Neutral Citation: [2025] UKFTT 51 (TC)

Case Number: TC09405

FIRST-TIER TRIBUNAL
TAX CHAMBER

Centre City Tower, Birmingham

Appeal reference: TC/2024/00471

Strike out – jurisdiction – r 8(2)(a) – amendment to tax return – top slicing relief – overpayment relief claim

Heard on: 11 November 2024
Further submissions received: 14 December 2024
Judgment date: 16 January 2025

Before

TRIBUNAL JUDGE MICHAEL BLACKWELL

Between

SARAH YAXLEY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr C. W. Yaxley

For the Respondents: Ms F. Ameerally, litigator of HM Revenue and Customs Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by the Appellant, Mrs Sarah Yaxley, against HMRC's calculation of the Appellant's top slicing relief in respect of the 2017/18 tax year.

2. HMRC have applied, under r 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT Rules") to strike out the whole of the proceedings.

3. After hearing, when writing the decision, I requested submissions in relation to paragraph [24] of *Cotter v HMRC* [2013] UKSC 69, [2013] STC 2480 ("*Cotter*"). That case had not been raised at the hearing but, on reflection, while writing the decision I considered it potentially relevant. That request was made on 20 November 2024 but only communicated by the Tribunal administration to the parties on 6 December 2024. The responses of the parties (each of three pages) was sent to me on 14 December 2024. This decision takes into account those written submissions.

PRIMARY FACTS

4. The primary facts are as follows. We understand they are not in dispute.

5. On 23 August 2018, the Appellant submitted a paper tax return for the tax year 2017/18.

6. On 18 April 2019, the decision of Judge Mosdale in *Silver v HMRC* [2019] UKFTT 263 (TC) ("*Silver*") was released.

7. On 7 August 2019, HMRC issued a tax liability calculation, which included a breakdown of HMRC's calculation of the Appellant's top slicing relief.

8. By letter dated 15 August 2019, the Appellant queried HMRC's top slicing relief calculation. She provided her own calculations for what she considered was the correct top slicing relief and said:

> "Can you please show the detailed calculations of the top slice relief of £8,778.80. In the meantime please accept this letter as an appeal."

9. By letter dated 25 August 2019, the Appellant provided her top slicing relief calculations in support of her appeal. The letter began:

> "To support my appeal, and because HMRC seems to take an inordinate amount of time to attend to matters, I enclose my top slice calculations."

10. The deadline for the Appellant to amend her assessment expired on 31 January 2020: Taxes Management Act 1970 ("TMA 1970") s 9ZA(2).

11. By letter dated 11 February 2020, HMRC provided a top slicing relief calculation for the 2017/18 tax year and confirmed that it had been reviewed and determined to be correct based on the income details provided. The cover letter stated:

> "I have reviewed this calculation and confirm it is correct based on the income details provided. Unfortunately, there have been a number of ongoing issues with the self-assessment calculator following the introduction of the new nil savings rates in April 2016. These new rates have made a larger impact on varying areas of the calculator than first anticipated and have made the calculation of liability much more complicated.
>
> The breakdown of the TSR calculation used is set out in line with guidance held within HMRC Insurance Policyholder Taxation Manual (IPTM 3840), which is in line with HMRC's current interpretation of the legislation governing TSR at section 535(5)-(6) ITTOIA 2005."

12. By letter dated 6 August 2021, the Appellant confirmed that she had been "advised to put in a protective appeal/overpayment relief claim re. the top slice relief calculation for 2017/18."

13. By letter dated 19 August 2021, HMRC acknowledged that there had been delays in responding to the Appellant's letters and explained that this had been a result of staff having been moved to deal with the ongoing impact of COVID-19. In relation to the overpayment relief claim, HMRC's letter stated:

> "You mentioned in your letter dated 6 August 2021 that you had been advised to submit an overpayment relief claim for top slice relief for the 2017-18 tax year. I have checked our postal records and can't find any correspondence received relating to this.
>
> If you have yet to send anything in, I would recommend an entirely separate letter. You need to tell us the following:
>
> • you are 'making a claim for overpayment relief'
>
> • the tax year of the overpayment
>
> • the reason you consider you have overpaid tax / we have charged too much tax
>
> • the amount you believe you have overpaid
>
> • the boxes and figures that you think need changed
>
> • if you have already appealed the calculation
>
> • that this has been the subject of a complaint and the reference number
>
> Please include –
>
> • a statement signed by yourself confirming 'the particulars given in the claim are correct and complete to the best of your knowledge and belief'
>
> • any documents showing tax deducted
>
> • write 'repayment claim complaint' at the top of your letter this should ensure it is passed through to a complaints adviser to review it"

14. In his letter, dated 10 March 2024, Mr Yaxley says he "had totally missed [HMRC's letter of 19 August 2021] and cannot remember how." In the letter he suggests it is likely to have been overlooked as he was undergoing treatment for a very serious medical condition at the time. In his oral submissions Mr Yaxley acknowledged that it was likely that HMRC's letter of 19 August 2021 had been received.

15. On 18 February 2022, the decision of Judge Brown QC in *Judges v HMRC* [2022] UKFTT 77 (TC) ("*Judges*") was released.

16. On 6 April 2022, the deadline for claiming overpayment relief expired: para. 3(1) of Sch. 1AB TMA 1970.

17. On 12 April 2022, HMRC wrote to the Appellant regarding an amendment to the 2020/21 tax return. They also enclosed a copy of the letter of 19 August 2021.

18. On 16 February 2023, HMRC again wrote to the Appellant regarding an amendment to the 2020/21 tax return. The letter also stated:

> "You say that you have not received a response regarding the 2017-18 Top Slicing Relief. My colleague from our Complaints Team spoke to you about this during a telephone call on the 11 February 2020. It was explained that the figure of £8,778.80 was correct and the officer issued a copy of our calculation to you. I enclose a copy of this calculation in case you did not receive it. I have

> reviewed this calculation again and confirm there is no change to the original result. While you have submitted a protective claim for 2017/18 Overpayment Relief you have not provided your own calculation. If you wish for a further review to be carried out, please supply me with a copy of this."

19. On 18 February 2023 the Appellant wrote to HMRC. The letter included the following passage:

> "As to the understanding point, it is you who has totally missed the point with regard to the top-slice issue. To repeat, I have been advised that a case is going through the courts, the nub of which is that HMRC's standard calculation is not legally correct. Pending the outcome of that case, I have been advised to put in a protective appeal. Why oh why cannot you merely acknowledge my appeal?"

20. On 21 February 2023 the Appellant wrote to HMRC, enclosing, as she wrote:

> "1 My letter of 15th August 2019 and its attendant calculations
>
> 2 Your letter of 11 th February 2020 and its attendant calculations
>
> 3 My letter of 6th August 2021 which has, even now, not been acknowledged."

In that letter she also referred to the cases of *Silver* and *Judges*, which she had by then discovered.

21. On 13 August 2023, HMRC notified the Appellant of the results of their internal investigation, the outcome of which was that the Appellant was offered £130 by way of an apology.

22. On 7 March 2024, HMRC wrote to the Appellant's husband, in response to his complaint:

> "With respect to the top slicing relief calculation for 2017-18 and the impact of the First Tier Tribunal *Marina Silver v HMRC* (2019), HMRC implemented a change in the calculation in line with this ruling back dated to take effect from 2018-19. As a First Tier Tribunal ruling, it is not binding, and although HMRC did choose not to appeal it the ruling is only applied to that specific individual's case.
>
> The only way to request a review of this for yourself would be to submit a claim for overpayment relief. I have not been able to identify any such claim from you for 2017-18, and the time limit for submitting such a claim expired on 6 April 2022. I know that the adjudicator's office is responding to your wife's complaint about this same issue, however the view of HMRC is that there is no appealable decision for 2017-18 and the normal time limit for any claims has now expired.
>
> I do want to acknowledge the worry, distress, and frustration that the delays and mistakes we have made has caused. In cases where we have not delivered customer service to the level you are entitled to expect, we can make small payments of redress as part of our apology. I would like to make a payment to you of £75 as part of my response to you."

23. On 10 March 2024 the Appellant wrote to HMRC making an out-of-time overpayment relief claim, providing the information required in HMRC's letter dated 19 August 2021. That letter stated:

> "Through [HMRC's litigator], I was advised that the TSR appeal should have been made pursuant to a formal Overpayment Relief Claim. In a letter dated 6th August 2021, (Yaxley 6th August Letter) (copy attached), I had lodged what I perceived to be an adequate TSR protective appeal pending the outcome of what I now know to be the then extant *Judges* case (as referred to

> in my attached formal claim). All this was prompted by an article in the July 2021 TaxAdviser (the professional magazine of the Chartered Institute of Taxation). The appeal was recommended in that article. At the time, it was not known whether the *Silver* case (again as referred to in my attached formal claim) would be followed and therefore whether any overpayment claim would in fact be relevant. As it transpired *Judges* did support *Silver*.
>
> It will hopefully not go unnoticed that I had in fact already alerted HMRC of my disquiet over the TSR calculation and submitted my calculation in my letter of 25th (but possibly 28th) August 2019. At the time, I had no knowledge of *Silver*. I was basing my calculations on my 40 odd years experience as a chartered accountant where the personal allowance (the main issue in dispute) was always incorporated into the S536 Income Tax (Trading and Other Income) Act 2005 calculations. In the event these calculations were challenged in February 2020. I assumed that HMRC knew the law at that time and my wife paid her tax. I now argue that in fact HMRC did not know the law as propounded in *Silver* or, in the alternative, did know but preferred not to inform me."

24. HMRC has not, yet, issued a decision in relation to that out-of-time overpayment relief claim made on 10 March 2024.

THE RESPONDENT'S APPLICATION

25. HMRC made an application on 15 April 2024 for this appeal to be struck out under r 8(2)(a) of the FTT rules. That rule states that the Tribunal *must* strike out proceedings if the Tribunal "does not have jurisdiction in relation to the proceedings".

26. In summary, HMRC's case is that:

(1) There are currently no appealable decisions, for the tax year 2017/18, against which the Appellant's appeal has been raised with the Tribunals Service.

(2) A taxpayer cannot appeal against their own self-assessment: *Ridley v HMRC* [2014] UKFTT 537 (TC) ("*Ridley*") at [47]; *Catal v HMRC* [2016] UKFTT 311 (TC) ("*Catal*") at [37]; *HMRC v Raftopoulou* [2018] EWCA Civ 818, [2018] STC 988 ("*Raftopoulou*") at [73].

(3) The letter of 15 August 2019 was not an amendment to the self-assessment, as it was not stated to be so. It was stated to be an appeal.

(4) The letter of 6 August 2021 was not a valid overpayment relief claim, as it did not conform to the prescribed form, as is required by para. 2(3) of Sch. 1A TMA 1970. The requisite form was set down in HMRC's Self-Assessment Claims Manual and also in HMRC's letter to the Appellant dated 19 August 2021.

(5) The Appellant's appeal was submitted on 22 January 2024, just under 2 months before she had submitted a valid overpayment relief claim. Up until 10 March 2024, there was no valid overpayment relief claim and no open enquiry. As such, there is no legal decision for which the appeal could have been be raised.

(6) The Appellant's appeal is therefore outside the Tribunal's remit as it does not have jurisdiction in relation to these proceedings.

THE APPELLANT'S CASE

27. In summary, the Appellant's case in relation to the strike out application is:

(1) There is a right of appeal since TMA s 31(1)(d) TMA 1970 gives a right of appeal to "any assessment to tax which is not a self-assessment."

(2) The cornerstone of the self-assessment regime is that the taxpayer calculates their own liability to tax. HMRC cannot impose its own version of the law. If HMRC disagrees with the assessment their only remedy is to open an enquiry under s 9A TMA 1970. HMRC's assessment that calculated the liability for the Appellant cannot be regarded as a "self-assessment". Specifically:

(a) The self-assessment process is now under the control of HMRC, as it is conducted through computer software which must be approved by HMRC.

(b) As an integral part of the self-assessment process, s 9(3) and 9(3A) TMA 1970 create a principal/agent relationship between the Appellant and HMRC. These provisions require HMRC to act in the best interests of the Appellant, not of itself. If that principle is not observed, then HMRC will have exceeded its authority, and HMRC's actions will not be binding on the Appellant. HMRC is not permitted to intervene in this way. Accordingly, HMRC's assessment was nugatory – of no legal effect. HMRC cannot calculate top slicing relief other than as the Appellant wished, on the basis approved by the Tribunal in *Silver*.

(c) HMRC is acting *ultra vires* in refusing the Appellant's request in August 2019 to amend HMRC's Assessment to rectify the incorrect top slice calculation, which would have converted HMRC's Assessment into a self-assessment in accordance with the law.

(3) If the Tribunal lacks jurisdiction it is open to it to transfer these proceedings to the Upper Tribunal, which has jurisdiction to hear judicial reviews, under r 5(k) of the FTT Rules.

DISCUSSION

Self-assessment

28. In *Cotter* Lord Hodge (with whom the other Supreme Court justices agreed) stated:

> "[24] Where, as in this case, the taxpayer has included information in his tax return but has left it to the Revenue to calculate the tax which he is due to pay, I think that the Revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear from sections 8(1) and 8(1AA) of TMA that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The Revenue's calculation of the tax due is made on behalf of the taxpayer and is treated as the taxpayer's self assessment (section 9(3) and (3A) of TMA).
>
> …
>
> [27] Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self assessment would in my view fall within a 'return' under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA."

29. It is clear from this that the Appellant's self-assessment remains a self-assessment, notwithstanding the fact that the amount is calculated by HMRC. This judgment is of the

highest authority and binds me. In the Appellant's additional written submissions it is suggested that to be a self-assessment it is also necessary that it be both accurate and in accordance with prevailing law. However there is nothing in either *Cotter* or s 9 TMA 1970 to support that proposition, which I therefore do not accept.

Amendment to self-assessment

30. In her skeleton argument the Appellant describes her request in her letter of 15 August 2019 as a request to amend the self-assessment. In oral submissions Mr Yaxley also pointed me to paragraphs [6]-[8] of *Judges* in which Judge Brown QC stated the following facts:

> "[6] The tax return and self-assessment were completed using HMRC's self-assessment calculator and the white space disclosure was used to make an appeal against the top slicing relief permitted by the calculator. The return was submitted on 30 April 2019. By letter dated 21 May 2019 the Appellant provided calculations which she considered reflected the statutory basis for calculation of top slicing relief.
>
> …
>
> [8] HMRC treated the letter as the submission of an amended tax return on 23 May 2019."

31. We do not know the particular contents of the letter in *Judges*. We note however that in that case the taxpayer had used the white space on the tax return to set out how top slicing relief should be calculated. In any event, it does not follow from the fact that in one case HMRC (perhaps by concession) has treated a letter as an amendment, that as a matter of law, a letter seeking to "appeal" (which is reinforced by the language of later letters, eg 25 August 2019, 6 August 2021 and 18 February 2023) must be categorised as an amendment.

32. Given the language used by the Appellant in her correspondence with HMRC, we do not consider there was an amendment of the self-assessment in the period when it was open to the taxpayer to make such an amendment.

Repayment relief

33. I accept that the letter of 6 August 2021 was not a valid overpayment relief claim, as it did not conform to the prescribed form, as is required by para. 2(3) of Sch. 1A TMA 1970. The requisite form was set down in HMRC's Self-Assessment Claims Manual and also in HMRC's letter to the Appellant dated 19 August 2021.

34. The Appellant's appeal was submitted on 22 January 2024, just under 2 months before she had submitted a valid overpayment relief claim. Up until 10 March 2024, there was no valid overpayment relief claim and no open enquiry. As such, there is no legal decision for which the appeal could have been be raised.

Public law arguments

35. The issues raised by the Appellant, noted in paragraph [27(2)(c)] above, are essentially public law grounds, that HMRC has acted *ultra vires*.

36. Unlike the High Court, this Tribunal does not possess a general supervisory jurisdiction in relation to HMRC: *Hackett v HMRC* [2016] UKFTT 781 (TC) at [11]. Whilst this Tribunal enjoys case management powers to regulate proceedings before it, including abuse of process, its jurisdiction does not go beyond this to allow a general public law review of HMRC's investigatory and decision-making powers: *Hackett v HMRC* [2020] UKUT 212 (TCC) at [46].

37. In any particular case this Tribunal's jurisdiction depends on the relevant statutory provision granting a right of appeal to the Tribunal: *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] UKUT 182 (TCC) at [27]. However, in this instance there simply is no relevant statutory

provision, as the Appellant is seeking to appeal her own self-assessment, and there is no statutory route to make such an appeal: *Ridley* at [47]; *Catal* at [37]; *Raftopoulou* at [73]. It follows that this Tribunal does not have jurisdiction to hear a public law appeal.

38. Rule 5(3)(k) of the FTT Rules specifies that:

> "(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—
>
> (i) the Tribunal no longer has jurisdiction in relation to the proceedings; or
>
> (ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;"

39. However, as I noted at the hearing, this requires a "change of circumstances". No such changed circumstances were in evidence before me.

40. It is also clear from the Tribunal Procedure (Upper Tribunal) Rules 2008 that an English appeal by way of judicial review to the Upper Tribunal must be either transferred from the High Court (r 27) or made by written application to the Upper Tribunal (r 28). It is not therefore possible to start a judicial review by making an application to the First-tier Tribunal that raises grounds of appeal that fall outside its jurisdiction and for the First-tier Tribunal to transfer such an appeal to the Upper Tribunal.

Conclusion

41. I must, therefore, strike out the appeal as this Tribunal has no jurisdiction.

42. It is evident, however, that HMRC has not been helpful in many of their interactions with the Appellant. Given it is HMRC's case that one cannot appeal a self-assessment, they could have pointed this out to the Appellant in response to her letter to them on 25 August 2019, purporting to make an appeal. They could have observed that she was still in-time to make an amendment to her self-assessment. They clearly understood that it was at the very least an arguable issue since, at that point, the decision in *Silver* had been released. Furthermore, HMRC did not raise the possibility of a claim for overpayment relief. This was first raised by the Appellant in her letter of 6 August 2021, almost two years after the initial correspondence. HMRC did then respond to the taxpayer indicating the necessary formalities for making a claim, in their letter of 19 August 2021. However, it is quite understandable that this correspondence was overlooked, given the serious health condition that the Appellant's husband was then experiencing. It is not how one would hope to see HMRC treat a customer.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

Release date: 16th JANAURY 2025