Neutral Citation: [2024] UKFTT 1116 (TC)

Case Number: TC09382

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/04359

Case management – applications by the parties - whether the Appellant had permission to include two new grounds – scope of Tribunal's jurisdiction under TMA s 50 – whether the transfer of assets abroad legislation breached Art 56 TFEU – whether evidence on Guernsey law should be directed – other directions

Heard on: 25 November 2024
Judgment date: 12 December 2024

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

DAVID WARREN HANNAH

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Julian Hickey of Counsel, instructed by Levy and Levy

For the Respondents: Christopher Stone KC and Katherine Elliot of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

INTERLOCUTORY DECISION

INTRODUCTION

1. In 2006, Mr Hannah ("the Appellant") set up in business providing advice on Stamp Duty Land Tax ("SDLT") under the name "Cornerstone Tax Advisers" ("the Cornerstone business"). Subsequently:

(1) the Cornerstone business was transferred to a Guernsey company, Marlborough Nominees Ltd ("MNL"), in exchange for loan notes issued to the Appellant;

(2) MNL established Cornerstone Advisory Service Ltd ("CAS") to run that business;

(3) the shares in CAS were settled into the Cloudburst Trust; and

(4) the Cornerstone business was later transferred to other offshore entities.

2. On 8 March 2018, HMRC issued the Appellant with discovery assessments for the tax years 2008-2010 and 2012-2017, on the basis that he was liable to income tax under the Transfer of Assets Abroad ("ToAA") provisions. On 21 June 2018, the Appellant notified his appeal against those assessments to the Tribunal("the original appeal").

3. On 13 December 2019, HMRC issued the Appellant with a discovery assessment for the tax year 2010-11 and with various penalty assessments. On 8 July 2020, the Appellant notified his appeal against those decisions to the Tribunal ("the 2020 appeal").

4. Meanwhile, in March 2020, the Appellant applied for a case management ("CM") hearing, and there were a number of subsequent applications by both parties. A CM hearing was listed before me, and on 18 November 2024, having considered the papers in the Tribunal file and subsequent correspondence with and between the parties, I set out a list of the issues which I understood they were asking the Tribunal to decide at this CM hearing ("the List of Issues").

5. By the time of the hearing, some of those Issues were no longer in dispute. I gave my provisional view orally on each of the remaining Issues in the course of the hearing, and said I would set out my final position in a written judgment; this is that judgment. It follows the same order as the List of Issues. I have not changed the preliminary views expressed at the hearing, but have expanded the points made orally, including by adding citations. Related Directions are being issued at or around the same time as this decision ("the Directions").

6. Of the ten Issues considered below, the most significant are:

(1) Issue 3, which was whether the Appellant should have permission to amend his grounds of appeal to include two new grounds. The first of those engaged the jurisdiction of the Tribunal, and the second concerned the application and effect of Article 63 of the Treaty on the Functioning of the European Union ("Art 63 TFEU"); and

(2) Issue 7, which was whether permission should be given for the Appellant (or the parties jointly) to provide the report of an expert on Guernsey law.

RULE 2 OF THE TRIBUNAL RULES

7. At the beginning of the hearing, having noted (a) the extent and number of Issues, and (b) the time which had already elapsed since the appeals were made, I reminded both parties of their obligation under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") to co-operate with each other and with the Tribunal, and the parties acknowledged that obligation.

ISSUE 1

8. Issue 1 was whether the Appellant had appealed to HMRC in relation to the tax year 2011-12. By the time of the hearing, it was common ground that the answer to this question was "No".

ISSUE 2

9. Issue 2 was whether the original appeal and the 2020 appeal should be consolidated. However, in the course of preparing for the hearing, HMRC identified that the Tribunal had already made an order on 24 August 2022 consolidating the 2020 appeal with the original appeal, although the parties had previously lost sight of this.

10. This Issue thus also fell away, albeit in the context of other Issues it was noted that:

(1) the grounds of appeal for the 2020 appeal simply repeated those for the original appeal; and

(2) HMRC had not yet filed or served a Statement of Case ("SoC") in response to the 2020 appeal.

ISSUE 3

11. Issue 3 was whether the Appellant should have permission to amend his grounds of appeal.

The approach

12. It was common ground that in deciding this Issue, the Tribunal should follow the following principles set out in *Quah v Goldman Sachs International* [2015] EWHC 759 ("*Quah*") at [36-38] and *Kawasaki Kisen Kaisha Ltd v Kemball Ltd* [2021] EWCA Civ 33 ("*Kawasaki*") at [17-18]:

(1) The amended grounds of appeal must have a realistic as opposed to a fanciful, prospect of success. This means that they must carry some degree of conviction, be properly particularised and be supported by evidence which establishes a sufficiently arguable case.

(2) Whether to allow the proposed amendment involves a balancing exercise taking into account the overriding objective of dealing with cases fairly and justly, including considering the injustice to each party and to litigants in general if the application is allowed or refused.

The grounds

13. The Appellant's grounds in relation to the original appeal were that:

(1) HMRC had misinterpreted and misapplied the ToAA legislation;

(2) the Appellant was not a beneficiary of the Cloudburst Trust;

(3) the amounts assessed were excessive; and

(4) there had been no deliberate behaviour on the Appellant's part.

14. The Appellant was now seeking permission to include two new sub-ground, which I have called the permanent establishment ("PE") ground and the European Law ("EU") ground.

The PE ground

15. As noted earlier in this decision, the Appellant had transferred the Charterhouse business to MNL in Guernsey in exchange for loan notes, and there had subsequently been further transfers of the business to other entities. The PE ground was as follows:

(1) HMRC appeared to be alleging that MNL and the other entities (together, the Entities) each had a PE in the UK;

(2) if so, the Entities were liable to pay UK corporation tax on the profits of the Cornerstone business; and

(3) in consequence, HMRC cannot pursue the Appellant for income tax with reference to those profits without offending against the principle of no double taxation.

Submissions

16. On behalf of HMRC, Mr Stone denied that any such allegation had been made, and emphasised that it formed no part of their case. On behalf of the Appellant, Mr Hickey submitted that even if neither party pleaded the point, the Tribunal had a duty under TMA s 50(6) to reduce the assessments if any of the Entities had a PE in the UK. Mr Stone responded by saying that the Tribunal's jurisdiction was adversarial and it was not able to act in the way proposed by Mr Hickey.

TMA s 50(6)

17. TMA s 50(6) reads, so far as relevant to this Issue:

> "If, on an appeal notified to the tribunal, the tribunal decides
>
> (a)-(b) …
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
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> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

Discussion

18. I agree with Mr Stone that the Tribunal has an adversarial and not an inquisitorial jurisdiction, see my earlier consideration of that matter in *Paya v HMRC* [2016] UKFTT 660 (TC) at [80] to [132]. In *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 ("*Mars*"), Dyson LJ said:

> "[21] It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.
>
> [22] The starting point must always be the pleadings. In *Loveridge and Loveridge v Healey* [2004] EWCA Civ 173, Lord Phillips MR said this at paragraph 23:
>
>> 'In *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 Lord Woolf MR observed:
>>
>>> "Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties."

> It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial.'"

19. It is true that the purely adversarial approach described above is modified in tax appeals, because the Tribunal is entitled to take the initiative and raise arguments not put by either party, see *Tower M'Cashback v R&C Commrs* [2011] UKSC 19 at [15], where Lord Walker adopted and approved the following paragraph from the High Court judgment of Henderson J (as he then was):

> "…There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest…For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

20. However, there is a significant difference between the Tribunal (a) considering the evidence as pleaded, (b) making findings of fact, and then (c) putting forward a different legal argument, and what is being suggested by Mr Hickey.

21. In order for the Tribunal to decide that the tax assessed on the Appellant was too high because one or more Entities had a PE in the UK during the relevant period, the Tribunal would first have to direct the parties to provide new evidence, including probably witness evidence, as to how the Entities had acted during the relevant time, and would have to make findings, not only about the Appellant's liability, but about the tax position of the Entities.

22. It would plainly not be just to make such findings without giving the Entities an opportunity to be joined to the appeal, and that in turn would significantly expand the nature and scope of the hearing, increase the time and costs of the parties, and be likely to require the Entities to spend time and money on a dispute about the Appellant's tax liabilities.

23. The proposed amendment must be rejected for a further reason. Mr Hickey was not asking me to agree that the Tribunal should be able to raise a new argument about PE *on its own initiative* as envisaged by TMA s 50(6). Instead, the Appellant was asking for permission to *invite* the Tribunal to raise the PE Issue. with a view to using its powers under s 50 to reduce the tax charged on the Appellant. Such an approach would be procedurally unfair to HMRC, who would not know (a) whether or not the Appellant would ask the Tribunal to consider the PE ground, or (b) whether the Tribunal would accept that invitation. HMRC would thus be unable properly to prepare for the hearing.

24. Finally, the PE ground does not meet the requirements in *Quah* and *Kawasaki* because:

   (1) it does not carry the necessary degree of conviction: Mr Hickey's skeleton for this hearing said (emphasis added): "it is *possible* that the Guernsey company had a PE in the UK…", and "clearly *to the extent that* there is any PE then the ToAA provisions cannot apply since there would be double taxation"; and

   (2) it is not supported by "evidence which establishes a sufficiently arguable case".

25. For all those reasons, I refuse the Appellant's application to include the PE ground.

26. If the Appellant had instead applied for permission to amend his grounds on the basis that his tax was too high because one or more of the Entities had a PE in the UK, I would have needed to consider the issues set out above – the extent and nature of the additional evidence, the joinder of other parties, the time and the costs of all involved, and the effect on other Tribunal users of such a significant expansion of the Appellant's grounds of appeal. But Mr Hickey confirmed that the Appellant was not seeking to amend his grounds in that way.

The EU ground

27. As already set out earlier in this decision, the Appellant had transferred his business to MNL in Guernsey in exchange for loan notes, and HMRC had issued the discovery assessments on the basis that the ToAA applied to that transfer and related associated operations.

28. The EU ground was that the ToAA legislation is incompatible with Art 63 TFEU; this prohibits restrictions on the freedom of movement of capital between Member States and third countries, including Guernsey. Mr Stone did not dispute that Art 63 was potentially relevant, but said that the "predominant freedom" in issue was instead conferred by Art 49, namely freedom of establishment, and that freedom took priority.

29. In *Hoey v HMRC* [2021] UKUT 82 (TCC) the Upper Tribunal ("UT") considered both Articles. Having discussed the case law, the UT stated at [294] that it was "necessary to look at the factual circumstances" in order to decide which took priority.

30. Mr Stone said that the facts on which HMRC was relying to apply the ToAA were (a) the Appellant's transfer of the business out of the UK, and (b) the subsequent transfers of that business to the Entities, and submitted that these did not engage Art 63.

31. Mr Hickey responded as follows:

(1) the Appellant had received loan notes in consideration for the transfer;

(2) in *Hoey* the UT considered both Mr Hoey's transfer of his employment to a Guernsey company and the loans made by his new employer out of an employment benefit trust ("EBT"), and then said at [294] (his emphasis):

> "It is therefore necessary to look at the factual circumstances in which the relevant capital movements are said to be restricted. These narrow down to the payments into the EBT **and loans out of it** to consider whether it is justified to examine them under art 63 or not"; and

(3) the issuance of loan notes to the Appellant in exchange for the Charterhouse business therefore engaged Art 63.

32. I make no finding as to (a) which party is correct as to whether or not Art 63 is engaged, or (b) if that is the case, whether the ToAA breaches that Article. However, I agree with Mr Hickey that the EU ground is properly particularised and has a degree of conviction, and thus meets two of the requirements in *Quah* and *Kawasaki,* see §12(1) above. Mr Stone did not submit that the proposed amendment was not supported by relevant evidence, and I have therefore taken the third requirement to be satisfied.

33. I went on to consider whether it was in the interests of justice to allow this amendment to the Appellant's grounds. I took into account the following:

(1) Although HMRC had filed and served both a SoC and an amended SoC ("ASoC") in relation to the original appeal, they had not yet responded to the 2020 appeal. They would therefore have to expand and rewrite the ASoC in any event.

(2) The case was at a very early stage; there have been no directions for the exchange of documents or witness evidence.

(3) The scope and effect of the ToAA is already front and centre in this appeal, so the EU ground does not open up an entirely new area. Instead, it adds to the Appellant's reasons for disputing the application of those provisions.

34. I therefore find that it is in the interests of justice to allow the Appellant to plead the EU ground.

ISSUE 4

35. Issue 4 was whether the Appellant should be directed to provide further and/or better ("F&B") particulars as to any part of his grounds of appeal.

36. I understood Mr Stone and Ms Elliot to accept, on behalf of HMRC, that the Appellant had already provided significant further details of his grounds by way of (a) the Reply to the ASoC and (b) the applications at issue in this CM hearing

37. HMRC nevertheless submitted that F&B particulars were required in relation to the reasons why the Appellant considered he met the ToAA exemption conditions in ITA s 737(3), (4) and (5)-(6) ("the exemption conditions").

38. Taking into account the submissions of both parties, I decided it was in the interests of justice to direct that the Appellant provide a single document setting out his grounds of appeal and that he had permission to:

(1) include within those grounds, any of the submissions made in pleadings filed and served after the original appeal was notified to the Tribunal;

(2) expand the reasons why the Appellant considers that the exemption conditions are met; and

(3) in relation to the penalties only, to include any further reasons why these were not due from the Appellant. Any such further reasons could (for example) address the issue of deliberate behaviour, while recognising that the burden here is on HMRC. However, this is not to be understood as a "backdoor" opportunity to provide further new grounds for the assessment appeals. Any such additional grounds must therefore not relate to *both* the assessment appeals and the penalty appeals, other than to the extent that a finding of deliberate behaviour has consequences for the time limits by which an assessment can be validly made.

39. HMRC submitted that they needed to see the new version of the Appellant's grounds before they could know whether to maintain their position that F&B particulars were required, and that is clearly a reasonable position to take. However, I hope the new version of the Appellant's grounds will make a F&B application unnecessary.

ISSUE 5

40. Issue 5 was whether HMRC should have permission further to amend their ASoC.

41. Given that the Appellant will be filing a new version of his grounds of appeal, it is plainly in the interests of justice to allow HMRC to amend their ASoc. In addition, HMRC have as yet not provided a SoC in response to the 2020 appeals.

42. As set out in the Directions, HMRC are to file and serve a single revised SoC in response to the new version of the Appellant's grounds of appeal.

ISSUE 6

43. Issue 6 was whether permission should be given for the parties to provide separate expert reports on valuation. The parties were in agreement that expert reports would assist the Tribunal to determine the issues, and I agreed. Detailed requirements have been included in the Directions.

ISSUE 7

44. Issue 7 was whether permission should be given for the Appellant (or the parties jointly) to provide the report of an expert on Guernsey law, and if so, any related directions.

Background facts

45. On 12 October 2020, the Appellant and his children issued proceedings in Guernsey to set aside the Cloudburst Trust (see §1(3)). HMRC originally intended to apply to be joined to the hearing of that application. However, on 9 February 2021, HMRC's solicitors informed Babbé LLP (the firm acting for the Appellant and his children) that HMRC was "more likely to lodge a letter with the Court containing its views of the application".

46. On 25 February 2021, Babbé wrote to HMRC's solicitors saying:

> "We are instructed that our clients are willing to agree to your client's proposed approach to the Application, subject to your client's agreement that it will accept and be bound by the decision of the Royal Court with respect to the determination of the Application (or any part thereof)."

47. On 4 March 2021, HMRC's solicitors confirmed that "our client will accept to be bound by the Royal Court's decision in due course".

48. On 4 August 2022, the Royal Court issued its judgment, which began by setting out two recitals, one of which said:

> "by correspondence dated the 4th March, 2021, Advocate J.T. Le Tissier Counsel for His Majesty's Revenue & Customs ("HMRC") advised, *inter alia*, that upon the provision of written representations HMRC would accept to be bound by any decision of the Court with respect to the determination of the Application (or any part thereof)."

Submissions

49. Mr Hickey said in his skeleton:

> "The FTT would benefit from an understanding as to the effect of HMRC's representations under Guernsey law and the extent of its participation in the Guernsey proceedings (i.e. where a party such as HMRC has been put on notice of an application, appointed legal representation and made written submissions). This point has been raised because the Guernsey Court records that HMRC will be bound by the decision."

50. Ms Elliot submitted that:

> "The key question will be the scope and nature of that agreement, put simply whether it encompassed only the legal effect of the Guernsey court decision that the Appellant is excluded from benefitting from the Trust (HMRC's position) or the various findings of fact made in considering the application as a whole (the Appellant's position). No question of Guernsey law arises."

Discussion

51. I drew the attention of the parties to HMRC's statement that they had agreed to be bound "by the decision" of the Royal Court. I said I was therefore unable to see why the Tribunal needed the assistance of an expert in Guernsey law to understand "the effect of HMRC's

representations under Guernsey law and the extent of its participation in the Guernsey proceedings".

52. Mr Hickey promptly withdrew this part of the application, and in my judgment was right to do so. It will, as both parties recognised, be a matter for submissions as to what was meant by HMRC agreeing "to be bound by any decision of the Court with respect to the determination of the Application".

53. However, I also referred the parties to *Hoyle v Rogers* [2014] EWCA Civ 257, in which Clarke LJ gave the only judgment, with which Treacy and Arden LJJ both agreed. He said:

> "[39] …findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ('the trial judge'), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.
>
> "40. In essence…the foundation of the rule must now be the preservation of the fairness of the trial in which the decision is entrusted to the trial judge alone."

ISSUE 8

54. Issue 8 was whether the parties should be directed to file a Statement of Agreed Facts and Issues ("SOAFI"). It was common ground that a SOAFI would assist the Tribunal.

55. However, in my experience, seeking agreement to a SOAFI in highly contested cases such as this often takes many months and frequently leads to multiple applications for extensions of time. Thus, while the parties are free to seek to agree a SOAFI, I have decided not to direct its provision. If the parties do come to an agreement, the SOAFI is to be included in the Bundle.

ISSUE 9

56. Issue 9 was whether detailed directions for the hearing of the appeal, including listing and bundles, should be given now.

57. Mr Hickey put forward a date by which he would be able to file and serve the new version of the grounds of appeal, taking into account his availability and that of his instructing solicitor Mr Levy, including allowing time to discuss matters with the Appellant.

58. Having consulted with her instructing solicitors, Ms Elliot agreed the date by which HMRC would be able to file and serve the revised SoC.

59. Those dates are incorporated in the Directions, with other compliance dates following therefrom. I agree with the parties that having a complete set of directions will assist with the efficient listing of the substantive appeal.

ISSUE 10

60. This was an addition to the List of Issues, because I only became aware of it shortly before the hearing. The Appellant's Reply to HMRC's ASoC included this passage:

> "The Appellant will apply in due course for an order under Rule 15(2)(b)(iii) of the FTT Rules to exclude evidence on the ground of unfairness, in respect of HMRC's apparent intention to rely on the matters referred to in §§ 31, 37 and 64 of the ASoC…The application will have to wait until the parties have exchanged evidence because only then will it be possible to determine such an application once the parties have clarified their cases and decided what evidence they wish to adduce (this is the approach endorsed by the CoA in *Mitchell & Anor v Revenue and Customs* [2023] EWCA Civ 261 at §86."

61. The matters referred to in §37 and §64 of the ASoC to which the Appellant objected were references to another case involving the Appellant in which the Tribunal and the UT had decided he had knowingly provided HMRC with an SDLT return containing an error with the intention that HMRC should rely upon it as an accurate document. The reference in §31 of the ASoC was to a case involving MTCL, the trustee of the Cloudburst Trust, as a result of which MTCL and its directors were penalised by the Guernsey Financial Services Commission.

62. I told the parties that I was conscious they had not had notice that this Issue would be raised, but said that as the overall purpose of this CM hearing was to get the proceedings on track, it would be helpful to address it if possible. I added that as the Appellant was fully aware that HMRC intended to refer to the outcomes of earlier proceedings, the position appeared to be different from that considered in *Mitchell*.

63. Mr Hickey said he was happy to confirm that the Appellant had no intention of making a future application to the Tribunal for HMRC to amend its case so as to withdraw these three references. Instead, he was likely to ask the Tribunal hearing the substantive appeal to disregard them, on the basis that they were irrelevant to the issue the Tribunal had to decide.

64. In reliance on that assurance, I decided Issue 10 did not raise a procedural issue requiring resolution.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. In relation to any application to this Tribunal for permission to appeal this decision, the time limit applicable under Rule 39 (2) of the Tribunal Rules is reduced from 56 to 28 days from the date on which this decision is provided to the parties.

66. The above direction is made pursuant to the power in Rule 5(3)(a) to shorten the time for complying with any Rule. Given the delays since the original appeal (which was made over six years ago), this shorter period is in the interests of justice so as to allow the case to move forward without unnecessary further uncertainties.

67. For the same reason, the Directions remain in full force and effect unless and until permission is received by a party to appeal this Decision.

68. 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.

Release Date: 12th DECEMBER 2024