



TC03272

Appeal number: TC/2013/00746

STRIKE OUT APPLICATION – matter previously heard and dismissed by the First-tier Tribunal – previous application for permission to appeal to the Upper Tribunal refused – abuse of process – strike out application allowed – permission to appeal the decision on the strike out application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WESTMINSTER COLLEGE OF COMPUTING LIMITED Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS Respondents**

**TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
CAROL DEBELL**

Sitting in public at Bedford Square, London WC1 on 4 December 2013

Mr Frans Khan for the Appellant

Mrs Lynne Ratnett, presenting Officer, for the Respondents

DECISION

Introduction

5 1. On 23 January 2013 the Birmingham Tax Tribunal received a Notice of Appeal dated 20 January 2013 on behalf of Westminster College of Computing Limited (“the Appellant”) signed by Dr A Arasilango, a Director of the Appellant. The Tribunal recorded the appeal under reference number TC/2013/00746.

10 2. The Notice of Appeal recorded that it was made against HMRC’s notice of conclusions of Review dated 8 June 2009. The latest date by which the appeal ought to have been made or notified was recorded as 7 July 2009. The Notice of Appeal seeks permission to appeal out of time and gives reasons for the late appeal. These are as follows:

15 *(1) The Director was sick for a long time and nobody else employed to carry out the work.*

(2) Not all the business records were available as the Metropolitan Police have ridiculously kept the documents without returning.

20 *(3) The Medical Certificate submitted to the tribunal for an application for the same was destroyed. Therefor the application must be considered again under Article 8 of Section 1 of the ECHR, there should be no interference by a public authority with the exercise of this right except such as in accordance with the law.*

3. On 3 May 2013 HMRC applied to have the appeal (TC/2013/00746) struck out. The grounds for that application are as follows—

25 (1) The First-tier Tribunal has already heard and given its decision in this matter (see *Westminster College of Computing Limited v HMRC* (TC/2010/08659) [2012] UKFTT 579 (TC)).

30 (2) The Appellant applied to the First-tier Tribunal for permission to appeal that previous decision and the Tribunal refused permission in a Decision Notice of 23 November 2012.

(3) The Appellant applied to the Upper Tribunal for permission to appeal the previous decision and on 14 January 2013 the Upper Tribunal refused permission.

35 4. With due respect to whatever arguments Mr Khan intended to advance to oppose HMRC’s application (as to which see further below), we noted at the hearing of the application that the matter was now closed and that this Tribunal has no power to consider it further. To the extent that it was necessary to do so (the Tribunal having recorded an appeal in its systems under TC/2013/00746) we therefore struck out the Appellant’s appeal. Mr Khan requested that we give full reasons for our decision.

40 5. On 31 December 2013 the Appellant applied for permission to appeal our decision to strike out its appeal. We deal with this application at the end of our decision.

The Tribunal's previous decision in this matter

6. The decision in *Westminster College of Computing Limited v HMRC* (TC/2010/08659) [2012] UKFTT 579 (TC) (“the First Decision”) concerned a decision by HMRC dated 13 October 2010. Paragraph [3] of the First Decision records, however, that at the beginning of the hearing Dr Arasilango applied for an extension of time to appeal HMRC’s decision of 8 June 2009. Mr Khan did not deny that this was the same decision as the Appellant is currently seeking to appeal under TC/2013/00746 and this is apparent because both the application made at the hearing of the First Decision and the current appeal concern a voluntary disclosure and claim for repayment of £400,681.

7. The Tribunal that made the First Decision (Judge Greg Sinfield and Tribunal Member Caroline De Albuquerque) dealt with the Appellant’s application as a preliminary matter and gave their decision on it at paragraphs [3] to [10] of the First Decision. At paragraph [10] they refused the application and gave their reasons for doing so.

8. The First-tier Tribunal subsequently refused the Appellant’s application to appeal the First Decision on 23 November 2012 and in a Decision Notice of 14 January 2013 the Upper Tribunal (Judge Timothy Herrington) refused permission on all grounds put forward by the Appellant. That Decision Notice specifically considers the refusal to allow the Appellant’s application to appeal out of time. It deals specifically with the allegation that is now repeated in the Notice of Appeal TC/2013/00746 that the medical certificate claimed to have been submitted at the hearing of the First Decision was destroyed by the usher on the instructions of Judge Sinfield. Judge Herrington records as follows—

“The College alleges that the judge asked the usher to destroy the medical certificate referred to above. The judge confirmed in the Decision Notice that neither he nor the member sitting with him recall any medical certificate being submitted or of asking for anything to be destroyed.”

9. Judge Herrington then goes on to consider the College’s allegation and its implications for its permission to appeal to the Upper Tribunal in paragraph [5] of his Decision Notice. He concludes that—

“I can therefore attach no credibility to the College’s contention and can find no arguable error of law on this point on the part of the First-tier Tribunal.”

10. This Tribunal would merely observe that if a medical certificate had been produced at the hearing of the First Decision, this Tribunal would ordinarily expect a copy to be given to HMRC or retained by the Appellant, so that even if the original had been destroyed inadvertently or otherwise, a copy might still be found (leaving aside any question as to the possibility of other records being available at the medical institution where the certificate was first issued). This Tribunal’s view of this matter is, however, irrelevant because it has been considered by the Upper Tribunal, which has given its decision, and this Tribunal is ordinarily bound by decisions of the Upper Tribunal.

11. Judge Herrington concludes in paragraph [6] of his Decision Notice that he can find no arguable error of law in the First Decision on the refusal to allow an appeal out of time. No appeal lies to this Tribunal against the First Decision or against the refusal of the Upper Tribunal to give permission to appeal the First Decision. In that respect that is the end of the matter.

The Appellant's grounds for resisting the strikeout application

12. The Appellant submitted a defence to HMRC's strike out application. We reviewed its defence but believe that we need only refer to a few of the grounds in contains specifically. The first two grounds are as follows—

10 (1) The appeal out of time is not final because the Appellant has appealed to the European Court of Human Rights. In support of this the Appellant submitted letters of 19 November 2012 and 30 January 2013 from the Strasbourg Court, the first enclosing an application form for completion and the second acknowledging receipt of a completed application form.

15 (2) The hearing of the First Decision was conducted erroneously and unfairly, in particular in not accepting the medical certificate and in subsequently having it destroyed.

13. As regards the second of these, we have previously dealt with this. As regards the reference to the Strasbourg Court, we do not have a copy of the completed application form but we are content to assume that it relates to the matters that arise out of the First Decision and/or the current Notice of Appeal. The problem, however, is that, notwithstanding what Mr Khan suggested regarding the application to the Strasbourg Court (that it would be necessary to show that the national court had reached a final decision on the relevant matter), a reference to that Court cannot confer jurisdiction on this Tribunal where none exists. The fact that the Appellant has now submitted an application to the Strasbourg Court is irrelevant to the considerations that led the First-tier Tribunal and the Upper Tribunal to reject the Appellant's previous application for permission to appeal out of time.

14. The remaining grounds of defence make various allegations of discrimination and error against the Judges Sinfield and Herrington in relation to the First Decision and the decision to refuse the application for permission to appeal. One particular point is that Judge Herrington's Decision Notice refers to the First Decision as having a reference number TC/2011/05025, whereas the actual reference number was TC/2010/08659. Whatever the origins of this 'error', it cannot detract from the fact that Judge Herrington's Decision Notice addresses the correct decision. He deals specifically with the matters raised in the First Decision, Dr Arisilango's contentions about the medical certificate and the First-tier Tribunal's reasons for refusing the Appellant permission to appeal out of time.

Our decision

40 15. A taxpayer's right to appeal decisions or other actions of HMRC in relation to their tax affairs are laid down by statute and the relevant time limits for exercising those rights are prescribed. Similarly this Tribunal is a creation of statute and only has the jurisdiction and powers prescribed by statute.

16. The Appellant had the right to appeal HMRC's conclusions on review at any time up to 7 July 2009 and thereafter only with the permission of this Tribunal. The Appellant failed to exercise its right within the prescribed time and accordingly sought permission of this Tribunal to appeal out of time. This Tribunal refused the Appellant's application and the Appellant sought and was refused permission to appeal that decision by both the First-tier and Upper Tribunals. The legislation permits no further right of appeal and confers no further jurisdiction, power or discretion on this Tribunal.

17. The Appellant cannot confer jurisdiction on this Tribunal to hear his appeal by the simple expedient of submitting a further Notice of Appeal in respect of the same matter and having it recorded by the Tribunal Administration under a particular reference number. The recording of the Appeal Notice is a necessary administrative act by the Tribunal in dealing with the papers that it receives. The Appellant's attempt to resurrect its appeal in this way is clearly an abuse of process.

18. In this respect it is not clear to this Tribunal whether in these circumstances it is in fact necessary for this Tribunal formally to exercise its powers to strike out appeal TC/2013/00746 under Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Once it has been drawn to the Tribunal's attention that it has recorded as a new appeal a matter that has in fact been subject to a previous appeal and a decision on that previous appeal by the Tribunal, it may be that the Tribunal, as an administrative matter, can just delete the appeal from its systems and notify the parties accordingly.

19. We make no decision to that effect because whether or not it is correct, Rule 8(2)(a) of the Tribunal Rules states that the Tribunal must strike out the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings. We are satisfied that we have no jurisdiction in appeal TC/2013/00746 and therefore must strike it out. The Appellant's grounds of defence offer no substantive reason against that course and Mr Khan was unable to suggest any further reasons beyond the point which we record below in relation to the application for permission to appeal our decision.

20. For completeness we note that Rule 5(3)(k) gives this Tribunal power in certain cases to transfer proceedings to another tribunal if that other tribunal has jurisdiction. We are satisfied that this is not a relevant case (a loss of jurisdiction due to a change in circumstances) and that, in any event, no other tribunal has jurisdiction in this matter. Finally, as we noted in paragraph 13, the reference to the Strasbourg Court cannot confer jurisdiction on this Tribunal where none exists.

21. We therefore allow HMRC's application and strike out the Appellant's appeal.

Our decision on the Appellant's application to appeal our decision

22. The previous paragraphs contain full findings of fact and reasons for our decision. It is customary at this stage to state that any party dissatisfied with the 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. As noted, however, the Appellant has already submitted an application for permission to appeal.

23. The relevant ground upon which permission is sought is as follows—

5 “The Appellant did not submit any Notice of Appeal for the voluntary disclosure dated 16/03/2009 with the amount of £400,681.00 and for the period from 11/05 to 11/07 prior to 20/01/2013. ... Because of the matter related to the voluntary disclosure for the amount of £400,681.00 was never been heard at the tribunal, there was no jurisdiction to strike out the Notice of Appeal dated 20/01/2013 (TC/2013/00746) by the judge on 04th December 2013.”

10 24. This corresponds to the point that we understood Mr Khan to make, namely that there has been no substantive consideration by this Tribunal of the voluntary disclosure of £400,681 that was the subject of HMRC’s notice of conclusions of Review of 8 June 2009. On that basis, appeal TC/2013/00746 is a new appeal and should be heard.

15 25. The Notice of Appeal TC/2013/00746, however, necessarily includes an application for permission to appeal outside the relevant time limit. The appeal against the Review decision of 8 June 2009 depends upon that application and that application has been heard and decided against the Appellant. Without that permission the Appellant has no appeal right and this Tribunal has no jurisdiction to hear its appeal. Permission has been refused once and that is the end of the matter.

20 26. Rule 40 of the Tribunal Rules requires that on an application for permission to appeal the Tribunal must first consider whether to review its decision in accordance with Rule 41. We have done so and have decided not to review our decision. We have further considered whether to give permission to appeal. We are satisfied that for the reasons given there is no error of law in our decision and that the Appellant’s application for permission to appeal is refused.

25 27. If the Appellant is dissatisfied with the outcome of its application for permission to appeal the decision in this appeal, it has a right to apply to the Upper Tribunal for permission to appeal the decision in this appeal. Such an application must be made in writing to the Upper Tribunal at 45 Bedford Square London WC1B 3DN no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber)*.

35 **MALCOLM GAMMIE**
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2014