TC03309

Appeal numbers: TC/2012/04697, TC/2012/05125 & TC/2012/07526

Income tax, class 4 NIC, associated penalties and VAT dishonest evasion penalty – whether respective appeals settled by agreement – representative argued that agreement vitiated because he had mistaken extent of his authority – held, on the facts, that appeal of amendment/assessments relating to income tax and class 4 NICs settled by agreement but appeals of associated penalties and of VAT dishonest evasion penalties not so settled – mistake by representative as to his instructions irrelevant to this – appeal in relation to amendment/assessments therefore struck out but penalty appeals permitted to continue – but agreement reached as to amounts of undeclared takings inherent in settlement of direct tax appeal may not be re-opened in the penalty appeals

FIRST-TIER TRIBUNAL
TAX CHAMBER

FILIT TUNCEL **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
BEVERLEY TANNER

Sitting in public in Priory Court, Bull Street, Birmingham on 10 January 2014

Naeem Shareef of Shareef & Co, Chartered Accountants, for the Appellant

Colin Brown, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns an application from the Appellant to "reinstate" his appeal relating to various disputed tax (and associated penalty) liabilities arising from a back duty investigation.

2. The Appellant had appealed to the Tribunal against the various liabilities. The proceedings had been stayed while negotiations took place between the parties. Eventually the Tribunal was informed that agreement had been reached and therefore no steps were taken by the Tribunal to progress the matter to a hearing.

3. It appears there was a misunderstanding between the Appellant (whose English is very poor) and his adviser as to the basis on which he agreed to settle the investigation and appeal. HMRC argue that the appeal has been settled by agreement under section 54 TMA/section 85 VATA94. The Appellant seeks to resurrect his appeal.

The facts

4. HMRC had carried out a long running investigation into the tax affairs of the Appellant. The details are largely immaterial, save to say that there were very few significant business records to work from and in the resulting negotiations there were ultimately two major points of disagreement. First, the applicable gross margin to be applied in deriving sales figures and profit could not be agreed and second, there was a dispute about whether a significant part of the Appellant's purchases had been made not for the purposes of his own business but as a favour for a business acquaintance who ran a separate mobile catering business with a blue van in his own right.

5. In November 2011, HMRC issued assessments and an amendment in respect of allegedly unpaid income tax and class 4 NICs for the years 2001-02 to 2007-08 inclusive and associated penalties.

6. In September 2011, HMRC also issued VAT assessments in respect of the calendar year 2001 and the period from 1 May to 31 July 2002 (in the total sum of £2,941.93) and in respect of the periods from 1 January 2004 to 31 July 2007 and for the single day of 1 November 2007 (in the total sum of £39,272.04).

7. In November 2011, HMRC also issued dishonest evasion penalties under section 60 Value Added Tax Act 1994 ("VATA94") in relation to the VAT claimed (these penalties were subsequently withdrawn and replaced by penalties issued on 22 August 2012).

8. Shareef & Co became involved only at a late stage in the investigation, in December 2011. The Appellant's previous advisers had not conducted the matter well and did not co-operate with the transfer of papers to Shareef & Co. It was also very difficult for Mr Shareef to communicate with the Appellant (who spent a great

deal of time during the relevant period in Turkey, where his mother was very ill) and quite often he was only able to obtain instructions through the Appellant's son.

9. The precise details of the various reconsiderations and reviews requested and carried out are unclear on the evidence before us, but the outcome, up to 23 April 2013, appears to have been as follows (for subsequent developments, see below):

(1) HMRC ultimately discharged all VAT assessments, on the basis that the original assessments were withdrawn as incorrect and replaced by new assessments, which were made out of time.

(2) HMRC nonetheless imposed dishonest evasion penalties (originally they informed the Appellant in November 2011 of total penalties of £11,862.12, but subsequently notified revised penalties on 22 August 2012 totalling £14,041; both penalties were charged at the rate of 60% of the relevant VAT).

(3) Following a statutory review, HMRC formally upheld the income tax and class 4 NIC amendment and assessments on 13 March 2012, in the total sum of £22,991.66.

(4) HMRC imposed penalties on 15 November 2011 in respect of the income tax and class 4 NIC matters at a rate of 45% of the tax, totalling £10,347. This was confirmed by them on a statutory review which was notified on 25 June 2012.

10. On 10 April 2012 a Notice of Appeal was sent to the Tribunal by Shareef & Co, attaching various correspondence. It was not clear precisely what the appeal related to, and as there appeared to be at least two strands to the matters being appealed against, the Tribunal divided the appeal into two, with an appeal against the original direct tax amendment/assessments being addressed under reference TC/2012/04697 and an appeal against the VAT matters being addressed under reference TC/2012/05125.

11. Following the HMRC review of the direct tax penalties, a further appeal was notified to the Tribunal on 25 July 2012 in relation to those penalties, addressed by the Tribunal under reference TC/2012/07526.

12. Whilst it can be seen that the VAT appeal (TC/2012/05125) was commenced before HMRC's issue of revised dishonest evasion penalties on 22 August 2012, that appeal has been treated by the parties as now relating to those revised penalties. All assessments for VAT having been withdrawn by HMRC, the dishonest evasion penalties are the only issue outstanding in relation to VAT matters, however the amounts of those penalties was further amended in April 2013 (see below).

13. Negotiations continued between the parties and Shareef & Co had a meeting with HMRC on 4 September 2012, at which provisional agreement in outline appears to have been reached, at least on the method of calculation to be used in ascertaining the underdeclarations of takings. On 6 September 2012, HMRC sent a fax to Shareef & Co setting out their understanding of the proposals that had been discussed at the

meeting, and asking Shareef & Co to reply after discussing it with the Appellant. This was followed up by a more formal letter from HMRC dated 14 September 2012, in which it was stated that:

> "I am prepared on a without prejudice basis to reach an agreement under section 54 TMA 1970 with Mr Tuncel to base additions to turnover and profit for the 7 years 2002 to 2008 inclusive on a GPR of 63%. Revised computations of liability are attached.
>
> If this offer is accepted I will amend the direct and indirect tax penalty determinations accordingly."

14. Mr Shareef does not appear to have confirmed his agreement at the time, but much later on 23 April 2013 he wrote to HMRC, apologising for the delay and sending them a copy of a letter which he said he had dictated but apparently not sent on 8 October 2012, accepting HMRC's proposals following the meeting, but asking for an improved penalty weighting. The material part of that letter read as follows:

> "It was a pleasure to meet you on 4 September 2012 and thank you for your letter dated 14 September 2012.
>
> I accept your proposals as outlined in your letter regarding the 63% margin. In addition, whilst I appreciate this is Mr Tuncel's second enquiry, I do strongly feel his shortcomings were a combination of very poor advice from his former accountant and his poor command of the English language. Indeed, I found communicating with him very difficult and frequently spoke to his son. For these reasons would you agree a penalty weighting of 25%?
>
> Will you please let me have a summary of what is the total amount now due for all taxes, penalty and interest?
>
> I look forward to hearing from you."

15. It should also be mentioned that from September 2012, the Tribunal issued various directions and other correspondence to Shareef & Co in relation to the case management of the appeals, and received no response from them. Ultimately, the Tribunal issued a Direction on 12 April 2003, warning that the appeals would be struck out unless the Appellant complied with the various outstanding Directions. It may well have been this Direction which finally spurred Shareef & Co into action by sending their letter dated 23 April 2013 referred to above.

16. In response to Shareef & Co's letter dated 23 April 2013, HMRC sent a number of formal letters to the Appellant:

> (1) A letter dated 23 April 2013, which included formal "determinations" under section 54(3) Taxes Management Act 1970 ("TMA") in respect of the outstanding appeals against income tax and class 4 National Insurance contributions for the years 2001-02 to 2007-08, on the basis of the figures set

out in the September 2012 correspondence. The total liability was £22,033.57, a slight reduction on the amounts earlier assessed.

(2) A letter dated 26 April 2013, which included formal "determinations" under section 54(3) TMA in respect of the associated direct tax penalties for the same years. The revised amount was £9,915, again a slight reduction from the earlier figure. The weighting was the same as before (55% abatement, 45% penalty rate).

(3) Two further letters dated 26 April 2013, in which the Appellant was formally notified of amendments to the earlier assessments for dishonest evasion penalties in the reduced sums of £1,023 (for the period from January 2001 to July 2002) and £7,796 (for the period from May 2003 to July 2007). The total penalties now notified were therefore £8,819. The reduction reflected a reduction in the weighting from the previous rate of 60% to 45% (the same penalty weighting as the direct tax penalties); we have not been able to follow the calculation in detail, but it presumably also reflects a reduction in the amount of undeclared turnover as agreed following the 4 September 2012 meeting. It is fair to say that the basis of the penalty is somewhat unclear to us at this stage, and in particular it is not clear that the penalty relates solely to underdeclarations of takings, as other matters were supposed to have occurred in addition which gave rise to undeclared VAT liabilities.

17. It is important to note that the letters in relation to the VAT penalties were expressed as notices of amendment of the earlier penalties, and not as letters recording an agreement of the penalties for the purposes of VATA94 section 85. They do however contain the following paragraph:

> "Following negotiations with Ms Naish of the Local Compliance Fraud Team in Bristol a revised under declaration of takings was agreed. This has now led to the need to amend the Civil Penalty assessment that was raised."

18. When the Tribunal was informed by HMRC of the expected settlement, it issued a Direction on 10 May 2013, staying all proceedings until 28 June 2013 and requiring the Appellant, by 12 July 2013, to inform the Tribunal that he wished to continue with his appeal and to comply with the outstanding Directions – in default of which, the proceedings "will be struck out without further reference to the parties".

19. On 27 June 2013, HMRC wrote to the Tribunal, asserting that "[t]he appeals against the various assessments and penalty determinations have all been settled by agreement. The Appellant has not withdrawn from the agreement within the time allowed, meaning the dispute is now settled." The Tribunal sought confirmation from Shareef & Co by letter dated 2 July 2013, requiring a response within 28 days and by letter dated 23 July they wrote back to the Tribunal as follows:

> "Thank you for your letter dated 2 July 2013.

> Please accept this letter as notification that we wish to continue with the appeal and for the case to be reinstated."

20. This letter was only received by the Tribunal as a copy letter attached to a further letter dated 6 August 2013.

21. Ultimately, the matter of whether the appeals (or any of them) should be "reinstated" came before us in the form of an application heard on 10 January 2014.

Submissions of the parties

Submissions from HMRC

22. Mr Brown argued first that the appeals had all been settled by agreement in accordance with sections 54 TMA and 85 VATA94; to the extent we might disagree with him on that, he submitted that the appeals should be struck out for non-compliance with the Directions issued on 10 May 2013.

23. Much of his submission on the first point revolved around the matter of the authority of Shareef & Co. In the event, Mr Shareef did not dispute that his firm had actual authority to negotiate with HMRC on behalf of the Appellant, or that they had ostensible authority to agree the matters that they had. Mr Brown's reference to *IRC v West* [1991] STC 357 was not therefore necessary, as it turned out.

Submissions on behalf of the Appellant

24. Mr Shareef submitted that any agreement reached with HMRC was based on a misunderstanding of his instructions from the Appellant, due to his obviously great language difficulties and the long periods when he was unable to contact him due to his absence abroad with his mother. The crucial misunderstanding was in relation to the "famous blue van", i.e. the question of whether some of the known purchases of the Appellant should be regarded as having contributed to his own turnover, or whether they were just sold on to the business acquaintance who ran his own mobile catering business through the "blue van". He asked the Tribunal for permission to continue the appeal so that this issue could be properly heard and determined by the Tribunal at a later hearing.

The law

25. The crucial provision in this case is section 54 TMA, which provides (so far as relevant in this case) as follows:

> **54 Settling of appeals by agreement**
>
> (1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like

consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.

(3) Where an agreement is not in writing—

(a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and

(b) the references in the said preceding provisions to the time when the agreement was come to shall be construed as references to the time of the giving of the said notice of confirmation.

(4) ….

(5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal."

26. Section 85 VATA94 follows the same pattern and, for the purposes of this appeal, is to the same effect.

Discussion and decision

Introduction

27. For section 54 to be engaged, it is clear that there must be an "agreement", either that the original assessment/decision is "upheld without variation", or that it is "upheld as varied in a particular manner", or that it is "discharged or cancelled". The agreement does not need to be in writing, but it is clear that an agreement must be reached.

28. If there is an agreement but it is not in writing, then for section 54 to be engaged, appropriate written confirmation as to the existence of the agreement and its terms must be given by one party to the other.

29. Once agreement has been reached, the taxpayer has a 30 day "cooling off" period, during which he can effectively cancel the agreement. Where the original

agreement was not in writing, that 30 day period runs from the date on which the written notice is given which sets out the terms agreed.

30. We are satisfied that Shareef & Co were acting on behalf of the Appellant in his appeal for the purposes of section 54(5).

31. The first question, therefore, is whether (and if so, when) an agreement was reached between HMRC and Shareef & Co in relation to each of the matters under appeal.

The amendment/assessments for income tax and class 4 NICs

32. Dealing first with the income tax and class 4 NIC amendment/assessments, it is quite clear to us that an agreement was reached on the variations to be made to the original assessments/amendment. HMRC set out the amounts proposed in an appendix to their letter dated 14 September 2012, and when Shareef & Co's letter dated 23 April 2013 was sent by fax (with their letter dated 8 October 2012 attached), we are satisfied that agreement was reached as to the agreed variations to the earlier assessments/amendment. We consider the agreement to have been made in writing at the moment when Shareef & Co sent that fax on 23 April 2013 (though if we are wrong in this, then HMRC's confirmation of the agreed variations in their letter of the same date would in our view count as a valid written confirmation of the unwritten agreement already reached and the result would be the same).

33. Once agreement has been reached in writing (or has been confirmed in writing), then section 54 TMA is engaged and the only statutorily permissible means of cancelling that agreement is through the "cooling off" provisions of section 54(2) TMA. It is common ground that no notice was given within 30 days under that sub-section purporting to repudiate or resile from the agreement and accordingly we find that section 54(1) applies to this agreement. Thus, so far as the income tax and NIC amendment/assessments are concerned, "the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had… varied it…" in the manner agreed.

34. This means that, for the purposes of the Appellant's application to "reinstate" the part of his appeal that relates to the income tax and NIC amendment/assessments, we are required to assume that the Tribunal has already determined that part of the appeal on the basis agreed. In such a case, the doctrine of *res judicata* means that it would be an abuse of the Tribunal's process to permit the appeal to be re-opened, because the Tribunal would thereby be allowing the parties to re-litigate an appeal which had already been deemed by statute to have been determined on an agreed basis.

35. Thus, in relation to the agreement reached on the income tax and class 4 NIC liabilities for the years 2001-02 to 2007-08, we must strike out the appeal and refuse the Appellant's application for its reinstatement.

36. In relation to the penalties, the position is less clear.

The direct tax penalties

37. Dealing first with the direct tax penalties, it is clear that Shareef & Co's letter dated 8 October 2012 did not even purport to agree a settlement – on the contrary, it requested a reduction in the applicable penalty rate. When they issued the letter referred to at [16(2)] above, therefore, HMRC could not be said to have been confirming the terms of an agreement, what they were really doing was refusing the request for a reduction in the penalties. In short, therefore, we consider that the first essential pre-requisite of a binding section 54 settlement – namely an agreement between the parties – was absent. The fact that HMRC sent a letter purporting to record such an agreement does not change this fact and therefore we do not consider a settlement to have been reached within section 54 TMA.

38. But we must then consider Mr Brown's second submission. He argues that the appeal should in any event be struck out for non-compliance with the Tribunal's "unless" order dated 10 May 2013.

39. It is quite true that this order has not been complied with. But we have a general discretion to vary the terms of any direction made by the Tribunal or to relieve a party from the consequences of non-compliance, and in this case we consider it appropriate to do so. We have regard to the communication difficulties that Mr Shareef has experienced with the Appellant and we also note that he received a letter from the Tribunal dated 2 July 2013, which indicated that he had a further 28 days to apply for reinstatement of the appeal. His letter dated 23 July 2013 seeking to do so, even though it was first received by the Tribunal on 9 August 2013 under cover of a letter dated 6 August 2013 from Shareef & Co, was a matter of days late and we would not consider it appropriate for the Appellant to be wholly shut out from pursuing his penalty appeal before the Tribunal in such circumstances.

40. We therefore find that there has been no agreed settlement of the direct tax penalties for the purposes of section 54 TMA, and the appeal may therefore continue in relation to those penalties.

The VAT penalties

41. Similar observations apply in relation to the VAT dishonest evasion penalties, with the extra point in the Appellant's favour that not only did HMRC refuse Shareef & Co's counter proposal as to the reduction in the weighting, they also issued amendments to the assessments for the penalties in question and did not even purport to record the terms of any "agreement" for their settlement in the amended amounts.

Unresolved issues

42. If the penalty appeals are to be permitted to continue, one potentially important question arises from this decision. If the appeal in relation to the amounts of the direct tax liabilities have been settled by agreement, does that mean that the Appellant is unable to contest the calculation of the "amount of the difference" referred to in section 95 TMA and/or the "amount of VAT evaded" referred to in section 60 VATA94? To put it another way, must the Appellant now accept, for the purposes of the penalty appeals, the underdeclarations of turnover that were accepted on his behalf in the settlement of the income tax and NIC amendment/assessment appeal?

43. We consider the effect of the deeming provision in section 54 TMA to be that the Appellant will be precluded from arguing, in any appeal in relation to the direct tax penalties, that the "amount of the difference" for the purpose of section 95 TMA is anything other than the amount agreed in the settlement of the appeal against the amendment/assessments. In particular, it will not in our view be permissible for the Appellant to re-open the issue of the "famous blue van" in an attempt to reduce the penalties. Similarly, in relation to the VAT dishonest evasion penalties, it will not be permissible for the Appellant to argue that the undeclared turnover figure which underlies the agreed settlement of the direct tax appeal is incorrect. This does not of course preclude any other attack on the validity of the penalties or their amount.

Summary and conclusion

44. We find that the appeal in relation to the income tax and class 4 NIC amendment/assessments for the periods 2001-02 to 2007-08 has been settled by agreement on the basis set out in HMRC's letter dated 23 April 2013. The appeal in relation to that issue must therefore be struck out (see [35] above).

45. We find there to be no such agreement in relation to the direct tax penalties or the VAT dishonest evasion penalties and we are prepared to allow the appeal in relation to each of those matters to continue (giving relief for non-compliance with the Directions issued on 10 May 2013), insofar as it refers to those matters (see [40] and [41] above).

46. In the future conduct of the appeal relating to the direct tax penalties and/or the VAT dishonest evasion penalties, the amount of undeclared sales of the Appellant is deemed to have been determined on the basis set out in the agreement referred to at [44] above and the Tribunal will therefore have no jurisdiction to consider any argument that the amount of undeclared sales so agreed is in fact excessive (see [43] above).

47. With a view to progressing the penalty appeals to a hearing, we make the following Directions:

(1) The appeal in relation to the direct tax penalties shall be dealt with under reference TC/2012/07526 and the appeal in relation to the VAT dishonest evasion penalties shall be dealt with under reference TC/2012/05125. Both appeals shall be case managed and heard together.

(2) The Appellant shall, no later than 56 days after the date of release of this decision, confirm to the Tribunal and to HMRC if he wishes to continue with his appeal against any of the penalties. If he fails to do so, then his appeal will be wholly struck out.

(3) In relation to all penalties the Appellant wishes to appeal against, he shall deliver to HMRC and to the Tribunal, so as to be received by both of them within the same 56 day period, a combined statement setting out in reasonable detail the grounds on which he appeals against each such penalty (within the requirements of paragraph [43] above).

(4) HMRC shall, within 42 days of the receipt of such combined statement, deliver an amended combined statement of case addressing the grounds of appeal made out by the Appellant.

(5) Upon receipt of such amended combined statement of case, the Tribunal will make further Directions to progress the outstanding matters to a hearing.

(6) Should either party apply for permission to appeal against this decision, the time limits set out above shall be suspended pending the outcome of such application and any subsequent appeal.

48. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 7 February 2014