



Neutral citation number: [2022] UKFTT 324 (TC)  
Case number: TC08585

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2019/05660

*PROCEDURE – application to set aside original decision – Rule 38 FTT Rules – whether procedural irregularity – no – application refused*

**Heard on: 30<sup>th</sup> August 2022**  
**Judgment date: 05<sup>th</sup> September 2022**

**Before**

**TRIBUNAL JUDGE ANNE SCOTT**

**Between**

**BEADNALL COPLEY LIMITED**

**Appellant**

**and**

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

**Respondents**

**Sitting in Chambers on 30 August 2022 considering the Appellant’s application for set aside dated 11 July 2022 and HMRC’s submissions in reply dated 5 August 2022**

## DECISION

### INTRODUCTION

1. Mr Firth (who did not appear in the hearing of the substantive appeal ) argued that there was a procedural irregularity in that the Tribunal had failed to consider and determine the appellant's argument that an interest in an asset, such as goodwill, is itself an asset and falls within the scope of Part 8 Corporation Tax Act 2009 ("CTA").
2. That argument was included at paragraph 25 in his Opinion for the appellant that had been annexed to the appellant's Skeleton Argument.
3. Mr Firth argues that if there was such a procedural irregularity then there would be no purpose in sending the case to the Upper Tribunal and "set aside performs a similar function to the review stage".
4. HMRC oppose the application on the basis that that was not a matter that needed to be considered by the Tribunal and advanced a number of arguments on the workings of the CTA.

### Mr Firth's Opinion

5. At paragraphs 6 and 7 in the substantive decision we addressed the issue of Mr Firth's Opinion as follows:-

#### *"The Opinion of Michael Firth of Gray's Inn Tax Chambers*

6. Mr Cruddas argued that the Opinion of Counsel that had been lodged as an annex to Mr Marshall's Skeleton Argument should be excluded since it could not be viewed in context. Mr Firth did not appear and no instructing paperwork or notes of any calls or meetings had been lodged. It may be that he was not in possession of all of the facts. For example he narrated simply that when Mr Copley retired he transferred his rights and interests to Mr Beadnall. As our findings in fact make clear that is not the whole story.
  7. We allowed Mr Marshall to refer to the arguments in the Opinion on the basis that he simply adopted them as his arguments."
6. I have it noted that, at times, Mr Marshall did refer to Mr Firth's Opinion but he referred only to paragraphs 15-17, 19-20, 22, 27 and 29. I have checked with Ms Shillaker and she has no record of him referring to paragraph 25.
7. Mr Marshall was not given *carte blanche* to adopt all of Mr Firth's arguments. It was his choice as to which arguments he addressed.

### The Law

8. Insofar as relevant, Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") provides:-
  - (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
    - (a) the Tribunal considers that it is in the interests of justice to do so; and
    - (b) one or more of the conditions in paragraph (2) is satisfied.
  - (2) The conditions are:-
    - (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

- (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
- (c) there has been some other procedural irregularity in the proceedings; or
- (d) a party, or a party's representative, was not present at a hearing related to the proceedings.

9. Rule 38 should be read as a whole. The procedural irregularity in Rule 38(2)(c) refers to an irregularity that is similar to the others in that Rule. An alleged failure to fail to address an argument is not similar to the other provisions.

10. Judge Bishopp considered the meaning of "procedural irregularity" in the very similar Upper Tribunal Rules in *Tager v HMRC* [2015] UKUT 663 (TCC) at paragraphs 15 to 18.

11. In summary, whilst he agreed that the phrase invites a wide interpretation, it must be interpreted consistently with what precedes, or in case surrounds it. The other sub-paragraphs provide examples of errors which affect the conduct of a hearing. Like the alleged error in that appeal the alleged error on which Mr Firth relies is not of the same character as the other examples.

12. If it occurred, it was not because a document was not available to the Tribunal or because the appellant was not present but because we allegedly failed to consider an argument. In the words of Judge Bishopp:-

"That is, classically, a judicial rather than procedural error. In my view the manner in which the rule has been drafted makes it clear that it was intended to apply only in the case of failings which have led to a flawed hearing, and that it cannot be extended to encompass judicial errors."

13. Not only am I bound by that but I agree.

14. Set aside is not the same as review.

15. Even if Mr Marshall had referred to paragraph 25, which I do not accept, then the appellant would have to establish that the failure to address that argument is an error in law.

16. If there is an error in law then the remedy is not to apply for set aside but rather to seek leave to appeal.

### **Decision**

17. For the reasons given above, the application for set aside of the decision dated 13 June 2022 is refused.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

18. 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.

**ANNE SCOTT  
TRIBUNAL JUDGE**

**RELEASE DATE: 05<sup>TH</sup> SEPTEMBER 2022**