General Commissioners had a discretion as to whether accede to the appellant's applications. HMRC refer to Pg 63/64 of McNeil J's judgment who in turn referred to s50 Taxes Management Act 1970:

> "It is plain from s 50, and in particular subs (6), (7) and (8) of the Taxes Management Act 1970, that this decision is not a final or conclusive determination of the appeal against the assessment in question."

> "If authority were needed for this proposition that the appeal was not concluded until final determination of the assessment, it is to be found in the decision of this Court in *Reg v General Commissioners of Income Tax ex parte G. R. Turner Ltd.* 32 TC 335."

10. The subsections of s 50 TMA 1970 were extracted in the High Court's decision as follows:

> "(6) If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is overcharged by any assessment, the assessment shall be reduced accordingly, but otherwise every such assessment shall stand good. (7) If on any appeal it appears to the Commissioners that the person assessed ought to be charged in an amount exceeding the amount contained in the assessment, the assessment shall be increased accordingly. (8) Where, on an appeal against an assessment which - (a) assesses an amount which is chargeable to tax, and (b) charges tax on the amount assessed, it appears to the Commissioners as mentioned in subsection (6) or (7) above, they may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly."

11. The appellants appealed to the Court of Appeal but in a decision given by Stephenson LJ with which the other LJJs agreed the appeal was dismissed. As to the issue of the scope of the General Commissioners' discretion and the test for exercising it in favour of a party who wished to revisit issues that had been decided in principle the court said this (at pg 74):

> "There is no doubt that there is jurisdiction to reopen an adjourned hearing such as this, letting the taxpayer do what these Appellants wanted done on 1 May, and still want done; but it is a jurisdiction which in my judgment ought to be exercised very sparingly, otherwise we would have a proliferation of what one might call double-barrelled hearings, to the disadvantage of everybody, except possibly the person who has failed to achieve his object with the first barrel that he has fired."

12. In the preceding passage Stephenson LJ emphasised:

> "It is in the public interest, and in the interests of all parties to litigation in disputes of this kind, including taxpayers, that they should put forward the whole of their case once, and that legal decisions, including decisions of these Commissioners, should put an end to disputes and that there should be finality. It is contrary to the best interests of justice, and to the due administration of justice, that there

> should be re-hearings once proceedings have been concluded, even less formal proceedings such as those before the Commissioners. It is an abuse of proceeding if an unsuccessful party can have a second bite at the cherry, and before he can be granted the exceptional privilege of being allowed to try and succeed after failing to prove his case, he needs solid grounds. If there are such grounds then I would agree that what was an indulgence becomes a right."

13. In *Larner v Warrington* the appeal before the General Commissioners concerned taxpayer's claim that assets had become of negligible value. The General Commissioners upheld the taxpayer's claim in principle and adjourned the appeal for the value of the shares to be agreed. The General Commissioners allowed the Revenue to present further argument on the point of principle which the General Commissioners had decided in the taxpayer's favour. Between the date of the hearing and the hearing a binding High Court decision *Williams (Inspector of Taxes) v Bullivant* had been given.

14. In the High Court, on appeal from the decision given following the resumed hearing, Nicholls J summarised the appellant's main complaint as being that the General Commissioners should not have permitted the decision in principle to be reopened and reargued. The taxpayer submitted he had relied on the earlier decision and had been prejudiced by the delay. The judge set out his views on the two questions of whether 1) the General Commissioners had jurisdiction to rehear the whole appeal and 2) if so whether they erred in exercising their jurisdiction to permit the re-hearing as follows at (pg 448).

> "In my view the answers to both these questions admit of no doubt. In July 1979 the commissioners decided a point of principle in favour of the taxpayer, but that did not finally dispose of the appeal. There had been no final decision on all matters raised by the parties, as values of the shares were still to be agreed or determined by the Special Commissioners. Agreement on those values was ultimately reached between the parties, but it seems to me plain that when the appeal was thereafter restored before the commissioners in February 1984 the appeal had still not been finally determined by them, even though (but for the intervening decision in *Williams (Inspector of Taxes) v Bullivant)* the hearing in February 1984 might have been expected to be little more than a formality. The appeal not then having been concluded, in law it was then still within the commissioners' jurisdiction to alter their decision, in the same way as a judge has jurisdiction to alter his decision before the order he makes has been formally drawn up and entered: see *R v Morleston and Litchurch IT General Comrs, ex p G R Turner* 32 TC 335 at 336, 337 per Lord Goddard CJ.
>
> As to the second question, 'solid grounds' (to use the expression of Stephenson LJ in *R v General Comrs for St Marylebone, ex p Hay* [1983] STC 346 at 359) must exist before a party who has already fully presented his case to the commissioners should be permitted to have a second bite at the cherry. But what had occurred in this case was that, since the previous hearing, the court had decided a relevant point of law in the sense contrary to that decided in principle by the

> commissioners in the instant matter in 1979. That decision of the court was binding on the commissioners. It would have been absurd for the commissioners to have refused to consider that decision but to have proceeded formally to determine the taxpayer's appeal on the basis of a construction of the statute which had by then to their knowledge been held to be erroneous."

15. The appellants' submit that the above cases pre-date the Tribunal Rules which exclusively govern the position. The Tribunal Rules set out in Part 4 rules on correcting (Rule 37), setting aside (Rule 38), reviewing (Rule 41 and Rule 40(1) and appealing (Rule 39 and Rule 40) Tribunal decisions. The primary legislation basis in relation to reviews and appeals and FTT decisions is found in sections 9 and 11 of the Tribunal Courts and Enforcement Act 2007 ("TCEA 2007").

16. When a comparison of the further actions that might be taken in relation to a decision of the General Commissioners or Special Commissioners is made[4], it is apparent that there were, under the old régime, similar provisions covering onward appeals, setting aside of decisions (if the decision was wrong as a result of administrative error, a party was not present with good reason, or relevant accounts or information had been sent prior to the hearing but not received until after it – described however as "review") and correction of e.g. clerical errors. The significant change under the new regime was the introduction of new powers and requirements in relation to the FTT's review of its own decisions. Section 9(4) of TCEA enables the FTT to:

> "…(a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside."

17. The subsequent sections set out the actions required to be taken if the decision was set aside:

> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—
>
> (a) re-decide the matter concerned, or
>
> (b) refer that matter to the Upper Tribunal.
>
> (6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.
>
> (7) Where the Upper Tribunal is under subsection (6) re-deciding a matter, it may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter.
>
> (8) Where a tribunal is acting under subsection (5)(a) or (6), it may make such findings of fact as it considers appropriate.

[4] Found in provisions of the TMA 1970 which have since been repealed or amended and the General Commissioners (Jurisdiction and Procedure) Regulations 1999 and the Special Commissioners (Jurisdiction and Procedure) Regulations 1999

…"

18. By virtue of s9(2) of TCEA the Tribunal Procedure Rules may provide for various specified matters in relation to reviews. Rule 41 of the Rules which apply to Tax Chamber provides:

> "**41 Review of a decision**
>
> (1) The Tribunal may only undertake a review of a decision—
>
> (a) pursuant to rule 40(1) (review on an application for permission to appeal); and
>
> (b) if it is satisfied that there was an error of law in the decision."

19. Rule 40(1) provides that on receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision accordance with rule 41 (review of a decision).

(1) Does the FTT have power to reconsider the PAYE determinations and NIC decisions which were made in principle?

20. As regards *ex p Hay* and *Lanter*, these cases clearly supported the proposition that the General Commissioners had power to reconsider a decision which has been made in principle where the amount of the assessment has not been finally determined. When the reasoning underpinning that conclusion is examined it can be seen it was founded on the wording of s50 TMA 1970 permitting the assessment to be reduced, increased or otherwise "stand good". Those provisions survive in the version of s50 TMA 1970 that is relevant to the current appeals.

21. As regards PAYE, Regulation 80(5) of the PAYE Regulations provides that a determination under the regulation is subject to a number of Parts of TMA which include Part 5 (which is the Part of TMA which deals with appeals):

> "as if –
>
> a) the determination were an assessment, and
>
> b) the amount of tax determined were income charged on the employer, and those Parts of that Act apply with any necessary modifications."

22. As regards NICs, the jurisdiction of the tribunal in relation to the decisions appealed under Part II of SSC(TF)A 1999 (which includes s8, the provision the relevant decisions here are made under) is dealt with under Regulation 10 of the Social Security Contributions (Decisions & Appeals) Regulations 1999. That regulation provides:

> "If, on an appeal under part II…it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner but otherwise shall stand good."

23. The proposition that decisions in principle may be reconsidered, which is grounded in the terms of s50 TMA 1970, applies similarly to decisions of the FTT such as the PAYE regulations and the NICs decisions where analogous powers on appeal in relation to variation of the amount at issue or else a default of the decision standing good exist.

24. In introducing the new tribunal framework it should be acknowledged that under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 further sub-sections, 10 and 11, were added to s50 TMA 1970.

25. Section 50(10) TMA 1970 now provides where an appeal notified to the tribunal "the decision of the tribunal on the appeal is final and conclusive". That is caveated by subsection 11 which states:

> "But subsection (10) is subject to –
>
> a) sections 9 to 14 of the TCEA 2007
>
> b) Tribunal Procedure Rules, and
>
> c) the Taxes Acts"

26. While I note that s50 (10) TMA refers to the tribunal's "decision on appeal" being final and conclusive (subject under subsection (11) to TCEA 2007, the Tribunal Rules, and the Taxes Acts) this does not assist on the question of whether a decision in principle is final and conclusive in a sense which would precludes a reconsideration of it. In the absence of any reference to decisions in principle in relation to the appeal, the reference to "decision on appeal" appears to me to refer to the final determination. (I also note in passing that the provision only applies in this case in respect to the PAYE regulation decisions and there appears to be no equivalent in the NICs decision regulations).

27. Accordingly, while the bodies charged with hearing appeals in relation to assessments, Regulation 80 determinations and s8 NICs decisions changed, as did the procedural environment they inhabited, there does not appear to me to anything in the reasoning of the courts' decisions in *ex p Hay* or *Lanter* which tied the question of a tribunal's jurisdiction to reopen an issue of principle to the particular rules and framework governing decision making by the General Commissioners and Special Commissioners.

28. I therefore conclude the FTT does have the power to reconsider its decision in principle.

Should the FTT reconsider its decision in principle?

29. HMRC submit that it is appropriate to exercise the tribunal's jurisdiction to reconsider its decision in principle where a binding decision on a relevant point of law has been handed down after the decision in principle and before the final determination of the assessments. As the appellants highlights, and as is confirmed in the authorities relied on by HMRC, there is a public interest in finality and not reopening matters once they have been litigated. Having said that, it follows from the

analysis above, that that there will be cases where, if solid grounds are shown, the FTT may exceptionally reconsider its decision in principle (in the context of particular appeals where the tribunal's jurisdiction is circumscribed by the provisions of s50 TMA or similar provisions to that section). Issues of finality and administration of justice are not conclusive on the question of how any discretion should be exercised; rather they are better understood as the factors which underlie the need to show that solid grounds exist before decisions are reconsidered.

30. As to the question of whether there are solid grounds in this application, the facts of *Lanter* illustrate that the subsequent issue of a binding decision, in that case a High Court decision, which affected the outcome of the decision on principle could well provide such solid grounds. But, in this regard, while, as set out above the introduction of the current framework of tribunal rules are not a reason to put *ex p Hay* and *Lanter* to one side on the first question of whether the FTT has a discretion to reconsider in the first place, the move to the new framework of rules is significant as far as this second issue is concerned. In particular the provisions regarding review by the tribunal (as contemplated by s9 TCEA 2007 and Rule 41 of the Tribunal's Procedure Rules) of its decision upon an application for permission to appeal, provide a mandatory review mechanism. Specific rules for revisiting a decision, if the tribunal is satisfied there was an error of law in the decision, are provided for. By contrast in *Lanter*, but for reconsideration of the issue of principle by the General Commissioners, it appears an appeal would have had to have been heard by the High Court in order for issues over whether the relevant law had been applied correctly to be aired and resolved.

31. Through the provisions of the TCEA 2007 and the authority given thereunder for certain Tribunal Rules to be made, the legislature has set down a scheme for dealing with a tribunal decision once it is issued (whether it is a decision of principle or not) as regards appeals, set aside, corrections and review. In relation to reviews the provisions in primary legislation and the Rules deal with when and how that mechanism is to be deployed, the specified outcomes as to what the tribunal may do and the consequences depending on those outcomes. The circumstances in which decisions once issued may be set aside and the ramifications of that are specifically provided for. Where, as is the case here, the basis for a party's application for reconsideration rests principally on the legal reasoning of a decision and the question of the relevant law to be applied, it cannot have been intended that such a statutory scheme should be allowed to be subverted by the tribunal reconsidering its decision outside of that framework. I take into account that a further concern is the uncertainty as to what the tribunal's powers would be in relation to any reconsidered decision on principle and as to the status of the original decision. It would be left unclear what rights of challenge existed in relation to the original decision and any revised reconsidered decision and how any such sets of rights might interact.

32. In view of the above I do not accept that strong reasons have been demonstrated for reconsidering the Tribunal's decision and accordingly refuse HMRC's application.

33. 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

5 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.

SWAMI RAGHAVAN

10 **TRIBUNAL JUDGE**
RELEASE DATE: 04 AUGUST 2017