Forced to continue

Management of taxes



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Rebecca Sheldon considers why HMRC may object to the withdrawal of an appeal and the repercussions of this in tribunal

Key Points

What is the issue?

The case of Albert House and Vale Property highlighted the issue of whether the appellant was able to withdraw their appeal when HMRC wanted to prevent them from doing so.

What does it mean for me?

Where HMRC objects to the withdrawal of an appeal within 30 days, the tribunal may decide to continue the proceedings in order to exercise its statutory duty to confirm the assessments, or to reduce them if it considers they are too high, and increase them if it considers they are too low.

What can I take away?

It is not always within an appellant's gift to withdraw an appeal once it has been lodged with the tribunal. HMRC may use its powers of objection to a tactical advantage to attempt to seek recovery of an increased assessment amount overall.

The case of Albert House and Vale Property v HMRC [2020] UKUT 373 (heard before the Upper Tribunal) highlighted the issue of whether an appellant was able to withdraw their appeal when HMRC wanted to prevent them from doing so. The appellants were two Guernsey companies in members' voluntary liquidation, each with appeals against separate but related decisions of the First-Tier Tribunal.

The first decision (found at [2019] UKFTT 732 (TC)) concerned Finance Act 2003 Sch 10 para 37(4), which permits an appellant to withdraw a stamp duty land tax appeal unless HMRC objects within 30 days by giving notice in writing. In this case, HMRC had objected to the First-tier Tribunal (rather than directly to the appellant), but the notice was forwarded to the appellants within the 30 day time limit. The First-tier Tribunal held that the appeal was consequently not withdrawn as there had been a valid notice of objection.

The second decision (found at [2020] UKFTT 274 (TC)) concerned an appeal to the First-tier Tribunal to strike out the appeals under Rule 8(3)(c) of the First-tier Tribunal (Tax Chambers) Rules (FTT Rules) on three distinct grounds (see below). The First-tier Tribunal in this decision also refused the appellants' applications.

Background facts

Both cases concerned stamp duty land tax schemes which were ‘each substantially similar to the scheme considered at a later date by the Supreme Court in Project Blue Ltd v HMRC [2018] UKSC 30 (see para 9 of the Upper Tier judgment). In Project Blue, the Supreme Court held that despite the technicalities of the operation of sub-sale relief in Finance Act 2003 s 45(3), the anti-avoidance provision in s 75A applied to the transactions and the purchaser would in fact be chargeable to stamp duty land tax.

HMRC consequently enquired into the stamp duty land tax returns of both Albert House and Vale Property (who stood in the place of the financial institutions in Project Blue), as well as the purchasers, and issued both a closure notice and (in the alternative) a discovery assessment imposing stamp duty land tax on the appellants.

In February 2015, the advisors of the appellants wrote to HMRC notifying them of their intention to withdraw their respective appeals.

First-tier Tribunal: first decision

The First-tier Tribunal (in paras 83 to 96) set out its reasoning for rejecting the appeal. This was that the purpose of Finance Act 2003 Sch 10 para 37(4)(b) was that ‘an appellant who sought to withdraw its appeal should know within 30 days whether HMRC are objecting to that withdrawal and should be told this in writing so that there is a record’. It found that as long as the statutory purpose has been achieved, failure to follow the literal wording of a provision does not invalidate the notices. It was further commented that ‘the reality of the situation was that the appellants were left in no doubt’.

First-tier Tribunal: second decision

In the second case, the First-tier Tribunal refused the applications:

- to strike out the appeals under Rule 8(3)(c) of the FTT Rules on the ground that they had no reasonable prospects of success;
- to strike out the appeals on the basis that it would be an abuse of process if they continued; and
- to exercise its discretion under Rule 5 of the FTT Rules to bring proceedings to an end.

The tribunal referred to an Upper Tier decision (HMRC v CM Utilities Ltd [2017] UKUT 305 (TCC)) concerning Taxes Management Act 1970 s 54 (which contains analogous provisions to those found in para 37). It consequently concluded:

> ‘Where an in-time objection is received, so that there is no deemed agreement between the parties, the tribunal may decide to continue the proceedings in order to exercise its statutory duty under Sch 10 para 42 to reduce assessments if it considers they are too high, and to increase them if it considers they are too low.’

The tribunal also considered the Court of Appeal decision in Shiner v HMRC [2018] EWCA Civ 31, concluding that: ‘Striking out the appeal therefore does not always have the effect of crystallising the tax payable as being the figure stated in the assessment under appeal. The tribunal cannot ignore its statutory obligation to determine the appeals in accordance with TMA s 50 (or Sch 10 para 42).’

The First-tier Tribunal rejected the appellants’ submission that they had no reasonable prospect of success. As in Project Blue, the liability fell on the purchaser, which indicated that the appellants had a reasonable prospect of success even if no submissions were made at the hearing.

With regards to the application for the appeals to be struck out as an abuse of process, the tribunal agreed with HMRC that it could not be ‘manifestly unfair to a party to litigation’ to require an appeal to continue because a party had admitted liability. Where a timely objection to withdrawal was made under Rule 37 on the basis that the assessments may be incorrect, the tribunal had a statutory obligation to determine the appeal by reducing, increasing or confirming the assessments. It was also concluded that the appellants need not incur further costs, as they could inform the tribunal that they were not going to participate and that this was unlikely to constitute unreasonable behaviour with a subsequent cost award in favour of HMRC.

Finally, the tribunal concluded that it would not exercise its discretion to dispose of the proceedings, as this conflicted with its obligations under Sch 10 para 42.

Upper Tribunal: first decision

Following HMRC v Raftopoulou [2018] EWCA Civ 818, the Upper Tribunal's starting point concerning the construction of para 37(4) was to consider its terms, context and purpose. It consequently held that the First-tier Tribunal was correct when it held that para 37(4) must be construed purposively. The Upper Tribunal also agreed that the purpose of the provision was to ensure that an appellant who withdraws an appeal should know within 30 days whether HMRC is objecting to that withdrawal in writing (see para 73).

The Upper Tribunal further held at para 88 of the judgment that 'there is no doubt in the present case that the email sent by HMRC to the FTT (and which was then forwarded by the FTT to the respective Appellant) was clear and constituted a notice'. The Upper Tribunal was 'clear that HMRC validly gave notice to the appellants of their objection to the withdrawal of their appeals for the purposes of para 37(4)(b).' The appeal was consequently dismissed in respect of the first decision.

> There are circumstances where HMRC may use its power of objection to a tactical advantage.

Upper Tribunal: second decision

In terms of the second decision, the Upper Tribunal considered that the relevant provisions in CM Utilities Limited were essentially the same as the provisions in this appeal. Therefore, Sch 10 para 37 is substantively the same as the Taxes Management Act 1970 s 54 and Sch 10 para 42.
The Upper Tribunal consequently stated that:

> 'We see no justification for distinguishing CM Utilities on the basis that, in that case, HMRC was seeking to increase an assessment, whereas in the present case HMRC consider it possible that there may be an over-assessment or at least a lack of clarity as to which taxpayer should bear the burden of SDLT… In so far as the FTT decided that para 42 imposed a duty to determine the assessments, and that the proceedings should continue for that purpose, we consider that it was correct to do so.' (para 110)

The Upper Tribunal also held that: ‘The FTT was well aware that it had a discretion under Rule 5 but one which had to be exercised judicially. The FTT, correctly in our view, recognised that it could not exercise its discretion in a way [which] conflicted with its statutory obligation under paragraph 42.’ Accordingly, it was held that the First-tier Tribunal had approached the exercise of its discretion correctly and was entitled to reach the conclusion that it did. The Appeal was consequently dismissed.

Discussion

Albert House and Vale Property concerns the unusual situation of appellants wishing to withdraw their appeals and HMRC objecting to this. However, this case is important from a procedural and practical perspective as it demonstrates that it is not always within an appellant’s gift to withdraw an appeal once it has been lodged with the tribunal.

Although it may be assumed that, generally, HMRC would not wish to object to the withdrawal of an appeal and subsequent acceptance of liability, clearly there are circumstances where HMRC may use its powers of objection to a tactical advantage to attempt to seek recovery of an increased assessment amount overall.

In this case, the appellant companies were in liquidation (Guernsey companies do not require a solvency statement for members’ voluntary liquidation and no information was provided as to the solvency of the appellants) and there was the potential for arguments by the purchasers that the liability of the appellants extinguished their own potential liability. Therefore, it is possible that HMRC objected to the withdrawal of the appeals so as to prevent a successful appeal in theory but with no recovery of the tax sought in reality.

However, as a general point, it is important to note the various procedural requirements on HMRC. Firstly, HMRC must object within 30 days of the appellant’s withdrawal (which, following this case, includes giving notice to the FTT which is then forwarded to the appellant within the requisite 30 days). Secondly, HMRC must give notice in writing (see para 37(4)(b) above).

If neither of these conditions are met, then HMRC’s objection would be invalid and consequently the appeal will be withdrawn.