

Tax Chamber
First-tier Tribunal for Scotland



[2018] FTSTC 1

Ref: FTS/TC/AP/17/1005

Scottish Landfill Tax - SLfT - sections 239 and 241 of Revenue Scotland and Tax Powers Act 2014 - Notice of Appeal submitted before review completed - whether appeal premature - yes - notices of assessment withdrawn after Notice of Appeal submitted - whether there was still an appealable decision - no - whether Tribunal had jurisdiction to determine appeal - no - rule 10 of Tribunal Rules - whether Tribunal could and should make an order in relation to expenses - no - appeal refused

DECISION NOTICE

IN THE CASE OF

FIFE RESOURCES SOLUTIONS LLP

Appellant

- and -

REVENUE SCOTLAND

Respondent

TRIBUNAL: Kenneth Campbell, QC

The Tribunal determined the appeal on 2 August 2018 without a hearing under the provisions of Rule 27 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (Default Paper case) having first read the Notice of Appeal, and attachments, dated 25 October 2017.

DECISION

Introductory

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1. This decision addresses an important procedural issue about the jurisdiction of the Tribunal where there is no longer an appealable decision. Similar questions have troubled the UK tax tribunals in several recent cases. This is the first time the issue has arisen before this Tribunal.

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2. The starting point for considering the exercise of a taxpayer's right of appeal is section 241 of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA"), which is set out in full in the annex to this decision. That section specifies a right of appeal where there is an "appealable decision", which is itself defined extensively in section 233 RSTPA. Section 241(2) provides that an appellant may not give notice of appeal where any of the circumstances in sections 241(3)-(5) applies, which, read short, relate to a number of situations where there has been a decision but there are ongoing matters.

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3. Several of the Tribunal's rules of procedure (The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Tribunal Rules")) which are set out in the annex also bear on this issue. Rule 8 sets out circumstances in which the Tribunal is bound to dismiss an appeal and circumstances in which it may do so. Rule 10 sets out circumstances in which the Tribunal may make an order awarding expenses. Rule 18 deals with withdrawal of a case. Rule 30 sets out circumstances in which the Tribunal may make a decision without a hearing.

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Circumstances

4. It is necessary to say something about the circumstances of this case in order to put the issues which arise in their proper context. On 30 January 2017, the respondent issued two Notices of Assessment to the appellant in respect of liability to Scottish Landfill Tax ("SLfT"). The first Notice was for the period April-June 2015, and the second for July-September 2015. The appellant sought review of those two decisions in terms of section 234 RSTPA. For reasons which are not immediately clear, there was delay in concluding that review. While the appellant initially agreed to extend the period within which the review was to be carried out, it lodged a Notice of Appeal on 25 October 2017. On 26 October 2017, the Tribunal appointed the case to proceed as a standard case in terms of rule 24 of the Tribunal Rules.

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5. On 18 December 2017, the respondent withdrew and cancelled the two Notices of 30 January 2017, because, so it was said, of an error in the calculation of the amount of SLfT stated in the Notices. The respondent further intimated a Closure Notice for the period July-September 2015, and separately indicated that its enquiry for the period April-June 2015 remained open, with the aim being to have it completed by 31 March 2018. In response

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to the Tribunal's enquiry whether the appeal was to be withdrawn, on 4 January 2018, the appellant intimated a Notice of Application seeking to have the appeal determined without a hearing, and for the respondent to pay all of the expenses incurred by the appellant in respect of the appeal. On 5 18 January 2018, the respondent submitted a written response, and on 5 February 2018, the appellant submitted a written reply, which in turn resulted in further written submissions from the respondent on 19 February 2018.

6. Meanwhile the respondent's existing enquiry continued, and fresh 10 Closure, Assessment and Penalty Notices were issued prior to 31 March 2018, in accordance with the respondent's stated aim. The appellant then sought review in terms of section 234 RSTPA.

7. On 19 April 2018, the President of the Tribunal made an Order requiring the respondent to confirm whether it wished an oral hearing, and for the 15 appellant to confirm whether it opposed the application for dismissal. Parties' responses to that Order indicated that the appellant (a) opposed the respondent's application for dismissal, and (b) was content for the Tribunal to deal with matters without an oral hearing; and that the respondent was (a) also content for the matter to be dealt with without oral hearing; and 20 (b) insisting on its request for dismissal. In her note forming part of the Order, the President reminded parties about the over-riding objective in rule 2 of the Tribunal Rules, and in particular the principles of proportionality and control of expense.

8. On 12 June 2018, the Tribunal therefore ordered written submissions 25 from the respondent followed by the appellant on the following questions: (a) whether review of its decision(s) by the respondent is a necessary step before a taxpayer can appeal against such decision; (b) whether or not there is an appealable decision in this case, as that is defined in section 233 RSTPA; (c) the effect of rule 30 of the Tribunal Rules in this case; and (d) whether the 30 Tribunal has jurisdiction in relation to these proceedings. Submissions were received from the respondent on 2 July 2018, and from the appellant on 24 July 2018.

Parties' positions

9. For reasons which will shortly appear, it is convenient to set out first the 35 respondent's position on the questions contained in the Tribunal's Order of 12 June 2018.

(a) Whether completion of review is a necessary step before an appeal to the 40 Tribunal

10. The appellant submitted that the appeal was premature. It had been initiated by the appellant prior to the conclusion, or a point at which the enquiry could be treated as concluded, of the review by the respondent of its

5 decisions which are the subject of the appeal. Further, the respondent did not accept that correspondence from the appellant's agent in September 2017 was sufficient to establish a deemed completion of the review. The respondent also submitted that section 241(4) RSTPA prevents a person aggrieved by an appealable decision from initiating an appeal where a review of that decision by the respondent has not been concluded nor treated as concluded. It followed, they argue, that completion of review is a necessary step before an appeal.

(b) Whether there is an appealable decision in this case

10 11. The respondent accepted that the Notices of 30 January 2017 were appealable decisions. However, in addition to the point about review already noted, those Notices have been cancelled by the respondent. There are, they submit, therefore, no extant appealable decisions in the present appeal. The respondent further submitted that because it had subsequently issued
15 Closure, Assessment and Penalty Notices to Fife Council, those decisions (and not the Notices of 31 January 2017) set out its position on the substantive matters which are in dispute between the parties in the present appeal. The appellant's agent has requested a review of the subsequent decisions, which the respondent is currently undertaking. The appellant will be
20 entitled to initiate an appeal to the Tribunal if they do not agree with the conclusions of that review.

(c) Rule 30 of the Tribunal Rules and (d) whether the Tribunal has jurisdiction

25 12. The respondent submitted the Tribunal should dismiss the appeal without a hearing on the ground that it does not have jurisdiction to consider the substantive issues in dispute between the parties. It referred to rule 30(3) of the Tribunal Rules, which provide that the Tribunal may dispose of proceedings, or a part of proceedings, under rule 8 of the Tribunal Rules without a hearing. Rule 8(1) requires the Tribunal to dismiss the whole or part
30 of the process if it does not have jurisdiction. The respondent submits there is no inconsistency between its request for the appeal to be dismissed without a hearing on the ground that the Tribunal has no jurisdiction, in terms of rules 8(1) and 30(3), and its objection to the appellant's application made with reference to rules 5 and 30(1)(b). The respondent's request was based on a
35 concern that the present appeal is dealt with in a proportionate manner and in accordance with both the jurisdiction of the Tribunal and the overriding objective of the Tribunal Rules. In contrast, the appellant's application was based on the erroneous assumption that its position on the substantive matters in dispute has been conceded by the respondent as a consequence
40 of it having cancelled its decisions due to technical errors.

13. The respondent did not accept the appellant's submission that the "natural consequence" of the cancellation of its decisions, on the basis of technical errors and with a clear statement that new decisions will be made, is

that an appeal initiated in respect of those cancelled decisions is to be upheld without further procedure. In its Order of 12 June 2018, the Tribunal called attention to *Rasam Gayatri Silks Ltd v HMRC* [2010] UKFTT 50(TC) and to *GE International Inc v HMRC* [2010] UKFTT 343 (TC). The respondent
5 acknowledged that these are not binding, and submitted that *GE International* should be preferred to *Rasam*, not least because the circumstances of the latter were very different from the present case. In light of all of these matters, the respondent submitted that the Tribunal is obliged, absent *both* a decision and a review conclusion, to dismiss the appeal.

10 14. In its response of 24 July 2018, the appellant's position was that it had "little choice but to withdraw the Appeal" in light of the respondent's submissions. However it did not wish to do so until the issue of expenses has been resolved, and the appellant called attention to the respondent's previous offer to pay the expenses "directly incurred by the appellants in initiating an appeal... on 25th
15 October 2017." The appellant submitted a Notice of Application in relation to expenses, in which an Order is sought requiring parties to endeavour to agree expenses within 60 days, and failing such agreement, for the Tribunal to determine quantum.

Discussion

20 (a) *The review issue*

15. The point which arises here is identifying the consequence where a review has been requested and is in the course of being conducted, and an appeal is initiated before the review is concluded.

25 16. On this, section 241(2) RSTPA is clear and unambiguous. An appellant is precluded from giving notice of appeal if any of subsections (3), (4) or (5) applies. Subsection (4) is in the following terms:

"(4) This subsection applies where—

30 (a) the appellant has given notice of review in relation to the same matter in question, and

(b) the review has not been concluded or treated as concluded."

That plainly describes the circumstances in this case.

35 17. The respondent had not concluded its review at the point when notice of appeal was given on 25 October 2017. It is true that the appellant, through its agent had correspondence with the respondent in September 2017 purporting to withdraw consent to an extended review period. However, section 239 provides:

“239 Notification of conclusions of review

(1) Revenue Scotland must notify the appellant of the conclusions of the review and its reasoning within—

5 (a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

10 (2) In subsection (1) “relevant day” means the day when Revenue Scotland notified the appellant of Revenue Scotland’s view of the matter in question.

(3) Where Revenue Scotland is required to undertake a review but does not give notice of the conclusions within the period specified in subsection (1), the review is treated as having concluded that Revenue Scotland’s view of the matter in question (see section 15 237(1)) is upheld.

(4) If subsection (3) applies, Revenue Scotland must notify the appellant of the conclusions which the review is treated as having reached.”

20 18. Subsection 239(3) envisages a deemed conclusion of the review where Revenue Scotland fails to complete the review within 45 days or such other period as has been agreed. Such a deemed conclusion may arise only where the circumstances in subsection (3) exist. They did not exist here because there was an agreed extension period which had not ended. Equally
25 important, the subsection does not appear to envisage withdrawing from such an agreement. A moment’s reflection indicates why that is likely to be the legislative intent: section 239 provides for a fixed period with scope to agree a longer period. Having reached such an agreement, it would be unreasonable for an appellant to bring it to an end artificially.

30 19. It follows that the respondent’s submission that the notice of appeal was premature is well-founded.

(b) Is there an appealable decision?

20. As already noted above, the right of appeal in section 241(1) RSTPA is against an appealable decision. It is not in dispute that the two notices of
35 30 January 2017 were appealable decisions. They were withdrawn on 18 December 2017. It is not in dispute that the respondent is empowered to do that. The respondent has subsequently issued further notices, which have themselves been the subject of a review request. As a matter of analysis, the substantive decisions dated 30 January 2017 are no longer extant, and in
40 consequence, there are no appealable decisions.

(c) Does the Tribunal have jurisdiction?

21. Those conclusions lead directly to the third and most important issue: whether the Tribunal has jurisdiction to determine the appeal. There are associated questions of what assistance may be derived from UK First-tier

Tribunal jurisprudence on analogous issues, and whether the jurisdiction issue can be resolved without a hearing.

22. Taking the last point first. Parties appear to be agreed that the Tribunal can determine this matter without a hearing, albeit their reasons for doing so are not identical. That would appear to be sufficient for the purposes of rule 30(1)(a) of the Tribunal Rules. In any event, for the avoidance of doubt, I am satisfied in accordance with rule 30(1)(b) that I am able to determine matters without a hearing, not least because there is specific power to do so under rule 30(3) where a jurisdiction question arises, as it does here.

23. Turning to the jurisdiction question. The UK First-tier Tribunal and Upper Tribunal Tax Chambers have had occasion to consider the effect of withdrawal of a decision by the tax authority on an outstanding appeal. Those decisions are of course not binding on this Tribunal, but they are nonetheless instructive because of the structural similarity of some of the rules of procedure vis a vis the Tribunal Rules.

24. *Rasam Gayatri Silks Ltd v HMRC* [2010] UKFTT 50(TC) involved an application for an appeal to be struck out after the disputed decision was withdrawn. Judge Berner decided that the proper course was not to strike out the decision, but to allow the appeal. There was no argument in that case that the appeal was invalid or that there was no appealable decision (see paragraph 9). The learned judge concluded that in the absence of a notice of withdrawal of the appeal, it remained live and the tribunal had jurisdiction (see paragraphs 11 & 13). Withdrawal of the decision did not of itself end the appeal in that case (see paragraph 13). In the circumstances, the learned judge decided the proper course was to allow the appeal (see paragraph 14).

25. *GE International Inc v HMRC* [2010] UKFTT 343 (TC) concerned an application by HMRC for an appeal to be allowed where it had withdrawn its decision and its statement of case. The appellant wanted a hearing in order that the tribunal could produce an authoritative decision on the substantive issue (see paragraph 5). Paragraph 8 of the decision is worth quoting at length:

“This turns upon the scope of the Tribunal’s jurisdiction. Put shortly, the Tribunal has no jurisdiction on a mere reference. It is not open to a taxpayer or any other person, or to HMRC, simply to refer to the Tribunal a question of doubtful customs classification... Absent a decision, and a review, there is no right of appeal. In the same way, once the disputed decision has been withdrawn, there is no jurisdiction for the Tribunal to consider the classification decision *in vacuo*. In the absence of a withdrawal by either party, the Tribunal must simply determine the appeal. The proper course, in my view, in these circumstances is for the appeal to be allowed.”

Crucially, in the following paragraph, the learned judge continued

“what is meant by the Tribunal allowing the appeal depends on the nature of the appeal itself and the circumstances in which the appeal has been allowed.”

26. *Rasam Silk* and *GE International*, illustrate that the issue of jurisdiction is live where the disputed decision is withdrawn after an appeal is initiated. It is clear that in this context, what happens next depends, even more than in the general run of cases, on individual circumstances. In these cases, the disputed decisions had been withdrawn by HMRC; however these were not replaced by new decisions. Further, in one case there were developed arguments which the tribunal was asked to address in the wider interest.

27. In the present case, the situation is somewhat different. While the Notices of 30 January 2017 were appealable decisions, at the point the Notice of Appeal was submitted there was an outstanding review. For the reasons set out above, the appeal was premature. Further, by analogy with Judge Berner's observation in *GE International*, this Tribunal, like the UK FTT Tax Chamber, has no jurisdiction on a mere reference. That is clear from section 241 RSTPA and the Tribunal Rules.

Conclusion

28. I consider that the proper course in this case is to dismiss the appeal, on the basis that the Tribunal lacks jurisdiction to determine it. It lacks jurisdiction because the appeal was made prematurely. In my view, that is likely to be the proper course in most cases where there is a premature appeal against an appealable decision which is in the course of review at the point where the appeal is made. That is in contrast to the outcome in each of *Rasam Silk* and *GE International*, but in those cases there was no question of prematurity and the only issue was the proper course of a valid appeal.

29. I am conscious that in its letter of 24 July 2018, the appellant indicates an intention to withdraw the appeal, but not until expenses have been agreed. The letter is explicitly said not to be a notice of withdrawal. As the matter is before the Tribunal for determination in light of parties' responses to the Order of 12 June 2018, it is perhaps better for the appeal to be dismissed now given my conclusion on the question of jurisdiction and the reasons for it.

Expenses

30. There remains the appellant's application of 24 July 2018 for an Order relating to expenses. In its Notice of Application of 4 January 2018, the appellant sought an Order in terms of rule 10 of the Tribunal Rules that the respondent pay all of the expenses incurred by the appellant in respect of the appeal. In its agent's letter of 24th July 2018, the appellant departs from that position. What is now sought is an Order that

"(a) the parties are to endeavour to agree the quantum of costs (*sic*) payable by the respondent to the appellant no later than 60 days from the date of this Notice; and

(b) in the event the parties are unable to agree the quantum of costs (*sic*) within the above timeframe, that the appellant be permitted to make application to the Tribunal to determine quantum in accordance with rule 10(2) of the Tribunal Rules.”

5 31. The appellant prays in aid an offer made by the respondent in its written response dated 18 January 2018 to that Notice of Application, to meet the expenses “directly incurred by the appellants in initiating an appeal to [the Tribunal] on 25 October 2017.” It is the quantum of the expenses so described which it now seeks to agree or have determined by the Tribunal.

10 32. That being so, it is unnecessary to explore the nature of the Tribunal’s power under rule 10(1) of the Tribunal Rules, save to say that, speaking as it does of “a party’s act, omission or other conduct [which] has caused any other party to incur expense which it would be unreasonable for that other party to be expected to pay” the rule has a partly punitive character. It is likely that the Tribunal will require compelling evidence in order to be satisfied that it should exercise that power.

15 33. Those issues do not arise here. On 18 January 2018, the respondent offered to meet the appellant’s expenses directly incurred by the appellant in initiating an appeal to the Tribunal on 25 October 2017. It has renewed that offer in its written submission of 2 July 2018. Therefore the only issue relating to expenses is quantum.

20 34. It would be preferable if expenses were able to be agreed by parties, however, as the appellant points out, in terms of rule 10(2) the Tribunal has jurisdiction in exceptional circumstances to fix the quantum of expenses. However it should be noted from the clear words of the rule that this jurisdiction is exceptional, and only arises where there is an actual award of
25 expenses by the Tribunal. That in turn would appear to presuppose the exercise of the Tribunal’s power under rule 10(1). There is no longer an application for an Order in terms of rule 10(1) before the Tribunal, and, further, there is no general jurisdiction in relation to expenses. As section 64 of the
30 Tribunals (Scotland) Act 2014 makes clear, the Tribunal may award expenses only so far as allowed in accordance with the Tribunal Rules. There is no other provision in the Tribunal Rules about expenses.

35. Accordingly, I conclude that the Order now sought is not one the Tribunal can competently make in the circumstances.

Decision

35 36. The appeal is dismissed in terms of rule 8(1) of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 because the Tribunal does not have jurisdiction because the appeal was made prematurely.

40 37. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to rule 38 of the First-tier Tribunal for

Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

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K J CAMPBELL QC

Legal Member

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RELEASE DATE: 9 August 2018

RSTPA

241 Right of appeal

- 5 (1) An appellant may appeal to the tribunal against an appealable decision.
10 (2) An appellant may not give notice of appeal under section 242 if subsection (3),
(4) or (5) applies.
(3) This subsection applies where—
10 (a) the decision which the appellant seeks to appeal is a decision of Revenue
Scotland to amend a self-assessment under section 87 while an enquiry is in
progress, and
(b) the enquiry has not been completed.
(4) This subsection applies where—
15 (a) the appellant has given notice of review in relation to the same matter in
question, and
(b) the review has not been concluded or treated as concluded.
(5) This subsection applies where the appellant has entered into a settlement
agreement with Revenue Scotland in relation to the same matter in question and
has not withdrawn from the agreement under section 246(4).
20 (6) This section does not prevent the matter in question from being dealt with in
accordance with section 246(1) and (2) (settling matters in question by
agreement).

Tribunal Rules

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8.— Dismissal of a party's case

- (1) The First-tier Tribunal must dismiss the whole or a part of the proceedings if
the First-tier Tribunal—
30 (a) does not have jurisdiction in relation to the proceedings or that part of
them; and
(b) does not exercise its power under rule 5(3)(1) (transfer to another court or
tribunal) in relation to the proceedings or that part of them.
(2) The First-tier Tribunal may dismiss the whole or a part of the proceedings if—
35 (a) the appellant has failed to comply with an order which stated that failure by
the appellant to comply with the order could lead to the dismissal of the
proceedings or part of them; or
(b) the appellant has failed to co-operate with the First-tier Tribunal to such an
extent that the First-tier Tribunal cannot deal with the proceedings fairly and
40 justly.
(3) The First-tier Tribunal may not dismiss the whole or a part of the proceedings
under paragraph (1) or (2) without first giving the appellant an opportunity to
make representations in relation to the proposed dismissal.

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10.— Orders for expenses

5 (1) The First-tier Tribunal may make an order for expenses as taxed by the Auditor of the Court of Session against a party if that party's act, omission or other conduct has caused any other party to incur expense which it would be unreasonable for that other party to be expected to pay, with the maximum recoverable expenses being the expenses incurred.

10 (2) The First-tier Tribunal, of its own initiative or on the application of a party or the parties, may in exceptional circumstances fix by order a sum payable by a party in discharge of an award of expenses.

18.— Withdrawal

15 (1) A party may give notice to the First-tier Tribunal of the withdrawal of the case made by it in the First-tier Tribunal proceedings, or any part of that case—

- (a) by sending or delivering to the First-tier Tribunal a notice of withdrawal; or
- (b) orally at a hearing.

20 (2) The First-tier Tribunal must notify each party of its receipt of a withdrawal under this rule.

30.— Decision with or without a hearing

25 (1) Subject to rule 27(6) (determination of a Default Paper case without a hearing) and the following paragraphs in this rule, the First-tier Tribunal must hold a hearing before making a decision which disposes of proceedings, or a part of proceedings, unless—

- (a) each party has consented to the matter being decided without a hearing; and
- (b) the First-tier Tribunal considers that it is able to decide the matter without a hearing.

30 (2) This rule does not apply to decisions under Part 4 of these Rules (correcting, reviewing and appealing decisions of the First-tier Tribunal).

35 (3) The First-tier Tribunal may dispose of proceedings, or a part of proceedings, under rule 8 (dismissal of a party's case) without a hearing.