Neutral Citation: **[2023] UKUT 00296 (TCC)**

Case Number: UT/2020/403

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London

Procedure – preliminary issue – marketed tax avoidance scheme – doctrine of precedent – the FtT does not have jurisdiction to consider whether a taxpayer was entitled to PAYE credits under Regulations 185 and 188 of the Income Tax (PAYE) Regulations 2003 for sums that end users were liable to deduct under PAYE.

Heard on: 29 November 2023
Judgment date: 13 December 2023

Before

JUDGE VINESH MANDALIA
and
JUDGE KEVIN POOLE

Between

PHILLIP BRIAN HIGGS & OTHERS

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Keith Gordon, counsel, instructed by Stratax LLP, trading as Strategic Tax Planning

For the Respondents: Akash Nawbatt KC and Sebastian Purnell, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. In a decision released on 24 February 2020 ("the Decision"), the First-tier Tribunal (Tax Chamber) ('the FtT') (Judge James Austen) determined three preliminary issues that had been identified and which concern the FtT's jurisdiction.

2. As the FtT judge set out at paragraph [3] of the Decision, the Appellants are the lead Appellants in the litigation between HMRC and the users of a tax avoidance scheme marketed by Edge Consulting Ltd ("ECL"). This scheme was designed to minimise its users' income tax liability by splitting the remuneration for their work for third parties ("end users") into two components: (1) payment of a minimum wage via an offshore company; and (2) payment of sums through an Employee Benefit Trust which purported to be discretionary loans.

3. It is necessary to provide a little more detail of the arrangements which are said to have been put in place, in order to set in context the issues which were before the FtT.

4. Users of the scheme (generally individual contractors, typically in the IT sector) entered into contracts of employment with ECL in the Isle of Man; ECL entered into contracts with at least one UK intermediary which, in turn, contracted with an employment agency for the provision of the individual contractors' services to end users. The end users would pay the intermediary for the services of the contractors; the intermediary would pay ECL (subject to fees or commission), ECL would pay a minimal wage to the individual contractors (upon which voluntary PAYE and NIC deductions were operated) and the balance of cash received would (after deduction of fees or commission) be paid over to an employee benefit trust in the Isle of Man which would then pay it on to the contractors, purportedly by way of loan.

5. The Appellants wished to pursue before the FtT an argument that they were entitled to a credit for income tax which they said ought to have been deducted by the UK intermediaries pursuant to the PAYE regulations, but in respect of which HMRC had issued retrospective determinations pursuant to section 684(7A)(b) Income Tax (Earnings and Pensions) Act 2003 that it was "unnecessary or not appropriate" for the deductions to have been made by them. Judge Sinfield had directed that the first of 10 substantive issues agreed between the parties – the FtT's jurisdiction – should be dealt with at a preliminary hearing.

6. Pursuant to Judge Sinfield's directions, the preliminary questions for the FtT to decide were:

> "1. Does the First-tier Tribunal have jurisdiction to consider Questions 2 to 3 below?
>
> 2. Was the end user or any other person in the contractual chain (other than the Appellant) under an obligation to deduct and/or account for income tax from the employment income prior to payment in accordance with the PAYE Regulations?
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> 3. Given that no income tax was in fact deducted nor accounted for in respect of those amounts, are the appellant's *[sic]* entitled to a credit under the PAYE regulations for the income tax that should have been (but which was not) deducted and/or accounted for?"

7. The FtT decided that the Tribunal does not have jurisdiction to consider questions 2 and 3.

THE DECISION OF THE FTT

8. The hearing convened to determine the preliminary questions took place on 26 July 2019. The hearing was concerned solely with points of law and neither party considered it necessary to adduce any factual evidence. Following that hearing, having begun his consideration, the judge noted that the FtT had issued its decision in another appeal, *Hoey v HMRC* [2019] UKFTT 489 (TC) and that what was said by Judge Phillip Gillett in that appeal at paragraphs [119] to [139], was relevant to the preliminary questions he was considering. The judge directed that the parties should supply written submissions on the relevant paragraphs of that case. The parties did so and the judge considered those submissions in reaching his decision.

9. The judge considered the calculation of a person's income tax liability and the justiciability of the PAYE Regulations. He concluded that the PAYE Regulations are not justiciable in the FtT for reasons set out in paragraphs [58] to [60] of the Decision. He said:

> "58. The logic of Mr Gordon's submissions seems to me to be that the PAYE Regulations, s.684(7A)(b) ITEPA, and the relevant provisions of TMA should all be treated as if they operate consecutively – and each in respect of the assessment to tax (notwithstanding Mr Gordon's protestation to the contrary in his reply to Mr Nawbatt's submissions). That is incorrect, and it ignores the classic division of tax into the three separate aspects of liability, assessment, and collection – each distinct in time and effect, as set out in Lord Dunedin's dictum in *Whitney*.
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> 59. I agree with Mr Nawbatt that the PAYE Regulations apply only to matters of collection, in respect of which this Tribunal has no jurisdiction. I accept Mr Nawbatt's submissions summarised at [51] above and I adopt them as my reasons for reaching this decision.
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> 60. It follows that I reject each of Mr Gordon's submissions summarised at [30] to [42] as being incompatible with my conclusion at [59]. In my opinion, in addition to the fundamental objection that PAYE operates only in respect of collection, Mr Gordon's submissions rely on a strained construction of Regulation 188 and – especially – Regulation 185 of the PAYE Regulations. Mr Gordon's submission that the Tribunal has a greater ability to construe the PAYE Regulations – being secondary legislation – is only necessary because of the difficulties which arise in construing those Regulations as he proposes. Those difficulties fall away if, as I have done, one accepts Mr Nawbatt's submissions as representing the true interpretation of those provisions."

10. The judge also considered the FtT's jurisdiction to consider public law matters such as the exercise of a public law discretion. He concluded, at [72]:

> "…because the question as to the effect of s.684(7A)(b) arises in a statutory appeal in which the Tribunal has no jurisdiction to consider the PAYE Regulations, the Tribunal equally has no jurisdiction to consider the exercise by HMRC of its discretion pursuant to s.684(7A)(b)."

11. Finally, the judge considered whether s684(7A)(b) can apply retrospectively albeit acknowledging that he had already concluded that the effect of s.684(7A)(b) arises in a statutory appeal in which the Tribunal has no jurisdiction to consider the PAYE Regulations or the exercise by HMRC of its discretion. In summary, the judge rejected the claim made Mr Gordon that s684(7A) should be given a much narrower interpretation that that argued for by HMRC. At paragraph [82] the judge said:

> "…In my view, so long as the discretion is properly exercised in accordance with the statutory requirement (that an officer of HMRC "is satisfied that it is unnecessary or not appropriate" that a person comply with the PAYE Regulations), then I see no difficulty with the decision having prospective and/or retrospective effect."

THE APPEAL TO THE UPPER TRIBUNAL

12. The Appellants relied upon five grounds of appeal in their application to the FtT dated 21 April 2020 for permission to appeal the Decision. They are summarised in the decision of the FtT on that application, released on 23 September 2023.

> "(1) The Tribunal erred by concluding at [57]-[60] that the First-tier has no jurisdiction to consider the credits conferred by regulations 185 and 188 of the PAYE regulations and by concluding that such matters are solely the reserve of the court hearing a taxpayer's defence in the course of enforcement proceedings. The Appellant taxpayers rely on the same submissions as made before the First-tier.
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> (2) The Appellants read the Tribunal's decision (at [61]-[72]) as saying that, but for the Tribunal's decision on the jurisdiction point (ground 1 above), the Appellants would be permitted to run the public law arguments in a statutory appeal. It is submitted that this follows from (inter alia) Birkett. However, to the extent that the Tribunal is saying that the public law arguments relied upon by the Appellants are still outwith the First-tier's jurisdiction (i.e. irrespective of the outcome of ground 1), then it is submitted that the Tribunal has made an error of law.
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> (3) To the extent that it is necessary to do so in the present case (i.e. to the extent that the Appellants' public law arguments go beyond those as considered permissible by Birkett), the Appellants separately seek to argue that an appellant in the First-tier Tribunal has an unfettered right to make collateral public law challenges to appealable decisions (to illustrate by way of a hypothetical example, so that an assessment made in breach of a taxpayer's legitimate expectation can be set aside in the course of a statutory appeal) and, therefore, the Upper Tribunal was wrong in Hok et al to adopt a more restricted view as to the scope of the Tribunal's jurisdiction.
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> (4) The Tribunal further erred at [73]-[82] when it concluded that the power in section 684(7A)(b) can be used to forgive an employer's previous non-compliance with the PAYE regulations (and can therefore have the effect of removing an employee's entitlement to the PAYE credits). Correctly construed, the legislation empowers HMRC to release employers only from future obligations to operate PAYE.
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> (5) To the extent that the Tribunal is saying at [83] that section 684(7A)(b) is drafted sufficiently widely to permit HMRC to exercise their discretion in relation to any payer in the contractual chain, then this is not disputed by the Appellants. However, the Appellants' argument is that the exercise of the discretion in the present case was expressly stated in the notification letters to apply to the end users. Therefore, to the extent that the First-tier is saying that HMRC's exercise of their powers in this case can be said to extend to other payers in the contractual chain then that amounts to an error of law on *Edwards v Bairstow* lines.

13. Permission to appeal on grounds 1 to 4 was granted by the FtT. The judge was satisfied that the legal questions concerned are of sufficient general importance (and, in this case, sufficiently high value) that an appeal to the Upper Tribunal was merited so that the law can be determined in a judgment which will be binding on the FtT in further such cases. The judge said:

> "In allowing leave to appeal on these grounds, I am conscious that the appeal in *HMRC v Stephen Hoey* (UT/2019/0145), which may also need to consider these questions, is already listed to be heard by the Upper Tribunal between 21 and 23 October 2020. As a result, by the time the appeal in this case comes to be heard, these points may already have been decided. But that will be a matter for the parties and/or for the Upper Tribunal to deal with."

14. The Appellants renewed the application for permission to appeal on ground 5 before the Upper Tribunal, and permission was granted by Judge Herrington on 27 October 2020.

HOEY

15. As anticipated by the FtT Judge when granting permission to appeal, the appeal to the Upper Tribunal in *Stephen Hoey v The Commissioners for HM Revenue and Customs* was determined in a decision released on 12 April 2021; [2021] UKUT 0082 (TCC). The Upper Tribunal upheld the decision of the FtT that Mr Hoey's entitlement to a PAYE credit under PAYE Regulation 185 and Regulation 188 was not within its jurisdiction.

16. Mr Hoey was granted permission to appeal to the Court of Appeal. In a judgement handed down on 13 May 2022 [2022] EWCA Civ 656; [2022] 1 W.L.R. 4113, Lady Justice Simler *(as she then was)*, Lord Justice Phillips and Sir Launcelot Henderson held that the FtT did not have jurisdiction to consider whether a taxpayer was entitled to PAYE Credits under Regulations 185 and 188 of the Income Tax (Pay As You Earn) Regulations 2003 for sums that end users were liable to deduct under PAYE.

THE HEARING BEFORE THE UPPER TRIBUNAL

17. In his skeleton argument filed in readiness for the hearing of the appeal before us, Mr Gordon said this:

> Although spread across five grounds of appeal, there are essentially three issues live before the Tribunal:
>
> (1) Does the First-tier have jurisdiction to consider questions concerning the existence/availability of the PAYE credit or is that solely a matter for enforcement/collection proceedings in the County Court?
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> (2) Can a pre-existing credit be effectively removed by an HMRC officer exercising his/her powers under section 684(7A)(b) of the Income Tax (Earnings and Pensions) Act 2003 under which an employer can be relieved of its own obligations under the PAYE regulations?
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> (3) If an officer has purported to exercise his powers under section 684(7A)(b) in respect of one class of employers, does that have the effect of removing the PAYE credit which arises from another employer within the contractual chain?

18. He went on to acknowledge that the first two of these issues had been decided against the taxpayer by the Court of Appeal in *Hoey*, and that the third issue was "parasitic" on the first issue. Accordingly, he accepted that "the doctrine of precedent is very likely to determine the outcome of this particular appeal". However, he respectfully submitted that the Court of Appeal had erred in *Hoey* and he wished to take the matter back there and, if necessary, to the Supreme Court.

19. At the outset of the hearing we indicated to Mr Gordon that in light of the concession set out in paragraph [5] of his skeleton argument, it would be useful for him to identify what it was that he was inviting us to do, and to outline the legal basis upon which he would invite the Tribunal to adopt such a course. Mr Gordon submitted that in the context of a statutory appeal, the Upper Tribunal plainly has jurisdiction to consider an appeal against the decision of the FtT. That is undisputed. Mr Gordon acknowledged that the 'jurisdiction' issue upon which the FtT found against the Appellants has now been authoritatively determined by the Court of Appeal and that he would not be seeking to persuade us that the decision of the Court of Appeal can be distinguished. He identified five possible courses open to us:

i) To conclude that the Court of Appeal decision is simply wrong; *or*

ii) Without going as far as saying the decision of the Court of Appeal is wrong, to conclude that we are not persuaded by the decision and reasons given by the Court of Appeal and would, were it not for that decision, find for the Appellants; *or*

iii) To conclude that we are bound by the decision of the Court of Appeal, but that there is an arguable case going forward; *or*

iv) To conclude that we are bound by the decision of the Court of Appeal and will not say anything more about the appeal, and await an application for permission to appeal; *or*

v) To conclude there is now no merit in the appeal and to dismiss the appeal and refuse any application for permission to appeal

20. Mr Gordon submitted that of the five possibilities identified by him, he considered (ii) and (iii) to be the 'realistic options'. His skeleton argument sought to run the arguments *de novo* and identified in an Appendix why the Appellants claim the Court of Appeal was wrong in *Hoey*. He submitted that where an appellant contends that a decision of the Court of Appeal is wrong, there must be a facility for that appellant to pursue the appeal so that it can progress to the next stage by making the relevant application for permission. Mr Gordon highlighted that adopting a pragmatic approach, following the decision of the Court of Appeal in *Hoey*, in March 2023, the Appellants had made it clear that a very short hearing might be considered appropriate (or even that the appeal could be determined on the papers). He said there has been correspondence between the parties concerning the potential for the hearing of the appeal to be vacated altogether, but HMRC had refused to provide the assurances being sought regarding the boundary between the jurisdiction of the FtT and that of the civil courts. The Appellants had, he said, repeatedly invited HMRC to agree that, if this appeal were to be abandoned by the Appellants, HMRC would not then argue in civil proceedings that the courts do not in fact have jurisdiction to consider the credit and that this is a matter that should, after all, have been raised in the course of the statutory appeal. HMRC have refused to give the assurances sought.

21. In reply, Mr Nawbatt submitted that since the promulgation of the FtT's decision, the Court of Appeal in *Hoey* has answered the same questions that arise in this appeal, binding the Upper Tribunal to that effect. He said that in *Hoey*, on 08 December 2022, the Supreme Court had refused permission to appeal because the application did not raise an arguable point of law. Mr Nawbatt informed us that when the application for permission to appeal was made to the Supreme Court , the Appellants had sought to intervene and filed a submission comprising some 27 pages. Mr Nawbatt submitted that contrary to the Appellants' invitation to the Upper Tribunal to promulgate a reasoned decision in this appeal, addressing the matters raised in their Skeleton Argument and the contentions advanced in its Appendix as to why *Hoey* was wrongly decided, such an approach is authoritatively discouraged and should not occur. He submitted it is not for this Tribunal to 'mark the work' of the Court of Appeal.

22. We indicated to the parties our provisional view that the Court of Appeal in *Hoey* has, as Mr Gordon quite properly accepts, determined the very issues which are the subject of this appeal against the Appellants. Where, as here, the Appellants do not seek to distinguish the decision of the Court of Appeal, by the doctrine of precedent we are bound by the decision of the Court of Appeal and it is not open to this Tribunal to rehear the arguments *de novo* and determine whether, with respect, we consider the Court of Appeal was wrong. We indicated our provisional view that we are unlikely to engage at any length with the criticisms made by the Appellants of the decision of the Court of Appeal in *Hoey* and will instead focus upon the

issues that arise in the statutory appeal before us, which in our provisional view, have been answered by the Court of Appeal in *Hoey*.

23. Having had the opportunity of reflecting upon our provisional view and having taken instructions, Mr Gordon confirmed that he would not seek to persuade us to do anything other that to proceed in accordance with our provisional view.

24. In the circumstances we can dispose of the appeal before us without engaging in each of the five grounds upon which permission to appeal has been granted. We accept, as Mr Nawbatt submits and Mr Gordon acknowledges, the Court of Appeal in *Hoey* determined the very issues which are the subject of this appeal in favour of HMRC.

25. In *Hoey*, the Court of Appeal confirmed the FtT and the Upper Tribunal had been correct to decide that the FtT did not have jurisdiction. In summary, the Court confirmed, at [117], that the FtT is a creature of statute, created by s3 of the Tribunals, Courts and Enforcement Act 2007 " *for the purpose of exercising the functions conferred on it under or by virtue of this or any other Act* ". Its jurisdiction is therefore entirely statutory and it has no inherent jurisdiction equivalent to that of the High Court to consider public law arguments founded on common law, or even equivalent to the limited statutory jurisdiction exercised by the UT.

26. The Court of Appeal reiterated, at [121], that the PAYE Regulations do not impose liability to tax on employment income. Liability is fixed by the provisions of the Income Tax (Earnings and Pensions) Act 2003.

27. For reasons set out at paragraphs [122] to [132] of its decision, the Court of Appeal held, in summary, that there is no express right of appeal to the FtT conferred by any legislation in relation to the exercise of the 7A power or in relation to the availability or otherwise of a PAYE credit following exercise of that power. The only relevant right of appeal was that provided by the Taxes Management Act 1970 s.31, concerning appeals against assessments and closure notices. The availability of the PAYE credit under reg.185 and reg.188 did not affect the amount of tax payable under s.8 and s.9 and/or s.29 of the 1970 Act and was not therefore part of the subject matter of an appeal against those assessments and/or closure notices under s.31. Neither reg.185 nor reg.188 affected the amount of tax payable under the assessment: both operated at the subsequent collection stage. At paragraph [130], the Court of Appeal held:

> "For all these reasons, which are essentially the same as those given by the UT, as a matter of construction neither regulation 185 nor 188 affects the amount of tax chargeable or payable under sections 8 and 9 or section 29 of TMA . It follows that these regulations and the availability of a PAYE credit do not fall within the scope of an appeal under section 31 of TMA to the First-tier Tribunal. Since the self-assessment and assessment provisions are the only relevant sources of the tax tribunal's jurisdiction, the availability of the PAYE credit does not fall within the First-tier Tribunal's jurisdiction."

28. Drawing the threads together, at paragraph [205] of its judgement, the Court of Appeal said:

> "It follows from our conclusions on each of the main issues that:
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> i) the 7A power in primary legislation is a wide power. It can operate both prospectively and retrospectively, and overlaps with the redirection regulations. It was available to be used in Mr Hoey's case and had the effect that his income tax liability must be paid by him without setting off notional PAYE deductions that would otherwise have been treated as made by the End Users.

ii) The power was lawfully exercised. There was no breach of any procedural legitimate expectation. The claim for judicial review accordingly fails and is dismissed.

iii) Neither the First-tier Tribunal nor the Upper Tribunal has jurisdiction to review or address the exercise by HMRC of the 7A power. The only avenue for challenging its exercise is on judicial review in the Administrative Court.

…"

29. We are bound by that decision and we do not need to address the arguments against it relied upon by Mr Gordon in his skeleton argument. Mr Gordon, quite properly, accepts the matters relied upon seek to do nothing more than to run the arguments again *de novo*. As the Court of Appeal has now confirmed, it was undoubtedly right for the FtT to conclude it did not have jurisdiction to consider questions 2 and 3 identified as preliminary issues in the appeal.

DISPOSITION

30. For the reasons given above, this appeal is dismissed.

COSTS

31. Any application for costs in relation to this appeal must be made in writing (and may, but need not, be accompanied by a schedule of the costs being claimed) and served on the Tribunal and the person against whom it is made within seven days after the date of release of this decision as required by Rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The parties will file and serve any response to any application for costs made against them within seven days after receiving the application for costs.

JUDGE VINESH MANDALIA
JUDGE KEVIN POOLE

Release date: 13 December2023