TC05113

Appeal number: TC/2013/00993

PROCEDURE – Notice of appeal given by appellant – appellant subsequently withdrew its "case" under rule 17 Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 – Effect of s 54 Taxes Management Act 1970 – Whether proceedings still in existence – No

FIRST-TIER TRIBUNAL
TAX CHAMBER

C M UTILITIES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Centre City Tower, Birmingham on 13 May 2016

The Appellant did not appear and was not represented

Richard Vallat, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. C M Utilities Limited (the "Company") was one of 1,171 participants in a disclosed marketed employee and business benefit trusts tax avoidance scheme. However, it is not necessary, for the purposes of this decision, to describe the operation of the scheme which HM Revenue and Customs ("HMRC") estimate has put £472m tax "at risk".

2. Between February 2012 and October 2013 HMRC issued the Company with determinations under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and decisions under s 8 of the Social Security (Transfer of Functions etc) Act 1999 in respect of PAYE income tax and primary and secondary Class 1 NICs on earnings on the Company's directors and/or employees for 2007-08, 2008-09 and 2009-10 which, in total, amounted to £537,102.05. In addition, as a result of the denial by HMRC of deductions claimed for contributions to the employee and business benefit trusts, on 14 February 2011 HMRC issued a "discovery" assessment resulting in an increase in corporation tax due of £163,750. On 14 May 2014 closure notices were issued for the accounting periods ending 31 March 2009 and 31 March 2010 resulting in increases of corporation tax of £148,750 and £128,193.10 respectively.

3. The Company appealed to the Tribunal against the Regulation 80 determination and s 8 decision for 2008-08 on 1 February 2013; the corporation tax "discovery" assessment and the 2008-09 and 2009-10 determinations and decisions on 21 August 2014; and the closure notices on 12 September 2014. The three appeals were consolidated by directions of the Tribunal issued on 21 November 2014.

4. In compliance with those directions HMRC provided a "combined" Statement of Case to the Company and Tribunal on 20 January 2015. Paragraph 48 of that Statement of Case says:

> Owing to an insufficiency of information at the time, the Regulation 80 determinations and s 8 decisions for 2007-08 and 2009-10 are not in the amounts that reflect the Respondents' case as presently pleaded. The Respondents informed the Appellant of the amount of PAYE income tax and NICs they consider due for those years in a letter dated 8 May 2014, being PAYE income tax of £344,207.74 and NICs of £124,733.43 for 2007-08 and PAYE income tax of £217,384.40 and NICs of £76,861.95 for 2009-10. The Respondents will ask the Tribunal to determine the appeals in those amounts [totalling £763,187.52].

5. The Tribunal issued further directions for the progress of the appeal on 26 June 2015 but the Company failed to comply producing neither witness statements, listing information nor complete bundle of documents. On 4 September 2015, the Company's representatives made an application for an extension of time in order to comply with these directions. This application was opposed by HMRC who applied to have the appeal struck out.

6. A hearing to determine these matters was listed for 18 January 2016. On 14 January 2016 the Company's representative wrote to the Tribunal as follows:

> We refer to the hearing scheduled for 18 January 2016 before the First-tier Tax Tribunal.
>
> For the reasons set out below the appellant cannot continue with its appeals. Essentially it is in no position to pay the assessments if the Respondents succeed in defeating the appeals therefore the appellant has no wish to waste the time on the Tribunal
>
> 1. The appellant ceased to trade on 24 November 2015. This decision followed the receipt of an APN relating to an avoidance scheme unconnected with the appeals which are the subject of the hearing next week. No representations are to be made concerning the APN.
>
> 2. The directors were advised that the appellant could not continue to trade while insolvent and have acted accordingly.
>
> 3. The bank account of the appellant s frozen but is in the process of being released. Having carefully considered the position of the appellant the directors have decided to pay the entire cash balance (circa £60,000) to HMRC on account of its liabilities. The appellant has no other assets. The appellant has communicated this decision to HMRC Debt Management Unit. The directors took this decision so as to try and avoid significant liquidation costs resulting in less to HMRC.
>
> In view of the above please accept this letter as the formal withdrawal of the appeals. We will send a copy of this letter to the Tribunal.

7. The Tribunal, in letters dated 15 January 2016, wrote to the parties acknowledging receipt of the withdrawal of the Company's appeal and notifying HMRC that the appeal had been withdrawn. HMRC responded by email, dated 18 January 2016, which was sent to the appellant's representative and the Tribunal, making the following points:

> (1) That although the appellant has the right, under rule 17 of the Tribunal Procedure (First-tier)(Tax Chamber) Rules 2009 (the "Procedure Rules"), to withdraw its appeal that withdrawal is limited to its case and accordingly HMRC's case remains unchallenged before the Tribunal and should stand as stated; and
>
> (2) Referring to paragraph 48 of the Statement of Case (see paragraph 4, above) and noting that "at no point has the appellant objected … [or] made any representation" in relation to it as the Company has withdrawn its case, and "these amounts are unchallenged" and "are therefore due and payable" HMRC will not accept the Company's withdrawal unless and until either:
>
> > (a) the Company enters into an agreement with HMRC under s 54 of the Taxes Management Act 1970 ("TMA") that such an amount is owed; or

> (b) the Tribunal, under rule 29 of the Procedure Rules [determination with or without a hearing], makes a decision disposing of the proceedings by upholding the amounts of tax and NICS as stated in paragraph 48 of the Statement of Case.

8. In an email to HMRC, dated 31 January 2016, it was stated on behalf of the Company that it "did not intend to make any admissions as to the PAYE and NIC position" and that in withdrawing the appeals it "made no admission as to liability, just that it is in no financial position to defend itself". As a result HMRC in an email, dated 11 February 2016, invited the Tribunal "to dismiss the appeal and raise the assessments as set out in HMRC's Statement of Case". HMRC further clarified its position in a letter of 23 February 2016 to the Tribunal.

9. This hearing was therefore listed to consider the effect of a withdrawal by an appellant of its case under rule 17 of the Procedure Rules request, in particular whether, notwithstanding the Company's withdrawal of its "case" the "proceedings" remained extant.

Absence of Appellant

10. Although Mr Richard Vallat of counsel appeared on behalf of HMRC the Company was not represented. However, as its representative had responded to the Notice of Hearing (sent to it by the Tribunal on 21 April 2016) on 5 May 2016 stating that it would not be attending, I was satisfied that it had been notified of the hearing and, as it was in the interests of justice to do so, proceeded in the Company's absence in accordance with rule 33 of the Procedure Rules.

Statutory Provisions

11. Despite there being a statutory provision for the notification of an appeal to the Tribunal, s 49D TMA, there is no equivalent provision with regard to its withdrawal. In fact, the only reference to "withdrawal" is contained in rule 17 of the Procedure Rules which, insofar as it applies to the present case, provides:

> (1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—
>
> (a) by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) …
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

12. It is accepted that the only provisions in an enactment relevant to this appeal to which rule 17 is "subject", are s 54 TMA (for tax purposes) and Regulation 11 of the Social Security (Decisions and Appeals) Regulations 1999 (for NIC purposes). As

Regulation 11 effectively mirrors s 54 TMA it is only necessary to set out and refer to the parts of s 54 TMA relevant to this case, which provide:

> **54 Settling of appeals by agreement**
>
> (1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.
>
> (2) …
>
> (3) …
>
> (4) Where—
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> (a) a person who has given a notice of appeal notifies the inspector or other proper officer of the Crown, whether orally or in writing, that he desires not to proceed with the appeal; and
>
> (b) thirty days have elapsed since the giving of the notification without the inspector or other proper officer giving to the appellant notice in writing indicating that he is unwilling that the appeal should be treated as withdrawn,
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> the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and the inspector or other proper officer had come to an agreement, orally or in writing, as the case may be, that the assessment or decision under appeal should be upheld without variation.

13. Section s 50 TMA, which by virtue of Regulation 80(5) of the Income Tax (Pay As You Earn) Regulations 2003 also applies to PAYE determinations, provides:

> **50 Procedure**
>
> (1) – (5) …
>
> (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged to tax by a self-assessment.
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides

> (a) that the appellant is undercharged to tax by a self-assessment
>
> (b) that any amounts contained in a partnership statement are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.

Regulation 10 of the Social Security (Decisions and Appeals) Regulations 1999 makes similar provision for the amount to be varied in relation to an appealed NIC decision.

Discussion and Conclusion

14. It is accepted that as the Company has withdrawn its "case" under rule 17 of the Procedure Rules and, is a "person who has given a notice of appeal" that has given notice that it "desires not to proceed with the appeal", s 54(4)(a) TMA is applicable.

15. It is also accepted that if HMRC had not given notice within 30 days that it was "unwilling to accept that the appeal should be treated as withdrawn" the parties would have been treated as though they had come to an agreement under s 54(1) TMA with all that entails, ie the appeal would be treated as though it had been determined by Tribunal. But where, as in this case, HMRC did give notice that it was unwilling to accept the appeal be treated as withdrawn, although s 54(4) TMA is silent as to the effect of such notice, it is clear that there cannot be an agreement under s 54(1) TMA and, as such, in the absence of an appeal the original assessment must stand.

16. However, Mr Vallat goes further, contending that s 54(4) TMA confirms that a taxpayer who has given notice of appeal cannot unilaterally withdraw it. He draws attention to the reference to the withdrawal of a "case" under rule 17 of the Procedure Rules which he submits does not amount to the withdrawal of the underlying appeal or withdraw it from the jurisdiction of the Tribunal or otherwise allow a taxpayer to avoid the risk that "if he pursues the appeal it may be the worse for him". He also contends an appellant that has withdrawn its case is in the same position as a respondent who is barred from taking any further part in proceedings under rule 8 of the Procedure Rules.

17. In either case, he says, the Tribunal not only has the jurisdiction but the duty to determine the appeal in accordance with s 50(7) TMA and Regulation 10 of the Social Security (Decisions and Appeals) Regulations 1999 and increase amounts under the PAYE determinations and NIC decisions accordingly.

18. To support his submissions Mr Vallat relies on *R v Income Tax Special Commissioner (ex p Elmhirst*) [1936] 1 KB 487 in which Lord Hewart CJ in the Divisional Court considered whether the Special Commissioners had been correct to refuse to allow the withdrawal of an appeal against an additional assessment made under the Income Tax Act 1918. At 489 he said:

> "In my view, it is quite plain on the wording of these sections [of the 1918 Act] that the fact that an appeal had been started makes it obligatory on the [Special] Commissioners to take steps, not merely or even primarily in the interest of the person appealing, but in pursuance of the duty imposed on them in the interest of the general body of the taxpayers, to ascertain what the true assessment ought to have been. That process, directed to public needs, cannot be stopped by the whim of an appellant who, perhaps, begins to realize that, if he pursues his appeal, it may be the worse for him. The matter has passed out of his hands after he has given notice of appeal. By that notice he gives the [Special] Commissioners not only the opportunity, but also the duty, of performing a public task which may have a result of a character entirely opposite to that which he anticipated when he gave the notice to appeal."

19. Mr Vallat contends that the position in *Elmhirst* survived the transfer of functions from the Special Commissioners to the Tax Chamber of First-tier Tribunal under the Tribunals, Courts and Enforcement Act 2007 and Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009. He relies on the comments of Henderson J in *Tower MCashback LLP1 and another v HMRC* [2008] STC 3366 which were approved by Lord Walker of Gestinghorpe JSC in the decision of the Supreme Court in that case (reported at [2011] 2 AC 457) who said, at [15]:

> "… He [Henderson J] also observed (again, in my view, entirely correctly), at paras 115-116:
>
> > "115. There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest. [The judge then considered changes in the tax system and continued] …
> >
> > 116. …"

20. However, in order to properly consider Mr Vallat's argument that the position in *Elmhirst* survived the transfer to the Tribunal it is necessary to consider what Henderson J said at [115] of his decision rather than rely on "The judge then considered changes in the tax system and continued" in Lord Walker's square brackets, which was:

> "This principle [that there is a public interest in taxpayers paying the correct amount of tax] finds expression in cases such as *R v Income Tax Special Commissioners, ex parte Elmhirst* [1936] 1KB 487 (CA), and in the need for special legislation (now contained in section 54 of TMA 1970) to enable tax appeals to be settled by agreement between the parties without the need for a hearing. The precise nature and scope of this principle in the 21st century is a controversial topic, having regard in particular to changes which have taken place over the years in the functions of the General and Special Commissioners, and to the introduction in 1994 of procedural rules regulating appeals to both tribunals. Furthermore, the whole question may become academic

> when appeals to the Commissioners are replaced next year by appeals to the new Tax Tribunal."

21. Describing the role of the Special Commissioners in 1936, Lord Wright MR, in the Court of Appeal in *Elmhirst*, (on the appeal from the Divisional Court) said, at 493:

> "… the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter partes; they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed."

He continued, referring to following the "very short passage" in *Inland Revenue Commissioners v Sneath* [1932] 2 KB 362 where Romer LJ said at 390-91:

> "The duty of the Commissioners, as I read the provisions of the Income Tax Acts, is to form an estimate in each year of assessment of the amount of the income of the taxpayer on which the surtax imposed for that year is to be charged. For this purpose the taxpayer is required to make a return of his income from all sources as defined by s. 5 of the Income Tax Act, 1918. With this to guide them, the Special Commissioners have then to form their own estimate of the total income and to make an assessment accordingly. If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax."

22. The functions of the Commissioners as an appellate body and those of an inspector of taxes as the officer responsible for making assessments were separated in 1964. Further changes occurred in 1994 when procedural rules were introduced by the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 and General Commissioners (Jurisdiction and Procedure) Regulations 1994, although neither had provision for the withdrawal of a case. The Commissioners were abolished in April 2009 as a result of the reforms implemented by the Tribunals Courts and Enforcement Act 2007 and their functions transferred to the Tax Chamber of the First-tier Tribunal under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

23. The current position in relation to appeal proceedings is therefore quite different from that at the time of *Elmhirst* and, in contrast to a Special Commissioner then, a

Tribunal Judge in a tax appeal is clearly "in the position of a judge deciding an issue between two particular parties", a taxpayer and HMRC, in an adversarial process with its practice and procedure governed by the Procedure Rules which, unlike the procedural rules of the Special and General Commissioners, does have a specific provision, in rule 17, relating to withdrawal.

24. Given these significant changes I do not accept Mr Vallat's submission that *Tower MCashback*, itself an appeal from the Special Commissioner, can be regarded as authority for the proposition that the principle in *Elmhirst* has survived and that the appeal process once commenced "cannot be stopped by the whim of an appellant". Rule 17 of the Procedure Rules clearly envisages that an appellant, as a party, may unilaterally withdraw its case without any provision for the other party to apply for that appeal to be reinstated. This may be contrasted with Part 38.4 of the Civil Procedure Rules which does allow a party to apply for reinstatement of a claim that has been discontinued by the other party.

25. Moreover, the ability of a party to withdraw its case is not inconsistent with the "venerable principle of tax law", to which Henderson J referred and Lord Walker endorsed in *Tower MCashback*, (ie "that there is public interest in taxpayers paying the correct amount of tax") to which the Tribunal has a duty to have regard in the application of s 50(6) or (7) TMA. This is apparent from a VAT context where, notwithstanding the provision in rule 16 of the Value Added Tax Tribunal Rules 1986 which permitted an appellant to "withdraw his appeal or application", Carnwath LJ (as he then was), giving guidance to the Tribunal on its approach when faced an appeal against a VAT "best judgment" assessment in *Pegasus Birds Ltd v HMRC* [2004] STC 1509 said, at [38]:

> "The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer."

26. The effect of the withdrawal of a case by an appellant under rule 17 of the Procedure Rules was considered by the Tribunal in *Orchid Properties v HMRC* [2012] UKFTT 651 (TC). As Judge Sinfield recognised, at [1], that case concerned:

> "… an unusual application. The Respondents ("HMRC") applied to the Tribunal to set aside the withdrawal of an appeal by Orchid Properties ("Orchid"). Orchid opposed the application despite the fact that, by withdrawing its appeal, Orchid became liable to pay an amount of tax which Orchid maintains is not due. Orchid had withdrawn its appeal following receipt of an amended statement of case ("the Amended SoC") from HMRC which stated that the tax in dispute was much less than previously discussed between the parties. Orchid claims that, by virtue of section 54 of the Taxes Management Act 1970 ("TMA"), the amount of tax now payable to HMRC is the amount set out in the Amended SoC. HMRC disagree: they maintain that the disputed tax was understated in error and, if the appeal is not reinstated, Orchid is liable to pay the amount of tax which was originally subject to appeal."

27. After observing, at [25] that a withdrawal under rule 17 of the Procedure Rules:

> "…does not require any decision by the Tribunal and, indeed, the Tribunal cannot do anything other than accept a withdrawal if it is validly made."

and at [31] that:

> "The Amended SoC was … was part of the pleadings in the appeal and did not invite any acceptance by Orchid but was predicated on the existence of a dispute between the parties."

Judge Sinfield went on to dismiss HMRC's application for the appeal to be reinstated. He also concluded, at [32], that:

> "… there was no agreement under section 54(1) of the TMA to settle the appeal. As a consequence of withdrawing the appeal in the absence of an agreement, Orchid has made itself liable to pay the tax due on the basis of HMRC's alternative argument [ie the decision originally subject to appeal] with no opportunity to appeal against that decision."

28. Although it is possible to distinguish *Orchid* on the facts as, unlike the present case, HMRC did not object to the withdrawal by Orchid of its case under rule 17 of the Procedure Rules, the finding by Judge Sinfield that in the absence of an agreement under s 54(1) TMA the original decision appealed against stood is, in my judgment, clearly applicable to the present case where the Company has withdrawn its case, under Rule 17 of the Procedure Rules, and where, albeit by reason of HMRC's objection to that withdrawal, there is no agreement under s 54(1) TMA.

29. Although Mr Vallat relies on the fact that rule 17 of the Procedure Rules refers to the withdrawal of a party's "case" as opposed to an "appeal" it is clear from the decision in *Orchid*, and *Vaultdown Ltd and others v HMRC* [2015] UKFTT 383 (TC) to which he refers in his skeleton argument, that such a distinction carries little, if any, significance in the context of a withdrawal, where the withdrawal of a case by one party brings the proceedings to a close on the basis of the position applying before the proceedings commenced as though its claim had failed.

30. Such a situation is manifestly different from that of a respondent barred from taking further part in proceedings under rule 8 of the Procedure Rules, the parts of which are relevant to this case provide:

> **8 Striking out a party's case**
>
> (1) – (6) …
>
> (7) This rule applies to a respondent as it applies to an appellant except that—
>
> (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and
>
> (b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

> (8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

31. It is clear from its terms, in particular rule 8(8), that rule 8 of the Procedure Rules envisages a continuation of proceedings, albeit with one party barred from taking part and against which the Tribunal may summarily determine any or all issues. In contrast, the withdrawal by a party or the striking out of its case disposes of the proceedings.

32. Therefore, as in *Orchid* I am not able do anything other than accept that a withdrawal has taken place and accordingly cannot accede to HMRC's request to increase the determinations and decisions in line with the revised figures in paragraph 48 of the Statement of Case.

Right to apply for Permission to Appeal

33. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 23 MAY 2016