Neutral Citation: [2025] UKFTT 00203 (TC)

Case Number: TC09426

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal reference: TC/2024/05510
TC/2024/05799

INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS – Notice issued to each appellant to give security – appeals filed with Tribunal – HMRC subsequently notifying the Tribunal that no prior appeal had been made to HMRC by either appellant – whether Tribunal has jurisdiction to consider this part of appellants' appeals – no – whether this part of the appeals should be struck out – yes, part of appeals relating to these Notices struck out

VALUE ADDED TAX – Notice issued to one appellant to give security – appeal filed with Tribunal – HMRC withdrawing Notice the next day, and subsequently informing the Tribunal – whether the appeal should be struck out – yes, struck out in respect of this Notice

Judgment date: 13 February 2025

Decided by:

TRIBUNAL JUDGE BAILEY

Between

(1) AVA ESTELL LIMITED
(2) YAW OKYERE

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the application to strike out this appeal on 6 February 2025 without a hearing having first read the Notices of Appeal (with enclosures) dated 17 October 2024, HMRC's Application to strike out this appeal dated 18 November 2024, and all other documents on the Tribunal file.

DECISION

INTRODUCTION

1. This decision notice is issued in respect of an application by the Respondents ("HMRC") to strike out these two joined appeals. Further points were made in subsequent correspondence by the parties, and those further points are taken into account in making the decision set out in this decision notice.

OUTCOME

2. HMRC's application is allowed for the reasons set out below.

3. These two appeals are STRUCK OUT under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 because:

> (a) at no stage of these proceedings did the Tribunal have jurisdiction to hear an appeal against either of the Notices of Requirement in respect of PAYE and NICs as there was no prior appeal made to HMRC;
>
> and
>
> (b) since 18 October 2024, the Tribunal has ceased to have jurisdiction to hear an appeal against the Notice of Requirement in respect of VAT as that Notice was withdrawn by HMRC on that date.

FACTUAL BACKGROUND

4. On 26 July 2024 HMRC issued three Notices of Requirement to give security. Two of these Notices were issued to the First Appellant: one Notice was in respect of PAYE and NICs, the other Notice was in respect of VAT. The Third Notice was issued to the Second Appellant, making him jointly and severally liable with the First Appellant for the amount of security required in respect of PAYE and NICs.

5. On 17 October 2024, the Tribunal received a single Notice of Appeal, said to be from both Appellants, against the two Notices of Requirement issued to the First Appellant. That appeal was late and the Appellants gave reasons for that delay.

6. Later on, still on 17 October 2024, the Appellants legal representative sent a copy of the Notice of Appeal to HMRC, under cover of a letter in which the Appellants both sought a review of the Notices that had been issued and made a Time to Pay proposal to HMRC.

7. On 18 October 2024, HMRC issued letters to the First and Second Appellant which withdrew all three Notices of Requirement for the Appellants to give security.

8. On 24 October 2024, HMRC wrote to the Appellants' legal representative, in response to the letter of 17 October 2024. HMRC noted (correctly) that they could not conduct a review while there was an appeal to the Tribunal. HMRC also stated that the three Notices of Requirement had been withdrawn on 18 October 2024.

9. The Tribunal was (at that stage) still unaware that three Notices of Requirement had been withdrawn. Having reviewed the Notice of Appeal filed, a Tribunal Caseworker concluded that both Appellants intended to appeal and that the reference to the Second Appellant in the PAYE Notice issued to the First Appellant was sufficient evidence of a separate Notice of Requirement also having been issued to the Second Appellant. On 4 November 2024, the Tribunal registered two late appeals – one for each appellant – and notified both appeals to HMRC.

10. Also on 4 November 2024, the Tribunal issued Directions to both parties. HMRC were directed to file and serve their Statement of Case no later than 9 December 2024. HMRC were

also directed that if they objected to either appeal proceeding on the basis that it had been filed out of time then they should file an objection to that effect by 9 December 2024.

11. On 18 November 2024, the allocated HMRC litigator emailed the Tribunal and the Appellants' legal representative. In this email HMRC wrote:

> **Application**
>
> The Respondents advise the Tribunal that, according to their records, the decisions under appeal were withdrawn after the Appellants submitted their appeal. I attach copies of the letters confirming this.
>
> The Respondents therefore respectfully submit that there are no remaining matters under appeal over which the Tribunal has jurisdiction. The Respondents request that the appeals are struck out under Rule 8 (2)(a) Firs-tier Tribunal Rules.
>
> The Respondents also request that the case be stayed pending the Tribunal's consideration of this application and all remaining time limits per the directions of 4th November be extended accordingly.

12. The Appellants' legal representative emailed the Tribunal and HMRC later the same day as follows:

> We believe the Respondents application for a stay and for strike out of the appeal are an abuse of the proper procedure of the Tribunal and should be rejected by the Tribunal; we oppose their applications.
>
> Rule 8(2)(a) First-tier Tribunal Rules relates to striking out a party case on the basis that the Tribunal does not have jurisdiction.
>
> At the time of the appeal being filed the relevant security notices were operative and the Tribunal has jurisdiction.
>
> HMRC have falsely and abusively suggested otherwise and this type of abuse should not be permitted by the Tribunal as it leads to a perverse record on the Tribunal file.
>
> The appeal has been successful as the Respondents determined to withdraw the notices after the appeal was lodged.

13. On 28 November 2024, HMRC sent a long email to the Tribunal, copied to the Appellants' legal representative. To this email were attached a copy of the legal representative's letter to HMRC dated 17 October 2024, and a copy of HMRC's letter of 24 October 2024 in reply. In this email HMRC stated that their application to strike out both appeals was correct for the following reasons:

> - the appeals against the PAYE and NICs Notices of Requirement could not be entertained by the Tribunal as there had been no prior appeal to HMRC. The legal representative's letter of 17 October 2024 was relied upon in this regard, as that letter referred to the Appellants having already appealed to the Tribunal (the "no prior appeal point");
>
> - both appeals were late and so could not have yet been admitted by the Tribunal as the issue of lateness had yet to be decided (the "late appeals point"); and
>
> - as the Tribunal had split the one Notice of Appeal into two appeals, it was likely that the Second Appellant's appeal had not been created until after the withdrawal of the underlying Notice of Requirement (the "split appeal point").

14. HMRC concluded with the request to amend their Strike Out application so that if the Tribunal did not agree to strike out the appeals, then they would be withdrawn.

15. A few hours later, the Appellants' legal representative emailed the Tribunal (but not HMRC) in response stating:

> HMRC appear to argue that the appeal (sic) was premature as well as late which makes little sense.
>
> In reality the appeal succeeded as HMRC withdrew all security notices.
>
> The Appellant (sic) requests a written determination of the Tribunal.

16. On 9 December 2024, HMRC emailed the Tribunal and the Appellants' legal representative to state that, as HMRC had already applied for a stay of the Directions, they did not intend to file their Statement of Case.

17. A few hours later, the Appellants' legal representative emailed in reply:

> As the respondent is not presenting a statement of case as required under the tribunal rules, the Appellant (sic) now applies for an order that the appeal (sic) is successful.

18. Shortly after this, both appeals were referred to me. I gave both parties 14 days to make any further representations they wished to make, and informed them that HMRC's strike out application would then be decided on the papers.

19. Nothing further was received from the Appellants' legal representative. HMRC confirmed that there were no further points that they wished to make.

DECISION

20. I will address some of the points raised by the parties in subsequent correspondence before I consider the strike out application.

The "no prior appeal point"

21. Although the three Notices of Requirement were issued at the same time, it is important not to lose sight of the fact that two of the Notices required security to be given in respect of PAYE and NICs, and the other Notice required security in respect of VAT. The statutory mechanics of how and when to appeal to the Tribunal depend on the underlying imposition.

22. While an appeal against a Notice of Requirement to give security in respect of VAT may be given directly to the Tribunal, without the need for any prior appeal to HMRC, HMRC are correct to state that no appeal can be made to the Tribunal against a Notice of Requirement to give security in respect of PAYE and NICs unless a prior appeal has already been made to HMRC against that Notice – see Sections 49D and 49G Taxes Management Act 1970, which make clear that it is the appeal that has been made to HMRC that is then notified to the Tribunal. It is not sufficient to do what the Appellants here have done, and make an appeal to HMRC after they have already appealed to the Tribunal.

23. Therefore, HMRC are correct to argue that the Tribunal has no jurisdiction to consider either Appellant's appeal against the Notice of Requirement to give security in respect of PAYE and NICs.

The "late appeals point"

24. I am less persuaded by HMRC's second point which seems to be that, because the Tribunal has not decided the issue of lateness, the Tribunal cannot yet have admitted either appeal. It is not entirely clear but I understand HMRC to be arguing that that this means that the underlying Notices of Requirement must have been withdrawn before the appeals were admitted by the Tribunal.

25. I am unsure why HMRC would consider the date of admittance to be relevant. While it is correct that the Tribunal practice is to provisionally admit late appeals, and those appeals are

not formally admitted until a later date (which, in some cases, is not until after the substantive hearing has concluded) that cannot affect the date on which the appeal was filed. It is clear that the appeals were filed on 17 October 2024, and the underlying Notices were withdrawn the following day. The Notices were still in operation on the day that the appeals were filed. I consider below how appeals should be disposed of in such circumstances but I do not consider the fact that the Appellants needed permission (which they had sought) to make their appeals out of time can affect the disposition of those appeals.

The "split appeal point"

26. I am also not persuaded by HMRC's suggestion that the Second Appellant's appeal was only made when the Tribunal chose to register two appeals rather than one. It is clear from Rule 1(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that it is possible for one appeal to be made jointly by two (or more) appellants. The Notice of Appeal filed on 17 October 2024 was intended to operate as an appeal by both Appellants. I am satisfied that 17 October 2024 is the correct filing date for both Appellants, even though the Tribunal decided, on a later date, to register a separate appeal for each Appellant.

27. Again, I consider below how appeals should be disposed of when the underlying decision has been withdrawn but I do not consider the date on which the Tribunal registered the appeal can either affect the date on which the Second Appellant's appeal was filed or be determinative of whether that appeal should be struck out.

The strike out application

28. Having set out those points, I can now consider HMRC's application to strike out both of these appeals due to the withdrawal of the underlying Notices.

29. Although it is not unusual for an underlying assessment or decision to be withdrawn during the course of Tribunal proceedings, until recently there had been relatively few reported decisions setting out how the appeal should be disposed of following such a withdrawal. However, two recent decisions, including one by the current President of the Tribunal, settle this issue.

30. In *Align Technology Switzerland GmbH and another v HMRC* [2024] UKFTT 01100 (TC) Judge Sinfield adopted the analysis of case law set out in an earlier case (*Charles Kendall Freight Ltd v HMRC* [2024] UKFTT 492 (TC)). At paragraph 52 of *Align Technology*, Judge Sinfield set out a succinct summary of how the proceedings should conclude:

> 52. … If HMRC withdraw a decision or assessment before the taxpayer makes an appeal to the FTT, there is no right to appeal under section 83 VATA94 because there is no matter within the section to appeal against (see *Furtado v City of London Brewery Company* [1914] 1 KB 709 as discussed by the Upper Tribunal in *LS v HMRC and RS v HMRC* [2017] UKUT 257 (AAC) ('*LS and RS*') at [20]). Accordingly, the FTT never has jurisdiction in relation to the matter. **Where HMRC withdraw a decision or assessment after an appeal has been made to the FTT, the FTT ceases to have jurisdiction from that point and must strike out the proceedings or the relevant part of the proceedings (see *LS and RS* at [25] and rule 8(2)(a) FTT Rules).**
>
> (My emphasis)

31. Judge Sinfield went on to explain that there might be further applications (for example, for costs) which remained, which the Tribunal would have the power to consider, but that the substantive proceedings were concluded by the striking out. The current appeals fall squarely within the second category of appeals described by Judge Sinfield in the passage quoted above.

CONCLUSION

32. Drawing all of these aspects together, on the information now available to the Tribunal it is clear that when the Appellants filed their appeals on 17 October 2024, the Tribunal did not have jurisdiction to entertain either Appellant's appeal against the two Notices of Requirement in respect of PAYE and NICs. If the three Notices had not subsequently been withdrawn, the Tribunal would still have been required to strike out the part of each Appellant's appeal that related to the Notices of Requirement in respect of PAYE and NICs. That would have resulted in the striking out of the entirety of the Second Appellant's appeal.

33. However, (subject to later being granted permission to make a late appeal) the First Appellant's appeal against the Notice of Requirement to give security in respect of VAT was an appeal which, on 17 October 2024, the Tribunal had jurisdiction to hear. However, once HMRC withdrew the underlying Notices on 18 October 2024, then the Tribunal ceased to have jurisdiction.

34. I understand why the Appellants might feel that HMRC's withdrawal of the underlying notices means that they have been successful. The Appellants can congratulate themselves on having succeeded in their substantive aim of being relieved of the requirement to give security. However, for the reasons explained by Judge Sinfield in *Align Technology*, the Tribunal no longer has jurisdiction when the Notices which were under appeal have been withdrawn.

35. Therefore, for the reasons set out above, HMRC's application is allowed.

36. These two joined appeals are STRUCK OUT under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 because:

> (a) at no stage of these proceedings did the Tribunal have jurisdiction to hear an appeal against either of the Notices of Requirement in respect of PAYE and NICs as there was no prior appeal made to HMRC;
>
> and
>
> (b) since 18 October 2024, the Tribunal has ceased to have jurisdiction to hear an appeal against the Notice of Requirement in respect of VAT as that Notice was withdrawn by HMRC on that date.

OTHER APPLICATIONS

37. If there are any other applications that either party wishes to make in respect of these proceedings, they should file that application with the Tribunal no later than 28 days from the date of this decision notice. As usual, any such application filed with the Tribunal must, at the same time, be served on the other party.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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.

JANE BAILEY
TRIBUNAL JUDGE

Release date: 13th FEBRUARY 2025