



**IN THE UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**FTC/3/2013**

**BETWEEN**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS**

**Appellants**

**- and -**

**ANTHONY BOSHER**

**Respondent**

**Tribunal: Mr Justice Warren, Chamber President  
Judge Colin Bishopp**

**Sitting in public in London on 5 and 6 November 2013**

**Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs for the Appellants**

**Keith Gordon and Ximena Montes Manzano, counsel, instructed by Mazars LLP,  
for the Defendants**

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## The Appellant's application to raise a new point in this appeal is REFUSED

### REASONS

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#### Introduction

1. At the hearing of Mr Boshers appeal on 5 and 6 November 2013, Mr Gordon (counsel for Mr Boshers) sought permission to raise a new point which we identify below. Even if we had decided in principle to allow the new point to be raised, it could not have been dealt with at the hearing in the light of the request by HMRC, which we regard as reasonable, to adduce further evidence.

2. As it happens, there was another tax appeal pending in the Tax Chamber in which, as we understood it, the point which Mr Gordon wishes to argue was being run. We decided to postpone making a decision whether to allow the new point to be raised in Mr Boshers appeal to us pending the decision in that other appeal. Since the hearing before us, it has transpired that the new point will not, after all, be run in that other case because of one critical factual difference which has come to light. We consider that we should now deal with the application to raise the new point in Mr Boshers appeal. We heard full argument on the point at the hearing; neither party has sought to add to those submissions following our indication that we would now decide the issue.

#### The New Point

3. The new point can be sufficiently identified this way. Part of the process of the penalty regime requires the determination imposing a penalty to be made by an authorised officer of HMRC. The process actually implemented by HMRC is fully automated: penalties are computer generated without any human intervention on a case-by-case basis. *Ergo*, the notices served on Mr Boshers were not in fact penalty notices so that his appeal must succeed.

#### A bad point?

4. One of the submissions made by Ms McCarthy, for HMRC, is that this point is such a bad one that we should not, on that ground alone, allow it to be introduced at this late stage. We do not agree with that. She may well be right that the point is a bad point, but if it is, it is not so obviously bad that we can dismiss it almost out of hand in a summary way.

#### Jurisdiction

5. Our jurisdiction on this appeal flows from section 11 TCEA 2007 which provides for an appeal from the Tax Chamber "on any point of law arising from a decision made by [it]"....". In the context of an appeal we have the wide case-management powers conferred by the UT Rules. In particular Rule 5(3)(d) gives us power to receive evidence. And Rule 5(3)(a) gives us power to extend time-limits.

6. There is no doubt that we have power to allow a new point of law to be taken on an appeal in a case where it is clear that no further fact-finding is required and that no further evidence will be needed. We consider that we have power to do so even where further fact-finding is required and that we have power to admit further evidence if necessary.

7. However, it will be much harder for an appellant to succeed in an application for permission to raise a new point of law if further findings of fact are required, the more so if further evidence is also required. As we have said, an appeal lies only on a point of law; thus an appeal does not take the form of a re-hearing. Therefore the need for the introduction of new evidence in order that further findings of fact may be made will be a significant factor in the exercise of the discretion whether to allow the new point to be raised.

8. In the present case, Mr Gordon submits that there is no need for further fact-finding, let alone new evidence: the evidence before the Tax Chamber was, he submits, absolutely clear about how the process operates in practice, that is to say without human intervention. He does not object to HMRC having the opportunity to adduce further evidence, but he submits that it can add nothing relevant to the determination of the new point. If that is right, then we should not be reluctant to allow the new point to be raised.

9. However, we have no doubt at all that, if we were to allow the new point to be taken, HMRC must be allowed to adduce further evidence. It is important for HMRC to be able to make their arguments about the true construction of the legislation in the context of a full explanation of the factual matrix against which the legislation was passed and in which that legislation now operates. Also relevant, they say, will be evidence to show how, at a high level, the automated procedure was set up and who authorised it and to show how, at a lower level, on a day-to-day basis the system is controlled and by whom. It is quite impossible at this stage to say that such evidence is irrelevant to the new point in the light of the findings of fact already made and the (incomplete) evidence previously before the Tax Chamber.

10. On the facts of the present case, we do not consider that we should exercise our powers to allow the new point to be raised. We take account of the following factors:

a. **The late stage at which the point is taken:** The time for a respondent's notice expired in late January or early February of this year. It was only taken, a few days before the hearing, in Mr Gordon's skeleton argument. He has explained the history of his involvement and how and when the new point came to be taken. It was only once the issue of Mr Boshier's potential costs exposure had been resolved that Mr Gordon started work on the skeleton and thought of the new point. We are bound to say that we attach very little weight to Mr Boshier's concerns about costs when it comes to delay in raising the point.

b. We note in passing that, because the point was raised so late in the day, HMRC had not had a proper opportunity before the hearing to identify the evidence which it will seek to rely on. It cannot be known, therefore, whether Mr Boshier will seek to challenge any of it.

- 10 c. **Costs:** The exercise of obtaining and presenting further evidence will result in further costs being incurred by HMRC. Although it is suggested by Mr Gordon that our **costs** direction (preventing either side from recovering any costs of this appeal) should be extended to the new point, there is no parallel to be drawn with the circumstances of that direction, and the factors which persuaded us to make that direction do not seem to us to be applicable to the costs of this further exercise. Our existing order relates to the costs of HMRC's appeal. The additional costs would relate to what would in effect be Mr Bosher's cross-appeal. It is one thing to allow Mr Bosher to present arguments in support of the Tax Chamber's decision on an appeal which HMRC were bringing to us and on which they would need to appear (whether or not Mr Bosher appeared at the hearing) without exposing himself to an adverse costs order; it is quite another to give him that same protection when it is he who is raising a new point and is not simply seeking to support a decision already given in his favour.
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- 25 d. We should not be blind to the reality which is that, if HMRC were to lose on the new point, there would be an appeal to the Court of Appeal (and quite possibly to the Supreme Court if HMRC were to lose in the Court of Appeal). Mr Bosher will no more be able to afford the costs of those appeals than of the present appeal and would no doubt seek similar cost orders.
- 30 e. Mr Bosher can argue, no doubt correctly, that the new point is one of great importance to HMRC which they need to have decided; and that there is nothing wrong in his being entitled to such costs protection. But against that, it is to be noted that there are other cases going through the system where the relevant fact-finding exercise can be carried out by the Tax Chamber and not as an after-thought by the Tax and Chancery Chamber.
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- 40 f. Further, if, on appeal to the Court of Appeal or the Supreme Court, the higher courts were to decline to make similar protective orders, Mr Bosher may decide (as he indicated would be his position before us) not to participate. HMRC's appeals would then proceed without representation, which is an objectively undesirable position. We do not, therefore, consider that Mr Bosher's appeal is likely to be the most suitable to go forward. The need for the point to be decided is not, therefore, a factor in favour of Mr Bosher being allowed to raise the point.
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11. We do not, in any case, see why this consideration (the need for HMRC to know the answer) as a point in favour of allowing Mr Bosher to raise the point

**Disposition**

10 12. The result of this decision and our earlier decision is that HMRC's appeal is  
allowed. The direction of the Tribunal reducing the 193 fixed penalties to zero is  
set aside and those penalties are reinstated.

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**Mr Justice Warren  
Chamber President**

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**Judge Colin Bishopp  
Upper Tribunal Judge**

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**RELEASE DATE 3 December 2013**