[2016] UKFTT 361 (TC)

TC05116

Appeal number: TC/2016/01753

INFORMATION NOTICE – taxpayer notice – FA 2008, Sch 36 – no right to a public hearing – jurisdiction and territoriality – irrelevance of representations on liability and assessment processes

FIRST-TIER TRIBUNAL
TAX CHAMBER

WITHOUT NOTICE APPLICATION FOR APPROVAL OF A TAXPAYER NOTICE UNDER PARAGRAPH 1 OF SCHEDULE 36 TO THE FINANCE ACT 2008

TRIBUNAL: JUDGE ROGER BERNER

Sitting in private at Fox Court, Brooke Street, London EC1 on 18 May 2016

DECISION

1. In the course of a without notice application by HMRC for approval by the Tribunal of an information notice to be given to a person ("the taxpayer") under paragraph 1 of Schedule 36 to the Finance Act 2008, I have considered a number of representations made on behalf of the taxpayer. The purpose of this short anonymised decision is to record my conclusions on those matters which may be of general interest. Other than those matters, in common with the normal practice in these applications I do not record in this decision my reasons for being satisfied that all the relevant conditions for approval were satisfied in this case.

Without notice application: private hearing

2. In the course of correspondence with HMRC, the taxpayer's representatives sought information with regard to the hearing of the application under Sch 36 FA 2008. Whilst acknowledging that the taxpayer would have no right to be represented at the hearing, they nonetheless asserted that the hearing would be a public hearing.

3. The application was made as a "without notice" application. At the same time an application was made for a direction that the hearing be in private on the ground that, if the hearing were in public, HMRC's case may be prejudiced. The hearing was directed by the Tribunal to be in private, pursuant to rule 32 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

4. The reason for such a direction is clear. Applications for approval of information notices under Sch 36 may be made without notice: Sch 36, para 3(2A). If such an application is made, as it was in this case, the notice required to be given to the person to whom notice is to be given, in this case the taxpayer, is limited to that in para 3(3)(c), namely that that person has been told that the information and documents referred to in the notice are required and has been given a reasonable opportunity to make representations. The consequence, under Rule 19 of the Rules, is that procedural requirements as to provision of documents and participation of the taxpayer are disapplied. In those circumstances, in the absence of the taxpayer, it would not be in the interests of justice to permit the public to hear the details of the taxpayer's personal and financial circumstances which may be put before the Tribunal in support of the application.

5. A taxpayer to whom a notice is to be given under Sch 36, para 1 has no right to an *inter partes* oral hearing. That was established in *R v A Special Commissioner ex parte Morgan Grenfell & Co Ltd* 74 TC 511, a case I discussed at some length in the published decision, *Ex parte certain taxpayers* [2012] UKFTT 765 (TC), and which was followed in the subsequent judicial review proceedings in *R (on the application of Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners* [2016] EWCA Civ 15. It was accepted in *Morgan Grenfell* that the self-evident risk of compromising the investigation by accidental disclosure of material to which the taxpayer was not entitled, and the disclosure of which would run counter to Parliament's purpose, excluded the possibility of such a hearing. Arguments to the

contrary based on article 6 when combined with article 8 of the European Convention on Human Rights were rejected in *Derrin*.

Jurisdiction

6. The representations on behalf of the taxpayer included that he was not resident in the UK, and that accordingly "HMRC has no jurisdiction over [the taxpayer's] affairs". A similar representation was made in relation to the taxpayer's non-domiciled status. Questions were also raised in other correspondence from the taxpayer's representatives concerning the applicability of a UK statute such as FA 2008 to a non-UK located taxpayer.

7. There are two jurisdictional questions here. The first is the question of the jurisdiction with respect to the liability of the taxpayer to UK tax. The second is the jurisdictional reach of Sch 36 itself. In my view, the two go very much hand in hand.

8. As to the first, HMRC's investigation, which has led to the Sch 36 application, is concerned with the question whether the taxpayer was resident in the UK over a period. Whatever might be the current residence status of the taxpayer, were he to be found to have been UK resident in the relevant period, and subject to the application of any treaty relief, a liability to UK tax may have arisen, whether on income and gains generally or, if he is not domiciled in the UK, UK source income and gains and foreign income and gains remitted to the UK. There is therefore no question of there being no jurisdiction with respect to the potential tax liability or, in the terms of Sch 36, para 1(1), the taxpayer's tax position.

9. Furthermore, representations of this nature, which essentially go to the substantive case that might arise, are not such as to render the information not reasonably required, as provided by Sch 36, para 1(1). The information is reasonably required because it goes to the question of the taxpayer's residence for tax purposes, both in the UK and in the other territory where he claims to have been resident in the relevant period. In that regard, I was made aware of an exchange of information request that had been made by HMRC of the relevant foreign tax authority, and I was shown both the request and the responses to it. I was satisfied that, having regard to those responses, it was reasonable for HMRC to seek the further information it was requiring in the taxpayer notice. Any question of dual residence, and the application of any treaty tie-breaker, is a matter for consideration once the relevant information pertinent to tax residence in the period in question has been made available.

10. The second jurisdictional question goes to the territorial scope of Sch 36. It is the fact that, in this case, the taxpayer notice is intended to be addressed to the taxpayer at an address which is outside the jurisdiction. But the mere fact that a taxpayer whose circumstances are such to give rise to reasonable enquiry in respect of a particular period no longer has an address in the UK to which such a notice might be sent does not, in my judgment, exclude the power of HMRC to give such a notice under Sch 36, para 1.

11. It is all a question of construction of the relevant statutory provision. The question to be asked is whether Parliament, in enacting Sch 36, intended a person in the position of the taxpayer in this case to be subject to an information notice. That is clear from *Clark v Oceanic Contractors Inc* [1983] 2 AC 130; 56 TC 183, where it was argued that a territorial limitation prevented the company from being obliged to deduct tax from certain payments of emoluments made outside the UK. Lord Wilberforce said (56 TC at p 227-228):

> "The Respondent company contends, and the Court of Appeal has held, that the provisions regarding collection of tax by deduction from wages can never have been intended to apply to a foreign company, non-resident in the United Kingdom, which makes payments outside the United Kingdom.
>
> In my opinion this contention is erroneous, because it is based upon a mistaken application or understanding of the 'territorial principle'. That principle, which is really a rule of construction of statutes expressed in general terms, and which as James L.J. said a 'broad principle', requires an inquiry to be made as to the persons with respect to whom Parliament is presumed, in the particular case, to be legislating.
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> Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration? …"

12. Applying that principle (and leaving aside the application of Sch 36 to a "relevant foreign tax", as defined by Sch 36, para 63(4) which is not relevant in the application under review), as far as UK tax is concerned in my judgment the territorial scope of Sch 36 must match the territorial scope of the liability to tax. To the extent that it is reasonable for HMRC to check a person's UK tax position, which must in cases where residence is an issue include consideration of the territorial reach of UK tax, such a person must, in the words of Lord Wilberforce, fall within the legislative grasp or intendment of Sch 36.

13. Further support for that conclusion may be found in *Re Clore (deceased) (No 3), IRC v Stype Trustees (Jersey) Ltd and others* [1985] STC 394. In that case Walton J held, at p 402, that it was inconceivable that if Parliament had intended foreign trustees to be liable to UK tax it would at the same time have intended them to be excluded from liability to comply with the administrative machinery, which in that case required the production of accounts of property comprised in the settlement for the purpose of capital transfer tax. A territoriality argument based on the proposition that Parliament would not legislate in respect of extra-territorial matters and that the principle of territoriality was much stronger in respect of machinery provisions than issues of liability was rejected. By the same token, in my judgment Parliament must have intended the machinery of Sch 36 to be capable of operating in respect of any prospective tax liability within the scope of UK law and thus to encompass the giving of notice to persons who, by reason of it being reasonable for HMRC to seek information as to their UK tax position, are taxpayers for the purpose of Sch 36, para 1 notwithstanding that they may be outside the UK.

Discovery and time limits

14. In the course of correspondence with HMRC, the taxpayer's representatives have referred to the requirements, in relation to the relevant periods, that would require to be met by HMRC before issuing discovery assessments, if applicable, for those periods, including the requirements under s 29 of the Taxes Management Act 1970 ("TMA") and those in relation to early periods which would require to be satisfied under s 36 TMA.

15. Those requirements relate to the assessment process and are not relevant to the reasonableness of the enquiries, including the giving of a taxpayer notice, which HMRC may undertake. The information gathered as part of that process will be as apt to the question of assessment as it will be to the question of the underlying liability; both are encompassed within the expression "tax position" in Sch 36, para 1(1).

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 24 May 2016