TC02424

Application number: TC/2012/7565

Information notice – Third Party Notice – FA 2008, Sch 36 – "relevant foreign tax" – European Convention on Human Rights – right to a fair hearing

FIRST-TIER TRIBUNAL
TAX CHAMBER

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

EX PARTE CERTAIN TAXPAYERS

TRIBUNAL: JUDGE ROGER BERNER

Sitting in private at 45 Bedford Square, London WC1 on 23 November 2012

DECISION

1. This was an application by HMRC under paragraph 3 of Schedule 36 to the Finance Act 2008 for the approval of the Tribunal to the giving of certain third party notices under para 2 of that Schedule.

2. The application originally came before me on 19 September 2012. The day before that, HMRC received certain representations from solicitors acting for a number of taxpayers whose affairs are the subject of the relevant enquiries. Those representations were settled by UK tax counsel. HMRC provided a copy of the representations to the Tribunal, and sought an adjournment of the application so that they could be fully considered by HMRC.

3. Although there is no provision of Schedule 36 for the consideration of representations by the taxpayer as opposed to the third party to whom the notice is to be addressed, the representations raised a number of fundamental issues as to the Tribunal's jurisdiction. I therefore considered it right that consideration should be given to them, and I granted the adjournment.

4. The application came before me again on 23 November 2012. At that time I approved all the third party notices.

5. As is customary for applications of this nature, I had directed that both the hearing on 19 September 2012 and the resumed hearing on 23 November 2012 should be in private. Unusually, and given the nature of certain of the representations made, I am publishing my reasons for concluding that none of those representations prevented me from giving my approval to the issue of the third party notices.

6. This decision does not record my reasons for being satisfied that all the relevant conditions were satisfied in this particular case. It deals only with those matters that I consider will be of general interest.

Relevant foreign tax

7. This application follows from a request made by the Australian Taxation Office ("ATO") for assistance in accordance with the exchange of information procedure under article 27 of the double taxation convention between Australia and the UK. It concerns enquiries of the ATO into a number of persons in respect of possible liability to Australian tax.

8. A third party notice may be given by HMRC under Sch 36, para 2 "for the purpose of checking the tax position of another [identified] person". The expression "tax" is not confined to UK tax; para 63(1) defines this to include "relevant foreign tax".

9. It is the definition of "relevant foreign tax" which is material in this context. Para 63(4)(b) provides that it includes, relevantly:

"any tax or duty which is imposed under the law of a territory in relation to which arrangements having effect by virtue of section 173 of FA 2006 (international tax enforcement arrangements) have been made and which is covered by the arrangements."

10. For an Australian tax to be a "relevant foreign tax" therefore, the arrangements in question must have effect by virtue of s 173 FA 2006. That section provides:

"(1) If Her Majesty by Order in Council declares that—

(a) arrangements relating to international tax enforcement which are specified in the Order have been made in relation to any territory or territories outside the United Kingdom, and

(b) it is expedient that those arrangements have effect,

those arrangements have effect (and do so in spite of anything in any enactment or instrument).

(2) For the purposes of subsection (1) arrangements relate to international tax enforcement if they relate to any or all of the following—

(a) the exchange of information forseeably relevant to the administration, enforcement or recovery of any UK tax or foreign tax;

(b) the recovery of debts relating to any UK tax or foreign tax;

(c) the service of documents relating to any UK tax or foreign tax.

(3) In this section—

"UK tax" means any tax or duty imposed under the domestic law of the United Kingdom, and

"foreign tax" means any tax or duty imposed under the law of the territory, or any of the territories, in relation to which the arrangements have been made."

11. The International Mutual Administrative Assistance in Tax Matters Order 2007 (SI 2007/2126) ("the 2007 Order") gave effect to the OECD Convention on Mutual Assistance in Tax Matters ("the original OECD Convention"). A draft of the Order having been laid before the House of Commons in accordance with s 173(7) FA 2006 and approved by resolution of that House, Article 2 provides:

"**Mutual administrative assistance arrangements to have effect**

It is declared that—

(a) arrangements relating to international tax enforcement that fall within the joint Council of Europe/Organisation for Economic Co-operation and Development Convention on Mutual Administrative Assistance in Tax Matters, signed on behalf of the United Kingdom on 24 May 2007, have been made in relation to the other signatory territories, and

(b) it is expedient that those arrangements have effect."

12. Australia was not a signatory to the original OECD Convention.

13. Amendments were made to the original OECD Convention by Protocol. Those amendments were given effect in UK law by the International Mutual Administrative Assistance in Tax Matters Order 2007 (SI 2011/1079) in accordance with s 173 and in similar terms to those in the 2007 Order.

14. Australia became a signatory of the amended Convention on 3 November 2011. An instrument of ratification, acceptance or approval was deposited on 30 August 2012. In respect of Australia the amended Convention enters into force on 1 December 2012.

15. Through the representations it was submitted that, having regard to these circumstances, it was not clear that "relevant foreign tax" currently includes Australian taxes until after 1 December 2012.

16. I do not agree. I accept that, without more, the mere existence of the exchange of information article in the Australia/UK treaty would not be sufficient to constitute arrangements within the meaning of Sch 36, para 63(4)(b). To be within that provision, the arrangements must have effect by virtue of s 173 FA 2006. If the arrangements already have effect, as they do in the case of the Australia/UK treaty, by virtue of s 788 of the Income and Corporation taxes Act 2008 (see The Double Taxation Relief (Taxes on Income) (Australia) Order 2003 (SI 2003/3199) ("the 2003 Order")), there is no room for them also to have effect under s 173. But that is not the end of the story. There is more, and it is to be found in s 173 itself.

17. The draftsman of s 173 was clearly aware of the fact that the original Convention was not to be signed by all relevant countries at the same time, and that it would come into effect over an extended period. To deal with the lacuna that would otherwise arise, deeming provisions were included in s 173 in the following form:

> "(8) Any provisions which—
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> (a) are included in an Order in Council made under any of the provisions specified in subsection (10),
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> (b) are in force immediately before the passing of this Act, and
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> (c) could have been included in an Order in Council under this section had the Order in Council been made after that time,
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> have effect after that time as if included in an Order in Council under this section.
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> (9) If any such provisions relate to arrangements covering UK taxes or foreign taxes (or both) other than those in relation to which the Order in Council had effect, the provisions also have effect after the passing of this Act (by virtue of subsection (8)) in relation to those other UK taxes or foreign taxes (or both).
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> (10) The provisions referred to in subsection (8)(a) are—

> (a) sections 788 and 815C of ICTA (international arrangements relating to income tax, corporation tax and capital gains tax and analogous foreign taxes), and
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> (b) sections 158 and 220A of IHTA 1984 (international arrangements relating to inheritance tax and analogous foreign taxes)."

18. These provisions operate in relation to the exchange of information arrangements in the Australia/UK treaty. Article 2 of the 2003 Order provides, relevantly:

> "It is hereby declared –
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> …
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> (b) that those arrangements include provisions with respect to the exchange of information forseeably relevant to the administration or enforcement of the domestic laws of the United Kingdom and the laws of Australia concerning taxes covered by the arrangements including, in particular, provisions about the prevention of fiscal evasion with respect to those taxes; and
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> (c) that it is expedient that those arrangements should have effect."

19. These are therefore provisions which:

(1) are included in an Order in Council under s 788 ICTA;

(2) were in force immediately before the passing of FA 2006 (19 July 2006); and

(3) could have been included in an Order in Council under s 173.

20. Accordingly, the exchange of information provisions in the Australia/UK treaty have effect as if they were included in an Order in Council under s 173. They are treated therefore as having effect by virtue of that section. The requirements of Sch 36, para 63(4)(b), are satisfied. Australian taxes within those arrangements are accordingly within the scope of "relevant foreign tax" for the purpose of Sch 36 FA 2008 at all relevant times.

Human rights

21. For the taxpayers in question it is submitted that they have not had access to an effective remedy in order to challenge the lawfulness of the proposed third party notices. In accordance with usual practice, the hearing is *ex parte* and the taxpayers were not informed where or when the hearing would take place. It is submitted, therefore, that the taxpayers have been precluded from taking any part in the proceedings, notwithstanding that HMRC's application is, in effect, for the seizure of the taxpayer's property currently in the possession of a third party.

22. It is submitted that this is a violation of article 6 of the European Convention on Human Rights ("ECHR") (right to a fair hearing) and/or article 13 (right to an

effective remedy) taken in conjunction with article 8 (right to respect for private and family life) and/or article 1 of the First Protocol (protection of property).

23. By way of example, the taxpayers cite *Ravon and Others v France* (application no 18497/03). In that case the European Court of Human Rights considered that there had been a violation of art 6 ECHR where the French tax authorities carried out searches and seizure at companies' premises and a taxpayer's home where they suspected tax fraud. The applicants claimed that they had not had access to an effective remedy in order to challenge the lawfulness of the searches of residential premises and seizures to which they had been subjected. The Court agreed; the applicants had not had access to a "tribunal" with the result that there had been a violation of art 6.

24. On this basis the taxpayers submit that there will be a similar violation of their rights under art 6 (as well as the other articles referred to) in the event that the Tribunal approves HMRC's application in circumstances where, first, HMRC has not given the taxpayers any reasons for its application, and secondly where the taxpayers have been denied a chance to be heard by a tribunal.

25. As regards the first circumstance, if HMRC were to have given no reasons to the taxpayers, the third party notice would not have been capable of approval. No reliance would have needed to have been placed on human rights arguments; the Tribunal would not have had the power to approve the notice by reason of failure of the statutory condition in Sch 36, para 3(3)(e). I need only say that I was satisfied that in this case the taxpayers had been given a summary of the reasons why HMRC required the relevant documents and information as required by para 3(3)(e).

26. The issue therefore is whether the third party notices should not be approved by reason of a violation of the taxpayers' human rights in being denied a chance to be heard by a tribunal.

27. That issue is, in my view, settled as far as this Tribunal is concerned by binding authority. In *R v A Special Commissioner ex parte Morgan Grenfell & Co Ltd* 74 TC 511 the principal issue, and one that was focused upon in the House of Lords, was whether the power to give an information notice under the former s 20(1) of the Taxes Management Act 1970 extended to material within the scope of legal professional privilege ("LPP"). The House of Lords, disagreeing with the special commissioner, the Divisional Court and the Court of Appeal, held that it did not.

28. Because of its finding, the House of Lords in *Morgan Grenfell* did not make any finding in relation to whether the special commissioner, as he himself had found, had the power to entertain oral submissions on an application for approval of the notice under s 20(7) TMA. But the question was addressed in both the Divisional Court and in the Court of Appeal, where the special commissioner's decision in this respect was upheld.

29. In the Divisional Court the argument of the taxpayer was rejected on a number of grounds. First, it was held that to the extent that rights under article 6 ECHR were

asserted on the basis of LPP material giving rise to a right under article 8, that argument must fail, as there was nothing that would prevent interference with such a right for the reasons and on the legal grounds that existed in that case (see [46], referring to [33]). At [46] the Court continued:

> "Second, the article 6 right to an oral hearing is usually thought to be associated with and to flow from a right to a *public* hearing: see for instance the analysis in *Grosz et al. Human Rights* (2000), para C6–77. But the concept of the public hearing of a s 20(7) application seems completely inept, not to mention its being far from what would be desired by most taxpayers. Third, the test under article 6 is always whether the procedure taken as a whole was fair. We are wholly unpersuaded that for the Commissioner, making the particular type of decision facing him, to confine MG to (extensive) written submissions was unfair so as to call for intervention under article 6.
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> 47. We conclude, therefore, that MG had no right to require an oral hearing that was engaged by a decision such as the present."

30. The same conclusion on this issue was reached by the Court of Appeal. For the Revenue it was argued, ultimately successfully, that both on principle and authority the self-evident risk of compromising the investigation shuts out any possibility of an oral procedure (see [49]). At [50] the Court said:

> "It has to be remembered that a right to be heard is axiomatically worth little without knowledge of the case that has to be met. Either, therefore, the inspector's hand has in some measure to be shown, or the taxpayer must be content to make submissions in the dark. The former, it is plain, is destructive of the whole purpose of the procedure; the latter, while some taxpayers may consider it better than nothing, will create a sustained pressure for disclosure. There are only two logical outcomes if these two imperatives clash in a face-to-face hearing: one is that the taxpayer will duly learn nothing, in which case it is not easy to see what will have been achieved on his behalf that could not have been achieved in writing; the other is that the Special Commissioner's opportunity (in Mr. Beloff's happy phrase) to "enjoy the benefit of advocacy" will lead to accidental disclosure by him or (more probably) the inspector of material to which Mr. Beloff does not contend that the taxpayer is entitled and the disclosure of which at this stage will run counter to Parliament's purpose. That purpose, we apprehend, is in lieu of any inter partes procedure to install the General or Special Commissioner as monitor of the exercise of the Inland Revenue intrusive powers and to require an inspector to put everything known to him, favourable and unfavourable, before the Commissioner when seeking his consent (*R.* v. *IRC*, ex parte *T.C. Coombs & Co.* [1991] 2 AC 283). We accept Mr. Brennan's contention, therefore, that the possibility of an oral hearing is excluded by the nature of the process in question."

31. Section 20 TMA was of course the precursor to Sch 36. The purpose is, however, the same. I see no reason why *Morgan Grenfell* should not apply to Sch 36 as it applied to s 20. I find accordingly that there is no violation of the taxpayers'

rights, under art 6 or any other article of the ECHR, or otherwise, in the application being dealt with *ex parte* in accordance with the statutory provisions of Sch 36.

32. I do not consider that *Ravon* can affect this conclusion. That case was concerned with the question whether there was any effective right of judicial review. Judicial review must be available in respect of both the law and facts on the lawfulness of a decision authorising searches and seizures and any effective actions taken. In *Ravon*, the decision to authorise the search and seizure had been taken by a tribunal following an ex parte application by the French tax administration. That decision was appealable before the Cour de Cassation (the French Supreme Court) on points of law, but no other judicial remedy was available. In particular, there was no available challenge to the factual basis of the decision.

33. In two judgments in the field of competition law (*Primagaz v France* (2961/08) and *Groupe Canal Plus and Sport Plus v France* (29408/08)), the European Court of Human Rights, applied *Ravon*. A process whereby an authorisation order could be appealed, in both law and fact, to the Court of Appeal in France was accepted as valid. It was the transitional arrangements from the former procedure, which resembled that in *Ravon*, that contravened art 6(1).

34. In the case of approvals of notices under FA 2008, Sch 36, there is only a limited right of appeal against a third party notice, and it is in favour of the third party and not the taxpayer (Sch 36, para 30). It applies only where the ground of appeal is that the notice would be unduly onerous, and it does not apply to a taxpayer's statutory records.

35. However, a taxpayer in respect of whose tax affairs an information notice is approved is not without a remedy. He can seek judicial review. That review is not in the nature of an appeal on a point of law; it can consider both the law and the underlying facts. The position is thus very different from the limited rights that were available to the French taxpayer in *Ravon*. Even if I were not bound by higher authority in the UK courts, I would conclude that the Sch 36 procedure does not deprive the taxpayer of an effective remedy.

Taxpayer

36. The taxpayers submitted that HMRC had failed in their statutory duty to provide the taxpayers with reasons why the documents were required, contrary to Sch 36, para 3(3)(e). As I mentioned earlier, I was satisfied, on the facts, that this condition had been satisfied, and I rejected the taxpayers' arguments to the contrary.

37. In the application of para 3(3)(e), it is important to identify the "taxpayer" or "taxpayers" in question. A person will be entitled to a summary of reasons only if he is the taxpayer or one of a number of taxpayers the checking of whose tax affairs is the *purpose* for which the documents or information is required (see para 2(1)). Only that person is entitled to be provided with reasons why the information or documents are so required. It is not open to a taxpayer to object to a notice on the ground that the information or documents might be relevant to the tax affairs of some

other person, who is not the immediate focus of the information notice, and who has not been given a summary of reasons. That person will not be a taxpayer for Sch 36 purposes, unless the purpose of the requirement for the information or document in question includes the checking of that person's tax position.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 29 November 2012