



Neutral Citation: [2023] UKFTT 00944 (TC)

Case Number: TC08981

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2023/00783

PROCEDURE – application to stay – whether validity of trust affects HMRC’s request for documentation and information under Schedule 36 Finance Act 2008 – no – stay refused

Judgment date: 03 November 2023

Decided by:

TRIBUNAL JUDGE AMANDA BRONW KC

Between

ANDREW JAMES WILSON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined this application appeal on 26 October 2023 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 1 February 2023 (with enclosures), Andrew Wilson (**Appellant**) application to stay dated 4 May 2023 and the various subsequent submissions by the parties dated 22 June 2023, 10 July 2023 and 12 September 2023 (from the Appellant) and 6 July 2023 and 15 August 2023 (from HM Revenue & Customs (**HMRC**)).

DECISION

INTRODUCTION

1. The appeal in respect of which this application is made concerns the imposition of a £300 penalty (**Penalty**) issued to the Appellant by HMRC pursuant to paragraphs 39 and 46 Schedule 36 Finance Act 2008 (**Sch 36**) for failure to produce information and documents requested by HMRC in respect of the Appellant's tax return for the tax year ended 5 April 2019 and in particular the Appellants use of a disguised remuneration trust.

PROCEDURAL BACKGROUND

2. The appeal was lodged on 1 February 2023. The Tribunal indicated that the appeal should be determined by video hearing as a basic case.

3. On 13 April 2023 the Appellant notified the Tribunal that:

“We wish to inform the Tribunal that the Trust to which the appeal relates is void and that arbitral proceedings in the British Virgin Islands are under issue, to obtain an order determining the beneficial ownership of the property hitherto supposed to be subject to the trusts of the void trust. There will then follow relevant court orders in that jurisdiction and (in the High Court) in this jurisdiction.

We, therefore, respectively submit that because of the above on-going matters, a request for video participants at this stage is premature.”

4. Following an indication from HMRC that the status of the trust was not pertinent to the determination of the appeal against Sch 36 penalties, on 4 May 2023 the Appellant made a formal application for stay. The grounds of the application were stated, in summary, to be:

- (1) The trust to which the penalty notice relates was void ab initio;
- (2) Arbitral proceedings in the British Virgin Islands (**BVI**) continue so as to determine the beneficial ownership of the property held within the void trust;
- (3) The arbitral proceedings would result in relevant court orders in BVI and the England and Wales High Court;
- (4) As the penalties are based on a premise that contributions were made to a trust and that the loan charge provisions of Part 7A Income Tax (Earnings and Pensions) Act 2003 apply the notices to which the penalties relate were necessarily founded on a premises which is incorrect in law which will be confirmed by the High Court order in due course;
- (5) As the trust is void all requested information and documents are similarly void;
- (6) The determination of a liability to penalties for failure to provide the requested information and documentation regarding the void trust should properly be stayed pending confirmation as to the status of the trust.

5. The Tribunal directed the parties to provide submissions on the question of the appropriateness of a stay. A summary of these submission is set out below.

BACKGROUND TO THE ISSUE OF THE PENALTY

6. The Appellant was appointed as a director of Agrochemex Global Services Limited on its incorporation on 19 December 2007 (**Company**).

7. The Company changed its name to Agrochemex International Limited on 6 June 2008.

8. Between 30 April 2011 and 30 April 2019 the Company made contributions to Agrochemex International Limited Remuneration Trust (**AILRT**) totalling £3,057,148 which then made loans to the Appellant.

9. Sometime before 18 March 2019 the Appellant was approached by Buckingham Wealth Ltd with a solution which met the concerns of some individuals who had established remuneration trusts, regarding the introduction of a tax charge on outstanding loans made by such trusts. The solution was known as “the Sunrise solution”. The arrangement involved a “Finco” which had been “established under a joint business venture between Minerva and a 3rd party financier”.

10. On 18 March 2019 the Appellant signed a hypothecated loan memorandum (**HLM**) pursuant to which LCS Finance Limited (**LCS**), an entity established in BVI, as lender, hypothecated “all such sums as may be claimed by HMRC ... as falling subject to the provisions of [the loan charge], in respect of [the Appellant]”. The Appellant borrowed £1,397,830.31 pursuant to the agreement, apparently for repayment of sums originally loaned by AILRT (the trustee for which was Costa Corporate Services Limited (**Costa**)).

11. At or about the same date £1,397,830.31 was paid by LCS at the Appellant’s order, to Costa who subsequently confirmed receipt of the sum.

12. HMRC’s understanding of the hypothecated loan arrangements offered under the Sunrise solution by Buckingham Wealth is that Costa subscribed as a shareholder of LCS for the “subscription amount”, a sum equal to the sum advanced to the Appellant under the HLM.

13. The Appellant’s self-assessment tax return for tax year ended 5 April 2019 declared income from the Company of £41,650, no loan charge was brought into account in respect of the sums lent to the Appellant by AILRT.

14. On 14 January 2021 HMRC opened an enquiry pursuant to section 9A Taxes Management Act 1970 (**Enquiry**) into the Appellant’s self-assessment tax return for the year ended 5 April 2019. The notification of the Enquiry indicated that HMRC were “checking [the Appellant’s return] to see whether it should have included information about outstanding disguised remuneration loans”.

15. The letter sets out:

“Disguised remuneration is a type of tax avoidance. It involves people being paid for work or services in the form of a loan that is unlikely to ever be repaid.

The disguised remuneration loan charge is a charge to tax that’s calculated on certain disguised remuneration loans.

You can find information about disguised remuneration and the loan charge online. Go to www.gov.uk and search for:

- ‘disguised remuneration tax avoidance schemes’
- ‘report and account for your disguised remuneration loan charge’ (to find out how to report a disguised remuneration loan in your tax return)
- ‘disguised remuneration independent loan charge review’ (to find out about changes to the loan charge that may affect the information you need to include in your tax return)

16. Attached to the letter opening the Enquiry was an informal request for information and documentation to be provided.

17. HMRC received a response dated 9 January 2022 to the information request which stated:

“We note that you are checking the taxpayer’s return to see whether it should have included information about outstanding “disguised remuneration loans”. In relation to the items contained on the Schedule regarding any such loans from a trust or foundation, it is confirmed that no loans from remuneration trusts or foundations have been taken or are outstanding for the period under enquiry, and that no loans are outstanding for the periods as requested within the Schedule. The items as contained in the Schedule are therefore not applicable and we would be grateful if you would please annotate your records accordingly.”

18. On 26 January 2022 HMRC reiterated that they required the information previously requested and issued a formal and detailed requirement to produce information and documents as set out in the accompanying schedule (**Notice**). The Appellant was notified that if he did not possess a copy of any particular document that he was expected to try to obtain it from others who might have such a copy and to provide evidence of all attempts to obtain the document if it was not produced. The deadline for production was set as 21 March 2022. The Appellant was notified that a failure to produce the documents by 21 March 2022 may render the Appellant liable to a £300 penalty and subsequent daily penalties. The Appellant was also duly notified of his right to appeal against the requirement to produce information and documentation.

19. By letter dated 15 February 2022, the Appellant appealed the Notice. The appeal was in time. The grounds of appeal, in summary, were that no disguised remuneration loans had been advanced to the Appellant and as such no loan charge could apply. Reference was made to case law supporting the assertion as to the underlying tax position. It was therefore contended that:

“it is apparent that the items requested in the Notice are not relevant and are not reasonably required for the stated purpose of your check”.

20. HMRC provided their view of the matter letter on 9 March 2022. HMRC confirmed that all the documents and information requested were reasonably required for the purposes of and relevant to, checking the Appellant’s tax position. HMRC expressed disagreement regarding the legal conclusions drawn in the appeal letter regarding the liability to a loan charge. The Appellant was offered a review of the decision to maintain the information request and informed of their right to notify the appeal to the Tribunal.

21. The Appellant accepted the offer of a review. The outcome of the review was communicated on 19 May 2022. It confirmed HMRC’s view that all the information and documentation requested was reasonably required for the purposes of checking the tax return for the year ended 5 April 2019 and that, in HMRC’s view, all documents were within the Appellant’s possession or power to obtain. It stated that the documents were required to test the position advanced by the Appellant as to the existence at law or in fact of a disguised remuneration loan and thereby whether the loan charge applied.

22. No appeal was notified to the Tribunal in respect of the review decision.

23. On 31 May 2022 the Appellant provided some of the information and documentation requested pursuant to the Notice.

24. HMRC accepted that the 31 May 2022 response fully met a number of the requests specified in the Notice but not all. In particular 1) there was a discrepancy in the information provided as to the amounts said to have been transferred to the Appellant and clarification was sought; 2) as no list of loan repayments was provided HMRC sought clarification that

there had been no such repayments; 3) documents relating to loan transfers on 29 April 2013 were requested; 4) with regard to documents which the Appellant contended were not in his possession the Appellant was required to obtain them from third parties. HMRC extended the deadline for provision of the outstanding information to 17 August 2022.

25. By a response dated 15 August 2022 the Appellant provided some explanation of the matters identified as 1 – 3 in paragraph 24. above. The Appellant indicated that the documents not in their possession had been requested from relevant third parties and stated:

“In relation to the outstanding items, it is confirmed that all documentation and correspondence in the Taxpayer’s possession has been provided. It is confirmed that there is no other such documentation as described in the Taxpayer’s possession and the Taxpayer does not know whether such documentation exists. Please note that as the Taxpayer does not possess the documentation requested, the Taxpayer has requested same from the relevant third-parties on numerous occasions. No response has been received to date. The Taxpayer will continue to request the documentation regularly and this will be provided upon receipt. Please find enclosed copy correspondence sent in this regard.

In relation to the original Notice, the Factsheet appended thereto states that you are not allowed to use a Notice to ask for documents not in the possession of the Taxpayer and they cannot get the documents or copies from whoever holds them. Based on the circumstances described above, it is clear that the Taxpayer has requested copies from the party that holds these, but these have not been forthcoming. Furthermore, the fact that the Taxpayer has made a strenuous effort to obtain these and that despite numerous requests, these have not been provided by the appropriate person, this constitutes a reasonable excuse for not complying with the Notice.”

26. Evidence of a request made to a LCS was provided. The email to LCS enclosed the Notice and “formally request[ed] that [LCS] provide [the Appellant] with copies of the required paperwork in order that [the Appellant could] comply with HMRC’s correspondence.” LCS was requested to acknowledge receipt of the request and to confirm that assistance would be provided.

27. HMRC accepted the explanation and clarifications provided by the Appellant but considered that the Appellant continued to have failed to comply with the requirement to produce the documents that the Appellant claimed were not in his immediate possession. HMRC questioned that, for instance, the Appellant could have received and returned certain documents (which had been provided) with no covering letters or explanations. HMRC also considered that the Appellant had not made any “serious attempt” to obtain the missing documents from third parties.

28. The documents outstanding after 17 August 2022 were:

“all documents relating to [arrangements involving hypothecated loans (arrangements sometimes referred to as Sunrise)] including, but not limited to:

- share subscription memorandums
- bank statements demonstrating the movements of money referred to in the various memorandum
- all promotional, marketing or explanatory material provided to you
- all correspondence (whether by letter, email or other method) to or from you”

(Outstanding Documents).

29. On 16 September 2022 HMRC issued the Penalty considering that the Appellant had continued to fail to meet the terms of the Notice in full.

30. On 10 October 2022, the Appellant notified HMRC that AILRT was not a trust as it did not meet one or more of what are described as “the 3 certainties required for valid formation of an express trust” such that the Enquiry was redundant thus invalidating the Notice. The Appellant invited HMRC to initiate a new enquiry should they consider an alternative basis of challenge be appropriate to the tax position of the Appellant.

31. In an undated letter which appears to have been sent at or about the same time, the Appellant appealed the imposition of the Penalty. By that letter the Appellant also provided HMRC with relevant promotional marketing and explanatory material and correspondence concerning the HLM. As regards the remaining Outstanding Documents it was contended that they were not in the Appellant’s possession and that sufficient and strenuous but unsuccessful attempts had been made to obtain them. The Appellant also challenged whether the documents existed. Attached to the letter were two emails following up on the request set out in paragraph 26. above and a response received from LCS refusing to provide copies of the documents on the grounds of confidentiality but indicating if there was a statutory entitlement or other lawful basis to compel delivery to advance such basis in writing. It was therefore claimed that there was a reasonable excuse for failure to meet the terms of the Notice in this regard.

32. HMRC’s view of the matter following the Penalty appeal is contained in a letter dated 28 October 2022. Regarding the contention that the Appellant had sought to but failed to obtain the missing documents from third parties HMRC’s report was that there were alternative sources from which the documents may be obtained. As the Appellant had sought to obtain the documents only from one potential source the Appellant had not exercised all the powers available to them to obtain the documents. HMRC considered that the Appellant remained in default and had failed to establish a reasonable excuse.

33. In the same letter HMRC address the Appellant’s letter of 10 October 2022 concerning the assertion that the trust was void ab initio contending that whether the trust is void or not does not render the information request irrelevant and inviting further particularisation of any legal argument which the Appellant wished to advance as to the substantive tax issue which might be predicated on the voiding of the trust.

34. The Appellant requested a review if HMRC’s view of the matter on 22 November 2022. The letter reiterates the Appellant’s position on not having power over the remaining Outstanding Documents.

35. HMRC’s review conclusion letter dated 4 January 2023 confirms the Penalty on the basis that, absent a notification to the Tribunal of the appeal against the Notice the terms of the Notice had become final, and the Appellant was bound to comply with its terms. Its terms had not been complied with, with the consequence that he had rendered himself liable to a penalty. As the assessment to the Penalty had been raised within the relevant statutory time limits it had been validly issued. HMRC identify that both the Company and AILRT through Costa were parties to the arrangements and who might reasonably be expected to also have copies of the remaining Outstanding Documents and conclude that as no attempt had been made to obtain the documents from these parties no reasonable excuse was made out. HMRC also rejected any contention that the voiding of the trust rendered the information request redundant as their powers to require provision of information and production of documents, in the present case, are founded in the Enquiry.

36. On the basis that the Appellant continued to fail to provide the Outstanding Documents daily penalties of £20 per day for 30 days were issued on 6 January 2023.

37. Following the imposition of these further penalties, on 13 January 2023, the Appellant made a further attempt to obtain the remaining Outstanding Documents by re-engaging with LCS requesting that they waive confidentiality in the documents such that they might be obtained from the trustee to which the contributions had been paid and the loans made.

38. On 26 January 2023 the Appellant also contacted Costa and requested disclosure of the Outstanding Documents. This prompted a response the same day indicating that the AILRT had been voided. Costa suggested that HMRC's request be reviewed by "BW" (whom I assume to be Buckingham Wealth).

39. The appeal in respect of the Penalty was notified to the Tribunal on 29 March 2023. As far as I am aware there is no appeal against the subsequent daily penalties.

LEGISLATION

40. Pursuant to paragraph 1 Sch 36 HMRC may require a taxpayer to provide information or produce documents "if the information or document[s] [are] reasonably required for the purposes of checking the taxpayer tax position". Where a person is required by a paragraph 1 notice to provide information or produce documents they must do so within the period reasonably specified in the notice. Paragraph 18 provides that a notice under paragraph 1 "only requires a person to produce a document if it is in the person's possession or power".

41. Section 49F Taxes Management Act 1970 (**TMA**) provides that where HMRC give notice of the conclusions of a review, then, absent notification of the appeal to the Tribunal, those conclusions are treated as the basis of a formal settlement under section 54(1) of the appeal formerly notified to HMRC.

42. Rule 5 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 grant the Tribunal wide powers of case management. Including the power to stay proceedings. In exercising its case management powers the Tribunal must act in accordance with the overriding objective to deal with matters justly and fairly.

PARTIES SUBMISSIONS

Appellant's submissions

43. The principal grounds for the application are set out in paragraph 4. above. It is the Appellants case that once the status of AILRT has been confirmed by the relevant BVI and English and Welsh High Court orders the matter of the which Tribunal is currently seized (i.e. the Appellant's liability to the Penalty) will "fall away by definition".

44. The Appellant contends that as AILRT was void ab initio the Appellant cannot have received sums by way of disguised remuneration as he never had legal title to the sums. In consequence of the legal status of AILRT, HMRC's attempts to tax the payments received are wrong in law. He contends that the arbitral proceedings will determine the beneficial ownership of the property previously considered to have been trust property and the position ultimately then confirmed with binding effect by the High Court, in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and section 36 of the Arbitration Act 1950. The consequence, so it is contended, will be that there can be no sound basis on which the documents and information could have been requested. By inference, I conclude that the Appellant contends that the information and documentation is not relevant to the tax position of the Appellant with the consequence that the information and documentation does not come within the relevant provisions of Sch 36.

45. The Appellant also appears to contend that there was no Outstanding Information and Documentation because the request must also be void.

46. In the Appellant's submission a stay is necessary in order that the High Court order confirming the invalidity of AILRT can be obtained at which point HMRC will be forced to concede that no Penalty was due and there will be no issue for the Tribunal to determine.

47. In their submission of 13 September 2023 the Appellant states:

“... were the Tribunal not to grant the Application for a stay, then the Tribunal would be placed in an injurious position. The Tribunal would be called upon to adjudicate matters concerning a trust which never had legal existence. Upon the issue of the said High Court Order, the Tribunal would be bound to reconsider the matter, at the waste of public time and money.”

HMRC's submissions

48. HMRC oppose the Appellant's application for a stay.

49. HMRC contend that they opened an enquiry in respect of the Appellant's tax return for the tax year ended 5 April 2019 in order to establish whether the Appellant had received disguised remuneration through AILRT and in respect of which the Appellant was liable to the loan charge. HMRC were aware that the Appellant was a user of the Sunrise arrangements.

50. HMRC were concerned that the Appellant had received monies which were not subject to any income tax charge and, it is contended, issued the Sch 36 notice with a view to establishing whether or not the Appellant's self-assessment tax return for the year to 5 April 2019 was accurate. HMRC contend that the legality of the information notice has been determined as it was appealed by the Appellant and subject to a review by HMRC but there was no notification of an appeal to the Tribunal with the statutory consequence (pursuant to section 49F(2) TMA that the appeal was treated as settled in accordance with the provisions of section 54 TMA. In this regard they refer to the judgment of *PML Accounting Ltd v HMRC* [2018] EWCA Civ 2231 (at [45], [47] and [113 – 115]). HMRC submit that, as a consequence, the Appellant is not entitled to assert that there is no basis on which the information and documentation could be requested and the sole issue for determination is whether the Appellant complied with the terms of the notice or had a reasonable excuse for failing to do so.

51. In substance HMRC contend that the relevant issues to be determined by the Tribunal in respect of the present appeal are limited to answering the following three questions:

- (1) Did the Appellant fail to comply with the terms of the Notice?
- (2) If so, has the Penalty been validly issued?
- (3) If so, does the Appellant had a reasonable excuse for non-compliance?

52. The question of the validity or otherwise of AILRT is not relevant to any one of those questions.

53. HMRC make various arguments as to the effect and nature of any English and Welsh court order that may be obtained (with which the Appellant takes issue – see paragraph 44. above) but ultimately contends only that the validity of AILRT is an irrelevant issue in the context of the points to be decided on the Penalty appeal.

DISCUSSION

54. I have no hesitation in concluding that the Appellant's application for a stay should be refused. Substantially for the reasons advanced by HMRC.

55. As indicated above, it does not appear to be contested by the Appellant (nor can it be) that the Company made payments to what purported to be a trust, namely, AILRT; and that payments were subsequently received by the Appellant from AILRT, whatever its status. Those payments were not returned as taxable income by the Appellant when paid. It also appears to have been accepted in correspondence, and by reference to documents and information which have been disclosed that the Appellant entered into the hypothecated loan agreement referred to at paragraph 10. above and that the payment referred to at paragraph 11. above was subsequently made. It has been claimed that no loans were outstanding as of 5 April 2019, at least indicating that the Appellant considered that any loans made to him were repaid by him. Bank statements have been produced showing movement of money in line with the agreements entered.

56. HMRC stated when opening their Enquiry that they were (and are) concerned that the various payments (which the Appellant cannot contest were made) represent disguised remuneration. It is open to the Appellant, in due course and consequent upon HMRC closing the enquiry in a manner adverse to the Appellant, to challenge HMRC's conclusion and the consequences which follow.

57. Similarly, the Appellant could have (and initially did) challenge the Notice on the basis that the information and documents were not reasonably required by HMRC for the purposes of checking the Appellant's return. Such a challenge could have been by reference to the validity of AILRT. However, the question of validity of AILRT was not, it would appear, something which had occurred to the Appellant or his advisors at the time that he did, in fact initiate a challenge to the Notice. HMRC had no reason to consider, at the time they issued their review conclusion letter in respect of the appeal against the Notice, that the validity of OLSRT was in question. The Notice was affirmed and there was no notification of an appeal to the Tribunal.

58. As no appeal was notified to the Tribunal in respect of the review the statutory consequence (as per sections 49F(2) and 54 TMA) is that the conclusions stated in the review represent a formal settlement between the Appellant and HMRC as if the Tribunal had determined the appeal on the basis agreed.

59. As such it is settled that:

- (1) the Notice was issued in order to check the Appellant's tax position
- (2) the information and documents requested were reasonably required
- (3) the Notice was validly issued.

60. Whether the Appellant should be entitled to seek to relitigate the validity of the Notice by reference to an assertion that AILRT has been voided and the Enquiry thereby rendered irrelevant or whether it is an abuse of process would be a matter to be determined on a broad merits basis (see [20 – 27] *HMRC v Dhalomal Kishore* [2021] EWCA Civ 1565) were the Tribunal to have jurisdiction to consider the validity of the Notice at all when determining whether there was a failure to comply for the purposes of an appeal against the Penalty.

61. However, I have no such jurisdiction. In *PML Accounting Ltd v HMRC* [2017] EWHC 733 (Admin) (at [63 – 67]) it was determined:

63. There is another reason that in my judgment the Tribunal had no jurisdiction to consider the validity of the information notice in the penalties appeal. That is the narrow scope of the issues in a penalties appeal as a result of the relevant statutory provisions. That narrow scope was correctly identified, in my view, in *Birkett v. Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 89 (TCC).

64. The claimant contended that in this case the issue was whether the claimant was liable for a penalty under paragraphs 39 ... of Schedule 36 of the 2008 Act. That included whether [HMRC's] decision was correct that the pre-conditions for imposing [the penalty] been met. The pre-conditions in this case included whether there was a valid information notice which had not been complied with. In the [taxpayer's] submission the Tribunal was correct to conclude that the validity of the information notice was "fundamental to the question of the lawfulness of the penalties under appeal".

...

66. ... The Tribunal's jurisdiction is statutory. Section 49D TMA 1970 provides that the Tribunal's overall jurisdiction is to decide "the matter in question". The right to appeal a penalty set out in paragraph 47 of Schedule 36 of the 2008 Act is against "(a) a decision that a penalty is payable by that person under paragraph 39, ..." or against the amount (not relevant in this case). Under paragraph 48(3) the Tribunal is limited to confirming or cancelling the decision. In a penalties appeal paragraph 39(1) of Schedule 36 applies "to a person who (a) fails to comply with an information notice" where there is liability to a penalty of £300. ...

67. Thus the issue on appeal whether a penalty is payable under both paragraph 39(1) ... is the narrow one of whether, ... the person has failed to comply with the notice ... The validity of the information notice which gives rise to the imposition of a penalty simply does not arise. ..."

62. On the basis that there is no jurisdiction of the Tribunal to consider the validity of the notice, whether AILRT is or is not void ab initio and the status of the arbitral proceedings in the BVI, and court order from the BVI or indeed from the High Court are all irrelevant in these proceedings. The Tribunal determining this appeal against the Penalty must proceed on the basis that the Notice was valid.

63. I therefore agree with HMRC that the only questions to be answered by the Tribunal in this appeal are those identified in paragraph 51..

64. In the context of a stay application it is not necessary for me to determine the answer to those questions as that is the role of the Tribunal appointed to hear the appeal. However, in the context of the application for a stay I must determine whether the status of AILRT is relevant to any of the questions.

65. I note that the first and second questions are matters of fact to be determined by reference to the terms of the Notice and the validity of AILRT will be irrelevant to them both.

66. The Appellant contends that the validity of AILRT is a relevant issue in determining whether he has a reasonable excuse.

67. I do not consider that the validity of AILRT is relevant to the reasonable excuse defence. I note that the test which the Tribunal hearing the appeal against the Penalty is required to apply is as set out in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) as recently endorsed by the Court of Appeal in *William Archer v HMRC* [2023] EWCA CIV 626. That test requires the tribunal to:

- (1) Establish the facts that the Appellant asserts give rise to the reasonable excuse;
- (2) Decide whether the facts are proven;
- (3) Determine whether, viewed objectively, the proven facts provide a reasonable excuse for default;

(4) If the reasonable excuse ceased determine if there was a reasonable delay between the excuse ending and compliance.

68. Where the excuse advanced is that the Appellant reasonably believed that there was no obligation to comply the Tribunal must determine as a fact whether that belief was held and if so whether the belief was reasonable.

69. The Appellant's appeal against the Penalty states that AILRT was void but notably it does not contend that the Appellant believed or had been advised that AILRT was void when he failed to comply with the Notice (some months previously). That it does not do so is entirely understandable in the context of the extensive correspondence between the Appellant's representatives and HMRC throughout the period between the issue of the Notice and the imposition of the Penalty which centred entirely on whether the documents were within the Appellant's possession or power. The validity of AILRT and its possible impact on the loan charge was a matter identified much later in the date.

70. On the case as pleaded the status of AILRT at the point at which payments were made to or by it and in March 2019 when it is claimed that any outstanding loans were repaid has no bearing on whether the Appellant has complied with the Notice or had a reasonable excuse for not doing so and therefore does not justify a stay of this appeal against the Sch 36 Penalty.

DISPOSAL

71. For the reasons stated above I refuse the application the appeal should now proceed to be determined.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

**AMANDA BROWN KC
TRIBUNAL JUDGE**

Release date: 03rd NOVEMBER 2023