



Neutral Citation: [2022] UKFTT 00466 (TC)

Case Number: TC08666

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2022/11305

PROCEDURE – Appeal against decision by HMRC not to make a refund of tax under the Disguised Remuneration Voluntary Repayment Scheme 2020 - Application by HMRC to strike out the Appeal under Rule 8(2)(a) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 on the basis that the Tribunal has no jurisdiction to hear the Appeal – Application allowed

Heard on: 6 December 2022
Judgment date: 08 December 2022

Before

TRIBUNAL JUDGE ROBIN VOS

Between

DOUGLAS LAMBOURNE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant appeared in person.

For the Respondents: Jennifer Mackay, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. There has been much publicity and controversy in relation to the loan charge which was introduced with retrospective effect in 2016 to combat schemes designed to remunerate employees by way of loans with the intention of reducing the amount of tax and National Insurance Contributions (“NICs”) which would be payable.

2. This led to a review carried out by Sir Amyas Morse in 2020. One of the recommendations of the review was that the loan charge should not apply to loans made before 9 December 2010 and that where taxpayers had entered into a settlement agreement after 2016 in respect of such loans and paid tax/NICs which could not legally be collected, HMRC should refund the amount paid.

3. HMRC duly established a scheme to provide refunds in these circumstances known as the Disguised Remuneration Voluntary Repayment Scheme (the “Scheme”). The appellant, Mr Lambourne, applied under the Scheme for repayment of just under £6,500 which he had paid as a result of a settlement agreement he entered into with HMRC in 2019. HMRC refused the refund application.

4. Mr Lambourne has appealed to the Tribunal against this decision. However, HMRC say that he has no right to appeal to the Tribunal and that the Appeal must therefore be struck out in accordance with Rule 8(2)(a) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 on the basis that the Tribunal does not have jurisdiction in relation to the proceedings.

BACKGROUND FACTS

5. The relevant facts are not in dispute and can be stated very briefly.

6. In 2004/2005, Mr Lambourne’s then employer, Vining Sparks UK Limited, made contributions to a "remuneration trust", some of which were allocated to Mr Lambourne. HMRC considered these contributions to constitute earnings of Mr Lambourne and so issued a determination under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (in relation to income tax payable under the PAYE system) and a notice of decision under s 8 of the Social Security Transfer Functions Act 1999 (in respect of NICs) to Vining Sparks in October 2008. The liabilities were however disputed by the company.

7. There is no suggestion that an enquiry was opened in relation to Mr Lambourne’s own tax returns. Ms Mackay accepted in her submissions that the liabilities under the Regulation 80 determination and the Section 8 decision notice were liabilities of Vining Sparks and not Mr Lambourne.

8. In February 2016, Vining Sparks was put into liquidation as a result of a winding-up petition which it appears was presented by HMRC. The liquidation was completed in March 2020 and the company was dissolved in August 2020.

9. On 29 July 2019, Mr Lambourne entered into a settlement agreement with HMRC under which he agreed to pay £6,480 being PAYE tax, NICs and interest which Vining Sparks had failed to pay in respect of the remuneration trust arrangements.

10. Following the introduction of the Disguised Remuneration Voluntary Repayment Scheme, Mr Lambourne made an application in December 2020 for a refund of the amount which he had paid under the settlement agreement. HMRC refused the application on 9 March 2021 on the basis that he was not eligible as HMRC were legally able to recover the amounts from Vining Sparks at the time the settlement agreement was entered into as a result of the Regulation 80 determination and the Section 8 decision notice which they had issued in 2008.

11. Mr Lambourne applied for a review of the decision but the original decision was upheld on 15 February 2022 for the same reasons.

12. Mr Lambourne requested a further review of the decision. However, as the provisions of the Scheme did not provide for a further review, HMRC treated this as a complaint. Mr Lambourne therefore notified his appeal to the Tribunal on 15 March 2022.

13. In broad terms, Mr Lambourne's grounds of appeal are that he entered into the settlement agreement voluntarily given that HMRC had no hope of collecting the liabilities from Vining Sparks which, by then, had been in insolvent liquidation for over three years (noting that HMRC had tried (unsuccessfully) to recover the liabilities from the directors of the company) and that Mr Lambourne had no personal liability for the amounts in question.

14. Mr Lambourne also made the point that it is unfair that individuals who chose not to settle are no longer required to meet any tax liabilities whereas those individuals who did settle (in order to avoid the loan charge) were now being denied a refund.

15. In further submissions to the Tribunal, Mr Lambourne drew attention to the fact that there were six individuals he was aware of who participated in the Vining Sparks remuneration trust. Of these, three had not entered into any settlement agreement and, following the changes resulting from the Morse review, were no longer liable to the loan charge whereas Mr Lambourne and two others had entered into a settlement agreement and were being denied a refund. He asks how it can be fair that individuals who are effectively in the same position should be treated so differently.

16. HMRC responded to the "complaint" in May 2022 noting that there was no further right of appeal against the review decision and that, if Mr Lambourne was still dissatisfied, he should seek judicial review, referring to guidance on how to do this included with their review letter dated 15 February 2022.

THE LEGAL FRAMEWORK

17. The recommendations in the Morse review relating to the establishment of a refund scheme were implemented in Finance Act 2020 ("FA 2020"). Section 20 FA 2020 required HMRC to establish a scheme under which they might make refunds if certain conditions were met. One of those conditions was that the amount in respect of which a refund is sought is not one that an officer of HMRC had power to recover at the time any settlement agreement was made (s 20(3)(b) FA 2020). There is no mention in FA 2020 of any right of appeal against any decision which HMRC may make under the terms of the scheme which they were required to establish.

18. The operation of the refund scheme was set out in the Disguised Remuneration Voluntary Repayment Scheme 2020 which was published in November 2020. Again, one of the conditions was that an officer of HMRC had no power to recover the relevant amounts at the time the settlement agreement was made (paragraph 3.1.27.3 of the Scheme).

19. As far as process is concerned, once a valid application was made, HMRC was required to make a "Repayment Decision" (paragraph 7.11). The applicant could either accept the Repayment Decision or request a review (paragraph 7.13).

20. The review was to be carried out by an independent officer of HMRC who would then send an "Updated Repayment Decision" either upholding the Repayment Decision or replacing that decision (paragraphs 7.22-7.25).

21. An Updated Repayment Decision could not be subject to a further review under the scheme (paragraph 7.30). Instead, if the applicant did not accept the Updated Repayment Decision within two months, HMRC have the right to terminate the application (paragraph

7.29). Termination of an application is treated for all purposes as the full and final determination of the application (paragraph 7.39).

22. It is therefore clear that the Scheme does not provide for any appeal to the First-Tier Tribunal.

THE JURISDICTION OF THE TRIBUNAL

23. There are numerous authorities which confirm that the First-Tier Tribunal only has the powers conferred on it by statute. Ms Mackay draws attention in particular to the summary of the position provided by the Upper Tribunal in *R&J Birkett v HMRC* [2017] UKUT 89 (TCC). After reviewing the authorities, the Tribunal set out various principles at [30]. In the context of this appeal, it is the first two that are most relevant:

“(1) The FTT is a creature of statute. It was created by s 3 of the Tribunals, Courts and Enforcement Act 2007 (‘TCEA’) ‘for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act.’ Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].

(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].”

24. The Upper Tribunal goes on to note that there are certain circumstances in which the First-Tier Tribunal can review decisions made by public authorities (such as HMRC) but observes that this is only the case if there is a statute which confers a right of appeal to the First-Tier Tribunal and, as a matter of statutory construction, the statute permits such a review to be carried out in order to determine the appeal.

25. Mr Lambourne made the point that the authorities referred to deal with very different situations (for example, whether it was unfair for a penalty to be charged) to the one in which he finds himself. However, it is quite clear in my view that the principles that the Tribunal only has jurisdiction if a right of appeal is conferred by legislation and that the Tribunal has no general power to review decisions of HMRC are of general application.

DECISION

26. I have great sympathy with Mr Lambourne’s position. It is not at all surprising that he considers it unfair that he finds himself in a worse position than his colleagues who chose not to enter into a settlement agreement with HMRC. They have not had to pay any tax/NICs and are no longer the subject of a loan charge.

27. Mr Lambourne on the other hand paid liabilities which he personally had no liability to meet in order to avoid the loan charge and is now denied a refund on the basis that HMRC had issued a Regulation 80 determination and Section 8 decision notice against his employer, Vining Sparks which meant that, in theory, the liabilities could be collected from the employer. However, as he perhaps unsurprisingly asks, if HMRC thought they could collect these liabilities from the employer, why did they not do so?

28. The reality of course is that Vining Sparks was in insolvent liquidation. The Tribunal did not have any evidence as to the assets or liabilities of Vining Sparks but it would perhaps not be unreasonable to speculate that, at the time Mr Lambourne entered into the settlement agreement in July 2019, there was no realistic prospect of HMRC recovering anything from the company, although I do note that the liquidators’ claim against the directors which Mr

Lambourne referred to was only heard by the High Court on 7-10 October 2019 and rejected in a judgment handed down on 30 October 2019 (after the date of the settlement agreement).

29. However, there is no doubt (as the Upper Tribunal in *Birkett* confirms) that the First-Tier Tribunal only has jurisdiction to hear an appeal if the right to make an appeal to the Tribunal is conferred on the taxpayer by legislation. It has no freestanding ability to review a decision made by HMRC.

30. As I have already described, neither Finance Act 2020 nor the terms of the Disguised Remuneration Voluntary Repayment Scheme make any mention of any right of appeal to the First-Tier Tribunal. The Tribunal does not therefore have jurisdiction in relation to Mr Lambourne's appeal and it must therefore be struck out in accordance with rule 8(2)(a) of the Tribunal rules.

31. In these circumstances, the only remedy of the taxpayer is to make an application for judicial review as explained to Mr Lambourne by HMRC in its letter of 25 May 2022. This was confirmed by the Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363 (TCC) at [39-40].

32. Mr Lambourne very fairly makes the point that, given its complexity, an application to the High Court for judicial review is beyond the reach of many taxpayers who may have limited means. Whilst the prospect of judicial review may well satisfy the requirements of human rights legislation, it is very likely that, from a practical perspective, Mr Lambourne is right in his observation.

33. Given the background to the Scheme there is perhaps a case for Parliament considering whether it would be appropriate to introduce a right of appeal to the First-Tier Tax Tribunal rather than requiring taxpayers who disagree with HMRC's decision to refuse a refund to apply for judicial review.

34. In this particular case, I note that HMRC have not yet issued a termination notice under paragraph 7.39 of the Scheme. At the hearing, I suggested that, before they do so, they should consider carefully whether, in the particular circumstances of this case, it can be said that, at the time the settlement agreement was entered into by Mr Lambourne, HMRC had a realistic prospect of recovering the amounts which Mr Lambourne agreed to pay. I do however accept that this may be influenced by the timing of the decision in the proceedings against the directors of Vining Sparks which I have mentioned above and which was not a point that was drawn attention to during the hearing.

DECISION

35. This appeal is struck out in accordance with rule 8(2)(a) of the Tribunal rules as the Tribunal has no jurisdiction in relation to the proceedings.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

**ROBIN VOS
TRIBUNAL JUDGE**

Release date: 08th DECEMBER 2022