



**TC02373**

**Appeal number: TC/2012/06064**

*APPLICATION TO STRIKE OUT – whether Tribunal has jurisdiction over  
HMRC’s use of statutory discretion – no – appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**P. C. DURKIN  
(HALIFAX ARCHITECTS)**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE J. BLEWITT**

**Sitting in public at Bradford on 17 October 2012**

**Mr Shaw for the Appellant**

**Mrs Newham, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. By Notice of Appeal dated 16 April 2012 the Appellant appealed against  
5 HMRC's decision to disallow the Appellant's claim for overpayments relief for the tax year 2005/06.

### *Facts*

2. The facts of the case are that the Appellant filed a Self Assessment tax return for the 2005/06 period prior to the due date of 31 January 2007. The Appellant  
10 subsequently attempted to amend the return to claim a repayment of overpaid tax in a document which was undated but which was received by HMRC on 29 June 2010.

3. As the amendment was received after the statutory deadline of 1 April 2010 it was refused by HMRC.

### *The Appeal*

4. The Appellant relied upon information provided by the Appellant's MP Mr Sheerman which was annexed to the Notice of Appeal and which stated:

*"For many taxpayers the new time limits will not come into effect until 1 April 2012."*

5. It was submitted by the Appellant in his Notice of Appeal that, on the basis of the document referred to at paragraph 4 above, it is clear that the legislation "*does not*  
20 *come into effect until April 2012.*"

6. The hearing before me was an application by HMRC to strike out the proceedings on the basis that the overpayment claim made by the Appellant is out of time and the Tribunal does not have jurisdiction over HMRC's decision not to accept a late claim.

### *Submissions on behalf of HMRC*

7. HMRC produced its response to the Appellant's Notice of Appeal in the form of a letter to the Tribunal Service dated 31 July 2012 in which it stated:

*"The quote made in the appeal documents **"For many taxpayers the new time limits will not come into effect until 1 April 2012"** refers to taxpayers who are outside of*  
30 *the Self Assessment regime i.e. taxpayers whose tax affairs are dealt with under PAYE. Mr Durkin's tax affairs are dealt with within the Self Assessment regime and therefore the new time limits applied from 1 April 2010."*

8. Mrs Newham referred me to the legislation applicable to this case, which was not disputed by Mr Shaw. Schedule 1AB TMA 1970 provides:

35 *"(1) This paragraph applies where –*

(a) *A person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due...*

(2) *The person may make a claim to the Commissioners for repayment...of the amount.*

5 ....

*3 (1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.*

9. Mrs Newham explained that the changes to the time limits were announced in the 2008 Budget and incorporated into the Finance Act 2008 at Schedule 39, which  
10 amended the relevant sections of the Taxes Management Act 1970.

10. For Self Assessment taxpayers, the new time limits took effect on 1 April 2010. For those taxpayers outside of the Self Assessment regime, the new time limits took effect from 1 April 2012. As the Appellant was required to file a Self Assessment return for 2005/06 by 31 January 2007 (which he did) the time limit for receipt of an  
15 amendment to that return was 1 April 2010.

11. Mrs Newham accepted that the legislation applicable as set out in paragraph 8 above includes the word “*may*” within section 3 (1) of Schedule 1AB TMA 1970, which allows HMRC a degree of discretion. It was submitted that any such discretion stops with HMRC and does not pass to the Tribunal. Furthermore there are no  
20 statutory provisions which would allow the Tribunal to extend the time limit of 4 years which is set by legislation. As the claim was made out of time, the Appellant has no right of appeal to this Tribunal against HMRC’s refusal to accept the amendment and the only avenue potentially open to the Appellant would be to judicially review the decision.

25 12. Mrs Newham helpfully provided the Tribunal with the case of *Martin Peter Steibelt (H M Inspector of Taxes) and Thomas Charles David Paling*. It was accepted by Mrs Newham that the authority was not concerned with the legislation applicable to this case, however HMRC relied upon the Court’s discussion on the issue of the exercise of discretion, which is clearly relevant to this case:

30 “*The discretionary power in question is that conferred on the Revenue to extend the time stipulated in subsection (3). Mr Rabinder Singh referred me to a judgment of Arden J in Kelsall (H M Inspector of Taxes) Investment Chartwork Ltd 65 TC 750. The case did not involve the same discretion as in the present case but did raise the question whether the exercise by the Revenue of a statutory discretion could be*  
35 *reviewed and upset by the General Commissioners on an appeal. Arden J held that it could not. She referred to the decision of the House of Lords in Customs and Excise Commissioners J H Corbitt (Numismatists) Ltd [1980] STC 231 in which Lord Lane, with whose speech the majority of the House agreed, approved the following passage from the judgment of Neill J:*

40 “*Once it is conceded, as I think rightly, that the commissioners are empowered, subject to the control of the Treasury, to lay down the conditions in a general notice such as Notice No.712 in such a form as they consider proper and that that power is*

*not subject to appeal, it seems to me impossible to contend that the discretion given by the final words of article 3(5) 'or may recognise as sufficient for those purposes' is a different kind of discretion which is subject to appeal."*

*Arden J referred also to Slater Richardson 53 TC 155 in which Oliver J had said:*

5 *"There is nothing in those words, I think, which can possibly enable the General Commissioners to discharge an assessment on the ground that the circumstances were such that the Collector of Taxes ought to have exercised a discretion which is placed upon him to remit tax which is clearly payable under the provisions of the section."*

10 *Following the statements of principle expressed in those cases, Arden J held that the Commissioners on an appeal against a decision of the Revenue did not have power to substitute their own discretion for the statutory discretion to be exercised by the Revenue.*

15 *In my judgment, the same applies to the present case. Subsection (3) of s 152 clearly gives power to the Revenue at its discretion to allow an extended period within which the acquisition of the new assets may take place. No criteria are expressed in the subsection as to when the power should or should not be exercised. The matter is left entirely to the discretion of the Revenue. The exercise of that power by the Revenue would be susceptible to challenge by judicial review on the grounds of*  
20 *unreasonableness or any other suitable ground, but it is not a power that can be exercised by the General Commissioners. In my judgment, the decision of the Revenue as to whether or how to exercise its subsection (3) discretion is not reviewable by the General Commissioners on an appeal.*

25 *It follows that, in my view, it was not open to the General Commissioners to extend the three-year period within which the new assets had to be acquired, or expenditure on improvements had to be incurred, in order to allow a claim for rollover relief to be made."*

#### *Submissions on behalf of the Appellant*

30 13. It was submitted on behalf of the Appellant that HMRC's refusal to allow amendments prior to 2006/07, combined with the fact that tax was still collected, is unfair to the Appellant as a business owner, particularly given that the inaccuracies in the 2005/06 return were the fault of his previous accountant.

35 14. Mr Shaw submitted that HMRC should have notified Mr Durkin in writing about the change in legislation and the new time limit for making an amendment to his return; to fail to notify taxpayers is wrong and HMRC should have officially notified every person, irrespective of who they are.

40 15. Mr Shaw spoke to his MP about the issue and the document received in response (annexed to the Notice of Appeal and referred to at paragraph 4 above) does not distinguish between those within or outside of the Self Assessment regime and therefore the reference to 1 April 2012 clearly applies in this case.

16. HMRC have allowed the amendments made by the Appellant in respect of the years 2006/07, 2007/08 and 2008/09 and, in so doing, accepted that the returns were incorrect. The clear inference to be drawn is that the 2005/06 return is also incorrect on the basis that all of the returns were erroneously completed and filed by the Appellant's former accountant.

*Issue*

17. The sole issue for me to determine is whether this Tribunal has any jurisdiction over HMRC's use of discretion and whether, if no such jurisdiction exists, the proceedings must be struck out under Rule 8 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

*Decision*

18. I considered the submissions made on behalf of the Appellant very carefully. I accepted that HMRC had publicised the changes to the legislation via its website and in bulletins sent to accountants. In my view, HMRC could not be criticised for failing to notify every person, whether affected or not by the changes, as to impose such a heavy burden would be disproportionate given the number of residents and taxpayers in the UK. There is no statutory obligation on HMRC to notify every person of a change in legislation and it is a long established principle that ignorance is no excuse; the onus rests with a taxpayer to ensure that he/she is aware of and complies with his or her tax obligations.

19. It was contended by Mr Shaw that HMRC have lost the Appellant's paperwork in support of his claim for repayment. Whether or not this is correct, the fact remains that the timing of the claim was not affected by this issue which occurred after the claim was made, and by which point was out of time.

20. The document from Mr Sheerman MP relied upon by the Appellant was vague and made no specific reference to the legislation upon which the assertion was based. In the absence of any alternative statutory provisions put forward to support the assertion that the Appellant feel within the category of "*many taxpayers*" for whom "*the new time limits will not come into effect until 1 April 2012*" I found as a fact that this referred to those outside of the Self Assessment regime and that the time limit of 1 April 2010 applied to the Appellant's case.

21. I noted that HMRC had allowed the Appellant's claims made in respect of the tax years 2006/07, 2007/08 and 2008/09. I heard no evidence as to the merits of the Appellant's claim and it should be noted that HMRC's refusal to allow the amendment for the 2005/06 return was based solely on the time limit applicable as opposed to the merits of his claim. It was clear that Mr Shaw had made every effort to assist the Appellant in correcting the 2005/06, 2006/07, 2007/08 and 2008/09 returns, all of which, save for 2005/06, had been amended. I was grateful to Mrs Newham who, having heard the background to the Appellant's case, offered to refer the case back for review by HMRC on the basis of care and management which would take into account the reasons why the amendment claim was made out of time and give

consideration to accepting what appears, on the evidence regarding the previous accountant's errors, to be a reasonable excuse. This is clearly a matter for HMRC but it seems to me that the proposed course of action may provide the Appellant with a fair and just outcome.

5 22. As to HMRC's use of its discretion, I respectfully agree with the comments of  
the Vice-Chancellor in *Steibelt v Paling*; the issue is left entirely with HMRC. In my  
view, there can be no unfairness or infringements of human rights as HMRC's  
exercise of discretion is capable of challenge by way of judicial review proceedings.  
10 The decision of HMRC as to whether or how to exercise its discretion is not,  
however, a matter which can be validly appealed to or reviewed by this Tribunal  
which has no jurisdiction over such matters.

23. I therefore must, and do, strike out this appeal.

24. 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  
15 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.

20

**J. BLEWITT**  
**TRIBUNAL JUDGE**

25

**RELEASE DATE: 7 November 2012**