TC03412

Appeals numbers: TC/2013/04284 & TC/2013/04283

PROCEDURE – Tribunal Procedure Rule 8 – application for barring of HMRC from proceedings on grounds of no reasonable prospect of success – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR RODERICK THOMAS & MR STUART THOMAS **Appellants**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER

Sitting in public at Bedford Square, London on 13 January 2014

Mr Roderick Thomas for both Appellants

Mr Anthony Stewart (HMRC Special Investigations Unit) for the Respondents

DECISION

1. The Appellants (who are brothers) have a long-running dispute with the Respondents ("HMRC") concerning an offshore trust ("the Trust"), the relevant details of which dispute are set out below. In April 2013 HMRC issued assessments to both Appellants under s 29 Taxes Management Act 1970 in respect of the tax year 2008-09 ("the Discovery Assessments"), assessing them on estimated gains of the Trust. The Appellants requested a formal internal review of the decision to issue the Discovery Assessments and in May 2013 that review upheld the original decision. In June 2013 the Appellants appealed to the Tribunal against the Discovery Assessments ("the Appeal Proceedings"). In August 2013 HMRC provided their statement of case in relation to the Appeal Proceedings.

2. In September 2013 the Appellants made an application to the Tribunal for "directions under Rule 8". Tribunal Procedure Rule 8 provides, so far as relevant:

> **"Striking out a party's case**
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> …
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
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> …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
>
> ...
>
> (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;
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> …
>
> (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."

3. At the hearing the Appellants confirmed that the direction sought was a barring of HMRC from taking further part in the Appeal Proceedings, on the grounds that there was no reasonable prospect of HMRC's case succeeding.

Appellants' Case

4. Mr Roderick Thomas for both Appellants submitted as follows.

5. The dispute with HMRC has been running for fourteen years. In 1997 the Trust was settled by the Appellants' brother-in-law, who was domiciled and resident outside the UK. HMRC have maintained incorrectly that the Appellants are settlors of the Trust, and have been seeking to tax the Appellants on that basis on the income and gains of the Trust.

6. Appeals against closure notices for 2002-03 had been the subject of hearings before Judge Berner in 2013, who required HMRC to state clearly their case. In December 2013 HMRC had conceded the dispute over those assessments. That was unreasonable conduct by HMRC, who had entailed the Appellants in a huge amount of work.

7. Appeals against closure notices for 2004-05 had also been the subject of hearings before Judge Berner in 2013, who determined that there were no gains in respect of that tax year. The income for that tax year had been *de minimis* and so the Appellants had taken no further issue in relation to 2004-05.

8. Appeals against assessments for 2005-06 had again been the subject of hearings before Judge Berner in 2013, who directed that the appeals should be stayed pending determination of the settlor issue in relation to 2002-03.

9. In relation to 2006-07 HMRC had concluded, after a very long enquiry, that the gains in dispute were £8,000. The Appellants had other losses available to extinguish those gains, so there was no additional liability.

10. In relation to 2007-08 HMRC had purported to open enquiries (under s 9A TMA 1970) but were in fact out of time, and HMRC had abandoned that tax year.

11. The Appeal Proceedings concerned tax year 2008-09.

(1) The figures in the Discovery Assessments were unsubstantiated and had been plucked out of thin air by HMRC. HMRC had failed and/or refused to provide any evidence of capital gains of the Trust in 2008-09. HMRC were under a duty to calculate the figures to the best of their judgment. There was a requirement for a reasonable suspicion and some form of enquiry or investigation; instead HMRC had just fabricated a figure of £200,000. The figure was plainly excessive compared to the £8,000 established in relation to 2006-07, and was even worse when viewed as relating to a year of economic conditions more likely to produce losses than gains. HMRC had failed to show any reasonable basis for the Discovery Assessments. HMRC had suggested that the Appellants should give details of disposals by the Trust in the tax year but the Trust had been wound up (after a lengthy process) at the end of 2009. The trustees had not supplied any accounts up to the point of dissolution. HMRC had not called for any such accounts – which they had done for earlier tax years. Any obligation to keep records had now expired; that ended with the closure of

the 2005-06 enquiry. The Appellants wished to move on and get on with their lives but were still being constantly assailed by unreasonable assessments.

(2) The Discovery Assessments were raised under s 29 but there was nothing new "discovered"; for the previous 13 years HMRC have been proceeding on the (incorrect) basis that the Appellants were the settlors of the Trust. The assessments have the character of a penalty.

12. The Appellants had received legal opinion that the 2004 Agreement (defined below) had been repudiated by HMRC's subsequent conduct. Subsequent correspondence had been effectively negotiations "without prejudice" and it was unfair of HMRC to raise it now. The withdrawal of the 2002-03 assessments effectively closed subsequent periods.

Respondents' Case

13. Mr Stewart for HMRC submitted as follows.

14. There was a substantive dispute between the parties as to whether the Appellants were settlors, within the meaning of the tax legislation, of the Trust. That point was not for determination by the Tribunal at this hearing but was central to HMRC's interest in the Appellants' tax affairs.

15. On 24 May 2004 the parties had entered into a settlement agreement ("the 2004 Agreement") whereby the Appellants and other named persons paid over £500,000 in settlement of tax, interest and penalties relating to the period 6 April 1997 to 31 December 2003 ("the Settlement Period"). By a side letter of the same date the Appellants undertook to wind-up the Trust and distribute its assets to the Appellants no later than 31 December 2004. In another side letter of the same date HMRC set out clearly that they regarded the Appellants to be settlors of the Trust; gave certain assurances *provided that* the Trust was wound up by 31 December 2004; and stated "Nothing in this letter shall be taken by [the Appellants] to amend or remove the requirement that the income and gains of [the Trust] … should be returned by them for the period from 1 January 2004 until … the termination of [the Trust]." The Trust was not in fact wound up until five years after the deadline of December 2004. It was accepted that by a telephone conversation in September 2004 a request for further time was agreed. No explanation had ever been provided for the long delay in terminating the Trust.

16. HMRC had decided not to continue the proceedings in relation to the 2002-03 closure notices following legal advice on technical matters concerning whether the Appellants were "participators" within the meaning of the tax legislation; the Discovery Assessments related to the separate issue of whether the Appellants were "settlors".

17. It was not correct that the figures for the Discovery Assessments had been "pulled out of thin air". No figures had been provided to HMRC for 2008-09. No explanation had been provided why figures could not be produced, when that had been possible for earlier years.

(1) The calculation of gains for 2005-06 had been made by HMRC from accounts of the Trust for the Settlement Period provided by the trustees in response to an order by Special Commissioner Brice. Those accounts showed additions of almost £11 million in the period. The figures in those accounts had been used to calculate the amounts assessed for 2005-06; those assessments were still the subject of proceedings before the Tribunal and the settlor issue was relevant there also.

(2) The calculation of gains for 2006-07 had been provided by the Appellants in an email in April 2012, and HMRC had taken those figures at face value and used them in raising assessments for 2006-07.

(3) In October 2011 the Appellants had written to HMRC claiming a capital loss of over £250,000 each in respect of 2009-10. That represented the disposals on the termination of the Trust in December 2009, and a schedule of disposals had been attached.

18. In January 2010 the trustee of the Trust had emailed HMRC stating:

> "On 22 December 2009 we retired as trustee in favour of [the Appellants]. The majority of the trust documentation was sent to them on that date and there is some additional documentation (including year end and final accounts) to be sent to them later this week."

19. In March 2010 the Appellants wrote to HMRC stating, "With regards to trust income and gains/losses for the final years of the trust, we will get back to you once we have the figures." That had not been done in relation to either 2007-08 or 2008-09. In early 2013 HMRC concluded that s 29 assessments should be raised for both tax years but were out-of-time in respect of 2007-08. The Discovery Assessments were raised in respect of 2008-09. The substantiation of the Discovery Assessments is a matter for the hearing of the Appeal Proceedings.

20. In the email in April 2012 already referred to, the Appellants had made an admission that they were the settlors of the Trust. Part of the proceedings before Judge Berner in 2013 had concerned that email and Judge Berner concluded that a binding agreement between the parties had not been created. Following the hearing the Appellants had resiled from the admission. On any analysis there had been a change of position.

21. The Appeal Proceedings did not concern penalties. There had been no harassment by HMRC. It had previously been necessary to issue formal statutory information notices to obtain required information. HMRC had honoured their side of the 2004 Agreement.

22. It was clear that HMRC's case in the Appeal Proceedings had a reasonable prospect of success.

Consideration and Conclusions

23. The application before me is as set out in paragraph 3 above. It is clear that the Appellants feel strongly that HMRC are being unreasonable in their pursuit of the

Appellants, part of which is the issue of the Discovery Assessments. It is also clear that HMRC are intent on ensuring that the right amount of tax is paid by the Appellants for the period from January 2004 (being the end of the period covered by the 2004 Agreement) to January 2010 (when the termination of the Trust was completed). I must put aside the "heat and light" surrounding these matters and determine the question: does HMRC's case in defending the appeal against the Discovery Assessments have any reasonable prospect of success? In considering the equivalent provision in the procedural rules of the Employment Tribunal the Court of Appeal in *A v B & C* [2010] EWCA Civ 1378 paraphrased the test as being whether the party had "a prospect which is more than fanciful" (Lloyd LJ at paragraph 61).

24. I consider that the Appellants face a high bar in relation to their application. It is not sufficient to cast doubts on whether HMRC would be successful at the substantive hearing of the Appeal Proceedings. Rather, the Appellants must show that HMRC's defence of the Appeal Proceedings is no more than fanciful.

25. I have not attached any weight to the April 2012 email in which the Appellants conceded they were settlors of the Trust. First, Judge Berner has found that there was no binding agreement arising from that correspondence ([2013] UKFTT 203 (TC)). Second, it may be (as Mr Thomas contended) that the statement was made in the context of negotiations (whether or not formally "without prejudice") with a view to a settlement.

26. Since the 2004 Agreement and its accompanying side letters were signed HMRC have proceeded on the basis that the Appellants were required to return the income and gains of the Trust. I understand that the Appellants now consider the 2004 Agreement is no longer binding on them, but that is a fairly recent development. The Appellants have provided information to HMRC in respect of some tax years, which HMRC have used; that was the case for 2005-06 and 2006-07. Moving ahead a couple of years, the Appellants also provided figures for 2009-10, showing capital losses of a quarter of a million pounds for each of them. What is missing is figures for the two intervening tax years: 2007-08 and 2008-09. HMRC have, I understand, abandoned 2007-08 as being out-of-time for assessment but they still seek to tax any income and gains for 2008-09. I am not convinced by the Appellants' submission that they are unable to obtain the relevant information for that tax year: first, the correspondence between the trustees and HMRC in January 2010 indicates that documentation was being handed over to the Appellants; second, in March 2010 the Appellants told HMRC that they would provide the figures; third, the Appellants seem to have been able to provide details of the losses claimed for 2009-10.

27. In *Nicholson v Morris* [1976] STC 269 Walton J stated (at 280) (approved by Goff LJ on appeal – [1977] STC 162 at 168):

> "… the Taxes Management Act 1970 throws on the taxpayer the onus of showing that the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer, and chapter and verse for the right answer, and it is idle for any taxpayer to say to the Revenue, 'Hidden somewhere in your vaults are the right

> answers: go thou and dig them out of the vaults.' That is not a duty of the Revenue. If it were, it would be a very onerous, very costly and very expensive operation, the costs of which would of course fall entirely on the taxpayers as a body. It is the duty of every individual taxpayer to make his own return and, if challenged, to support the return he has made, or, if that return cannot be supported, to come completely clean; and if he gives no evidence whatsoever he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered."

28. In the absence of figures for 2008-09 from the Appellants HMRC have raised assessments in estimated amounts. It may be that the Appellants can demonstrate to the Tribunal in due course that the Discovery Assessments should be vacated or amended. That may be because the Appellants succeed on the settlor issue, or show that the Discovery Assessments are in some way technically flawed, or merely that the amounts should be adjusted. What the Appellants have failed to convince me is that HMRC's case in defending the Appeal Proceedings has no reasonable prospect of success. Accordingly, I shall refuse the application for a direction barring HMRC from taking further part in the Appeal Proceedings.

Decision

29. The application is REFUSED.

30. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 19 March 2014