



[2021] UKFTT 0273 (TC)

TC08218

INCOME TAX – Pensions saving lifetime allowance – Fixed protection 2012 – Additional contributions made after April 2012 – Application to strike out - Whether there is an appealable decision – Held no – If there were an appealable decision, does tribunal have jurisdiction – Held no - appeal struck out.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

APPEAL NUMBER: TC/2020/01804

BETWEEN

MR JONATHAN GOUGH

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KELVAN SWINNERTON
ANN CHRISTIAN**

The hearing took place on 17 June 2021. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform. A face-to-face hearing was not held because of the ongoing Covid 19 pandemic and the related restrictions. The documentation to which we were referred was a bundle of 27 pages and a generic bundle including legislation and case law of 56 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Gough, the Appellant, in person with Mr Mark Ashton of Lancaster Haskins Limited.

Mr Kevin Brooke, HMRC Officer, and Mr Gary Cruddas in attendance for the Respondents.

DECISION

INTRODUCTION

1. This is an application by the Respondent to strike out the proceedings under Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2020 (“the FTT Rules”) in respect of an appeal brought by the Appellant, Mr Jonathan Gough.
2. The Appellant appeals against the refusal of HMRC to reinstate the Certificate for fixed protection 2012 of the Appellant.
3. The first year of application of the lifetime allowance was 2006-7. The value of benefits paid out of registered pension schemes in excess of the lifetime allowance is subject to a lifetime allowance charge.
4. In 2006-7, the lifetime allowance was £1.5 million. It was gradually increased thereafter. In 2010-11, it was £1.8 million. It was then reduced to £1.5 million with effect from 6 April 2012.
5. Fixed Protection was designed to protect pension savers who had already accrued pension savings in the expectation that the lifetime allowance would be at least £1.8 million at the time when the lifetime allowance was reduced to £1.5 million. It did so by reducing or eliminating liability to the lifetime allowance charge in accordance with paragraph 14, Schedule 18 Finance Act 2011.
6. One of the conditions of Fixed Protection was that there was no further benefit accrual after 5 April 2012.

THE FACTS

7. The following facts are not in dispute between the parties.
8. The Appellant is a director and 50% shareholder of a successful group of building contracting companies.
9. Lancaster Haskins Limited (“LH”) is the agent of the Appellant and deals with the payroll of the group of companies of which the Appellant is a director and shareholder.
10. In 1987, the Appellant commenced contributing to a Retirement Benefits Scheme. From 1987, employer contributions of £1000 per annum were made to the Retirement Benefits Scheme for 5 years and monthly employee contributions of £66.35 were made by the Appellant from 6 April 1988.
11. In March 2012, the Appellant made an election for Fixed Protection against a lifetime allowance charge.
12. On or about 26 March 2012, the Appellant advised LH that he had applied for fixed protection of his lifetime allowance such that no further pension contributions should be made for him.
13. A Certificate for Fixed Protection (reference number 8018049R) dated 24 April 2012 was issued to the Appellant. That Certificate (“the 2012 Certificate”) stated that the lifetime allowance of the Appellant was the greater of £1.8 million or the standard lifetime allowance. The fixed protection was valid from 6 April 2012.
14. The 2012 Certificate stated that the lifetime allowance of the Appellant would remain at that level where he continues to meet the conditions for fixed protection referred to at note 2 of the 2012 Certificate. Note 2 of the 2012 Certificate references paragraph 14, Schedule 18 Finance Act 2011.

15. On 20 November 2013, LH advised HMRC that during an audit of the group of companies of which the Appellant is a director and shareholder, an issue had arisen as to the pension contributions of the Appellant. That letter stated that it became apparent during that audit that, *“as a result of a failure by our practice, a clear instruction from our client was not carried out, following his election application. Consequently pension contributions have continued to be made by deduction from our clients salary. These deductions together with a company contribution have continued until 6 October 2013 at a rate of £66.35 per month”*.
16. On 13 December 2013, HMRC wrote to LH and made reference to the rules on losing fixed protection which were detailed on a web page to which a link was provided. It was stated: *“The above sets out the conditions in which there is scope to treat fixed protection as continuing. I am not clear whether these conditions are met in this case ... Unless the case is in line with this guidance, fixed protection would be lost. We do not have discretion to vary what is laid down here”*.
17. On 18 February 2014, LH in a letter to HMRC acknowledged that the 2012 Certificate of the Appellant was no longer valid. In their letter, LH stated: *“We can confirm that our clients fixed protection has been lost by virtue of a contribution made on 30th April 2012. We are enclosing the Certificate for fixed protection”*.
18. On 1 April 2014, a Certificate for Fixed Protection 2014 (reference number 9023584P) was issued to the Appellant. That certificate stated that the lifetime allowance of the Appellant was the greater of £1.5 million or the standard lifetime allowance. The fixed protection was valid from 6 April 2014.
19. On 24 September 2019, LH wrote to HMRC seeking a review of the loss of the Fixed Protection 2012 in light of the decision of *Gary Hymanson v The Commissioners for HMRC [2018] UKFTT 0667 (TC)*. In the *Hymanson case*, the lifetime allowance reduced from £1.8 million to £1.5 million in the context of pension contributions not having ceased.
20. On 15 October 2019, HMRC responded to LH stating that the decision in the *Hymanson case* did not change the view of HMRC as to how the rules relating to Fixed Protection applied and that the appropriate forum to determine whether payments should be rescinded because of an equitable mistake would be the High Court.
21. On 18 May 2020, the Appellant appealed to the First-tier Tribunal.
22. On 27 April 2021, HMRC applied to strike out the proceedings brought by the Appellant.
23. In their skeleton argument, HMRC state that the Tribunal is invited to consider two issues as follows: 1. whether there is a decision made by HMRC against which the Appellant can appeal to a tribunal and 2. whether the High Court is the correct tax chamber to hear the appeal.

RELEVANT LAW

24. Paragraph 14, Schedule 18 Finance Act 2011 sets out the rules governing Fixed Protection.
25. Paragraph 14(4) states that paragraph 14 *“ceases to apply if on or after 6 April 2012*
 - (a) there is benefit accrual in relation to the individual under an arrangement under a registered pension scheme,*
 - (b) there is an impermissible transfer into any arrangement under a registered pension scheme relating to the individual,*
 - (c) a transfer of sums or assets held for the purposes of, or representing accrued rights under, any such arrangement is made that is not a permitted transfer, or*

(d) an arrangement relating to the individual is made under a registered pension scheme otherwise than in permitted circumstances”.

26. Paragraph 14(5) states that: *“For the purposes of sub-paragraph (4)(a) there is benefit accrual in relation to the individual under an arrangement-*

(a) in the case of a money purchase arrangement that is not a cash balance arrangement, if a relevant contribution is paid under the arrangement on or after 6 April 2012”.

27. Section 3 (The First-tier Tribunal and the Upper Tribunal) of the Tribunals, Courts and Enforcement Act 2007 states:

3(1) *“There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act”.*

28. Section 8 of the First-tier Tribunal (Tax Chamber) Rules (consolidated version as in effect from 21 July 2020) is entitled ‘Striking out a party’s case’. It states:

“(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them; ...”.

APPELLANT’S SUBMISSIONS

29. Mr Gough explained that he had an independent pension adviser and that it was not in dispute that pension contributions had been made until October 2013. He took the responsibility for that having occurred upon himself. He had been trying to build a business which now employed in the region of 100 people and his focus had been upon that.
30. He did not want to and was not in a position to incur the expense involved in having to instruct a barrister with associated costs to pursue any proceedings in the High Court and stated that the total of the pension contributions in issue amounted to less than £2000 and that he would be quite prepared to donate those monies to a charity.

RESPONDENT’S SUBMISSIONS

31. In respect of whether or not HMRC made an appealable decision, HMRC referred to and rely upon the case of *Adam Mather v HMRC [2014] UKFTT 1062 (TC)*. In that case, which Mr Brooke acknowledged was not binding upon this tribunal, the First-tier Tribunal struck out an appeal by a taxpayer under Rule 8 (2)(a) of the Tribunal Rules.
32. In brief, the *Mather case* concerned the cost of a telephone call made to Canada from the UK and whether or not VAT should have been charged on only half of the full price of the telephone call on the basis that the use and enjoyment of the call was 50% in the UK and 50% in Canada. Mr Mather lodged an appeal with the FTT against what he described as a decision of HMRC in a letter of HMRC dated 6 August 2012. That letter of HMRC responded to a letter that Mr Mather had written to HMRC asking for a decision confirming his view that VAT should be charged on only half of the full price of the telephone call.

33. HMRC applied to strike out the appeal with one of the grounds for that application being that the FTT lacked jurisdiction because there was no decision by HMRC. The appeal was struck out and it was stated in the decision in the *Mather case* that the letter of HMRC responding to Mr Mather was not a decision and that “*a refusal to issue a decision is not a decision rejecting the legal position considered to be correct by the appellant*” [paragraph 46 of the *Mather case*].
34. In their skeleton argument, HMRC in discussing the *Mather case* state that without a decision the FTT held that it lacked jurisdiction to entertain the proceedings so it struck out the appeal.
35. In the present case, HMRC contend that their letter of 12 December 2013 to LH referring LH to the rules on Fixed Protection was not a decision and merely signposted the relevant rules to LH. Subsequently, in their response, LH freely returned the 2012 Certificate. HMRC contend also that their refusal to not review the Appellant’s case in light of the decision in the *Hymanson case* is not a decision.
36. In respect of whether the High Court is the correct tax chamber to hear the appeal, HMRC contend that the FTT decided in favour of Mr Hymanson on the basis that the High Court would have granted the discretionary equitable remedy of rescission (in other words, setting aside the pension contributions made beyond the point in time when they should have ceased in exchange for the fixed protection).
37. In the present case, HMRC contend that the jurisdiction of the FTT is statutory and that the FTT does not have the jurisdiction to rescind the transaction. It was stated further by HMRC that the decision in the *Hymanson case* was not appealed by HMRC to the Upper Tribunal because an order for rescission was obtained by Mr Hymanson from the High Court although Mr Brooke was not able to provide us with any additional detail relating to the circumstances surrounding that.

DISCUSSION

38. The first issue to consider is whether or not there is an appealable decision.
39. It is not in dispute between the parties that the 2012 Certificate was returned freely to HMRC in February 2014 on behalf of the Appellant. That occurred after LH had considered the rules relating to Fixed Protection to which they had been referred by HMRC in HMRC’s letter of 13 December 2013 and after reaching a decision that, in the case of the Appellant, pension contributions had not ceased as required by the relevant rules and, as a consequence, the fixed protection afforded by the rules had been lost due to non-compliance with the rules.
40. Thereafter, a Certificate for Fixed Protection 2014 was issued to the Appellant effective from 6 April 2014 which afforded a lower rate of protection (a lifetime allowance of £1.5 million rather than £1.8 million).
41. With respect to the 2012 Certificate, HMRC emphasise that there was no decision made by HMRC to revoke the fixed protection of the Appellant, that the 2012 Certificate was freely returned on behalf of the Appellant and that this was done in the absence of any decision by HMRC. We agree. The 2012 Certificate was returned to HMRC voluntarily on behalf of the Appellant. HMRC did not send a letter or otherwise communicate to the Appellant that the 2012 Certificate had been revoked by HMRC due to the continued pension contributions made by the Appellant until October 2012.
42. About five and a half years after the 2012 Certificate had been returned on behalf of the Appellant, LH wrote on 24 September 2019 to HMRC seeking a review by HMRC of the loss of the fixed protection afforded by the 2012 Certificate in light of the decision in the *Hymanson case*.
43. In their response of 15 October 2019 to LH, HMRC stated:

“You have asked whether we could review your clients loss of Fixed Protection following the recent decision in Gary Hymanson v The Commissioners for HMRC TC06815 (“the Hymanson case”).

The decision in the Hymanson case is a First-tier Tax Tribunal decision and as such does not set a legal precedent. The case has not changed HMRC’s view of how the Fixed Protection rules apply and therefore HMRC will not be reviewing previous decisions on loss of LTA Fixed Protections as a matter of course...”.

44. As stated above, HMRC rely upon the *Mather case*. Paragraph 47 of that case states:
“And I find ...HMRC have refused in this case to issue a decision on the VAT liability of the supply in issue. HMRC did make general statements about their view of the law but this amounted to no more than advice as it was not a statement about the VAT liability of the particular supply in issue. I am therefore satisfied that this Tribunal does not have jurisdiction to entertain the proceedings”.
45. In the present case, HMRC in its letter of 15 October 2019 has stated that its view on the operation of the rules relating to Fixed Protection has not changed as a consequence of the decision in the *Mather case* and that, consequently, it will not be reviewing previous cases of loss of LTA as a matter of course and that this means it will not be reviewing the case of the Appellant. We agree with the contentions of HMRC and their reliance on the *Mather case* and find that the refusal of HMRC to carry out a review of the case of the Appellant in view of the decision in the *Hymanson case* is not a decision.
46. In summary on the first issue, we do not accept that an appealable decision was made by HMRC at the time that the 2012 Certificate was freely returned or at the time that HMRC stated that it would not be reviewing the case of the Appellant.
47. With respect to the second issue, that concerns whether the High Court is the correct tax chamber to hear the appeal or whether the FTT is the correct tax chamber if we had found that there is an appealable decision in the FTT.
48. As stated above, the *Hymanson case* related to a decision by HMRC to revoke a certificate of fixed protection. In brief, Mr Hymanson had four pension schemes. The FTT found, despite some inconsistent evidence, that Mr Hymanson had a genuine belief that continuing to make the standing order payments to two of his four pension schemes would not prejudice his fixed protection.
49. The FTT concluded in the *Hymanson case* that the High Court would have granted the remedy of rescission in respect of the taxpayer’s mistake because it was a genuine conscious belief of the taxpayer that it was acceptable to continue making the standing order payments to the pension schemes and that this was a relevant factor that HMRC had not taken into account.
50. Mr Brooke for HMRC stated that the *Hymanson case* was not appealed because, as stated earlier, an order from the High Court for rescission was obtained.
51. Mr Brooke for HMRC contends that the jurisdiction of the FTT is statutory and that the FTT does not have the jurisdiction to rescind the transaction such that it should not decide whether the discretionary equitable remedy of rescission would be available and then put the individual in the position that he would have been if the matter was heard before the High Court.
52. In any event, Mr Brooke emphasised that there are clear distinctions between the *Hymanson case* and the appeal of Mr Gough.
53. In the current appeal, Mr Gough was aware in March 2012 that pension contributions had to cease as a condition of obtaining the fixed protection. That is not in dispute between the parties and it was the clear belief of Mr Gough at that time. That is confirmed by the clear instruction of Mr Gough to LH to cease pension contributions following his application for fixed protection detailed in the letter of LH to HMRC dated 20 November 2013. It is acknowledged in that same letter that the instruction to cease pension contributions was not carried out.

54. That the pension contributions of Mr Gough did not cease as required in order to comply with the rules relating to fixed protection (but continued until October 2013) was not due to any conscious or mistaken belief of Mr Gough as present in the *Hymanson case* but rather due to an administrative oversight which was detected during a subsequent audit and of which HMRC were informed by LH. HMRC did not then make a decision to revoke the 2012 Certificate in the case of Mr Gough. It was returned voluntarily.
55. The circumstances of the *Hymanson case*, therefore, differ very significantly to those in the current appeal.
56. It was stated in the *Hymanson case* that the FTT can only interfere with HMRC's decision to revoke the certificate if the decision of HMRC did not take into account relevant factors or did take into account irrelevant factors, or was otherwise such that no properly directed officer could come to that conclusion. None of that is present in the case of Mr Gough. The current appeal is an instance of non-compliance with a clear rule due to an administrative oversight by an adviser.
57. Even if the reasoning in the *Hymanson case* is applied to the case of Mr Gough, we do not accept that there is any scope to argue that the FTT could interfere with the decision of HMRC.

DECISION

58. For the reasons stated above, we do not accept that there is an appealable decision and, if we had found that there was an appealable decision, we do not accept that the FTT would have jurisdiction with respect to that appeal.
59. The appeal is struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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.

KELVAN SWINNERTON
TRIBUNAL JUDGE

RELEASE DATE: 28 JULY 2021