



**TC04599**

**Appeal number: TC/2014/05665**

*PROCEDURE – application to strike out appeals – appeals against notice of amendments during progress of enquiry – s 9C TMA – right to notify appeal to tribunal – TMA, s 31 and 49A – whether enquiries for relevant years had been completed – closure notice – tribunal jurisdiction – whether appeals in respect of appealable matters should be struck out because a takings build up exercise for an open year had not been completed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS ELSA BARUELA**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ROGER BERNER**

**Sitting in public at Fox Court, London WC2 on 25 August 2015**

**Mr John Brierley, the Appellant's husband, for the Appellant**

**Mr Tony O'Grady, HMRC presenting officer, for the Respondents**

## DECISION

5 1. This is my decision in relation to HMRC's application to strike out six appeals made by the Appellant, Mrs Baruela.

2. The appeals can usefully be divided into two categories:

(1) Tax years 2005-06, 2006-07, 2007-08 and 2008-09. These are tax years for which "jeopardy amendments" have been issued under s 9C(2) of the Taxes Management Act 1970 ("TMA").

10 (2) Tax years 2009-10 and 2011-12. For 2009-10 there has been a discovery assessment under s 29 TMA; for 2011-12 the enquiry into Mrs Baruela's self assessment for that year has been closed by a closure notice under s 28A TMA.

15 3. For completeness I should mention that tax year 2010-11 is not the subject of any appeal. For that tax year there has been a determination under s 28C TMA, in respect of which there is no right of appeal.

### **Appeals against jeopardy amendments**

4. The issue in respect of the jeopardy amendments under s 9C TMA is one of jurisdiction. Does this Tribunal have jurisdiction in respect of the appeals which have been made by Mrs Baruela in that respect?

20 5. The right to notify an appeal to the Tribunal from an amendment to a self assessment under s 9C is governed by s 31 TMA, and s 49A TMA, which materially provide:

#### *Section 31*

(1) An appeal may be brought against—

25 (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),

...

30 (2) If an appeal under subsection (1)(a) above against an amendment of a self-assessment is made while an enquiry is in progress none of the steps mentioned in section 49A(2)(a) to (c) may be taken in relation to the appeal until the enquiry is completed.

...

#### *Section 49A*

(1) This section applies if notice of appeal has been given to HMRC.

35 (2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

- (b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
- (c) the appellant may notify the appeal to the tribunal (see section 49D).

5 ...

6. The question in this respect therefore resolves itself into whether the enquiries in relation to each of the four tax years in question have been completed. That depends on the application of s 28A TMA, which provides:

- 10 (1) An enquiry under section 9A(1) ... of this Act is completed when an officer of the Board by notice (a “closure notice”) informs the taxpayer that he has completed his enquiries and states his conclusions. In this section “the taxpayer” means the person to whom notice of enquiry was given.
- 15 (2) A closure notice must either—
  - (a) state that in the officer's opinion no amendment of the return is required, or
  - (b) make the amendments of the return required to give effect to his conclusions.
- 20 (3) A closure notice takes effect when it is issued.
- (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.
- (5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).
- 25 (6) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.

7. It was HMRC’s case, put by Mr O’Grady, that there had been no closure notice in respect of any of the four years in question.

30 8. Mr Brierley, who made submissions on behalf of his wife, Mrs Baruela, argued that it was clear that the enquiries for those years were closed. He relied on two factors which he submitted, when viewed in combination, showed that the enquiries had been closed.

35 9. The first line of argument concerned enforcement proceedings taken by HMRC. I was told that there had been a claim issued in the Northampton County Court on 13 June 2015, and subsequent judgment for £444,514.80 (although I understand there has been, or is to be, a reduction in that amount). That judgment is the subject of an application to appeal it. In addition, HMRC had on 24 July 2014 and again on 11 December 2014 issued letters warning of bankruptcy action. These enforcement  
40 proceedings showed, argued Mr Brierley, that the enquiries had been closed.

10. I do not agree. The matter of enforcement does not depend on closure of an enquiry. Tax that arises as a consequence of an amendment under s 9C TMA is payable 30 days after the date of notice of amendment (see s 59B(5) TMA). As a s 9C amendment can only be made in the course of an enquiry, and before it is closed,  
5 that shows that the payment date, and consequent ability of HMRC to enforce that payment obligation, is not dependent upon the enquiry being closed. Accordingly, the fact of enforcement action does not show that the enquiries have been closed.

11. The second line of argument turned on the terms of a letter written by HMRC to Mrs Baruela on 16 June 2014. The material part of that letter is as follows:

10 “I enclose a copy of the letter I sent you on the 6 March 2013, which provides details of the amendments issued for the years 2005/06, 2006/07, 2007/08 and 2008/09, the 2009/10 assessment and the opening and closure notices for the year 2011/12. The appropriate notices have therefore been issued for all relevant years and are  
15 therefore deemed to have been closed.”

12. Mr Brierley argued that this statement, made by the HMRC case worker dealing with the relevant matters, proved beyond doubt that the enquiries had been completed.

13. Again, I cannot agree. In my judgment the letter of 16 June 2014 cannot itself be a closure notice, as it does not meet the requirements of s 28A TMA. Although it  
20 contains a statement that “all relevant years are deemed closed”, that is not enough. The letter does not state any conclusions; nor does it make any amendments.

14. The statement regarding closure is not an operative statement in its own right. It is by way of information (as it turns out, and unfortunately, misinformation to some extent) as to the effect of the earlier notices issued on 6 March 2013. It is nothing  
25 more than a commentary on the effect of those earlier notices. It could not therefore operate as a closure notice itself. It is only if those other notices constituted closure notices that enquiries could be regarded as closed under s 28A TMA.

15. The relevant notices issued on 6 March 2013 were clearly, according to their terms, notices of amendment under s 9C TMA, and not closure notices under s 28A.  
30 The letter of 16 June 2014 could not convert those letters into closure notices. The statement as to the deemed effect of the 6 March 2013 notices was simply wrong. There is, as a matter of law, no deemed closure of those years by reason of the issue of the jeopardy amendments. As s 9C itself makes clear, such a notice of amendment must, by definition, arise in the course of an enquiry. It cannot therefore itself close  
35 an enquiry. To have that effect the notice must be a closure notice within the meaning of s28A. In this case, for tax years 2005-06 through to 2008-09, there has been no such closure notice.

16. This means that there is no right to notify appeals to the Tribunal against the jeopardy assessments under s 9C. Such an appeal right can arise only after the  
40 enquiry is completed: see s 31(2) TMA. By its nature a jeopardy amendment under s 9C is made during the progress of an enquiry, and s 31(2) provides that in such a case “none of the steps mentioned in section 49(2)(a) to (c) may be taken until the enquiry

is completed”. Those steps include, crucially, the right of an appellant to notify the appeal to the Tribunal.

17. As there is no current right of appeal to the Tribunal in relation to the tax years 2005-06 through to 2008-09, the Tribunal has no jurisdiction in relation to those  
5 appeals. That means that, under Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”), the appeals in relation to those years *must* be struck out. That is mandatory under the Tribunal Rules; the Tribunal has no discretion.

### **Appeals in respect of 2009-10 and 2011-12**

10 18. I now turn to consider the application to strike out Mrs Baruela’s appeals in respect of 2009-10, which is an appeal against a discovery assessment, and 2011-12, where there has been a closure notice, and an amendment made to the self assessment by that closure notice.

15 19. In each case it is accepted by HMRC that Mrs Baruela has a right of appeal, and that this Tribunal has jurisdiction in respect of such appeals. It is nonetheless argued that these appeals too should be struck out. The ground is that these appeals cannot be heard in isolation from tax year 2008-09, for which there is (as I have concluded) an open enquiry and which is the year of assessment for which a “takings build-up exercise” is in the course of being carried out by HMRC. The argument, as Mr  
20 O’Grady put it, is that it is either impossible for those appeals to be dealt with in isolation, or at least too difficult.

20. That, however, is no basis for a striking out of these appeals. Striking out is a draconian remedy, generally available only in the circumstances described by Rule 8 of the Tribunal Rules. Other than in relation to jurisdiction, which is accepted in  
25 these particular cases, the circumstances where an appeal may be struck out relate to compliance failures or where an appellant’s case has no reasonable prospect of success. Neither circumstance applies here. There can be no strike out purely on the basis of convenience.

21. These appeals in respect of 2009-10 and 2011-12 will not therefore be struck  
30 out. Nor do I consider that there is any justification for a stay of the appeals. If HMRC issue discovery assessments and/or closure notices in respect of a particular year of assessment, they must do so on the basis that the assessments or amendments are regarded as properly made and are able to be defended on appeal. A taxpayer must have a right to appeal those assessments and amendments as made, and it would  
35 not in my judgment be in the interests of justice for proceedings in the Tribunal to be delayed because there might be further appeals in the future once enquiries into another year, or other years, have been completed.

22. The fact is that, for each of the tax years 2009-10 and 2011-12, appealable  
40 decisions have been made, and there are valid appeals before the Tribunal. Those appeals should be progressed in the usual manner, and I shall make an appropriate direction for HMRC to serve and file a statement of case in respect of those appeals.

### **Decision**

23. The appeals in respect of the amendments to Mrs Baruela's self assessments for tax years 2005-06, 2006-07, 2007-08 and 2008-09 made pursuant to s 9C TMA are struck out.

- 5 24. The application of the HMRC to strike out the appeals in respect of the discovery assessment for tax year 2009-10 and the amendments made by the closure notice in relation to tax year 2011-12 is refused.

### **Direction**

- 10 25. Not later than 19 October 2015 HMRC shall serve and file their statement of case in the appeals in respect of the discovery assessment for tax year 2009-10 and the amendments made by the closure notice in relation to tax year 2011-12.

### **Application for permission to appeal**

- 15 26. 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.

20

**ROGER BERNER  
TRIBUNAL JUDGE**

25

**RELEASE DATE: 27 August 2015**