[2017] UKFTT 204 (TC)

TC05692

Tribunal ref: TC/2016/02067

PROCEDURE — privacy application — deductibility of expenses — well-known actor undergoing cosmetic treatment — whether identity should be concealed — no — application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARTIN CLUNES **Appellant**

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in private in London on 12 December 2016

Mr Dave Morrison, chartered accountant, for the appellant

Mrs Gill Cawardine, presenting officer, for the respondents

DECISION

1. This application raises again the thorny question of privacy in a tax appeal. The appellant, Mr Martin Clunes, is a well-known actor. He underwent certain treatment of a cosmetic nature for which he paid. The question in the appeal is whether he is entitled to set the cost of the treatment, or some of it, against his earnings in the calculation of his income tax liability. In essence, he says that he underwent the treatment for the purposes of his acting trade, and HMRC that the expense is disqualified for relief by virtue of s 34 of the Income Tax (Trading and Other Income) Act 2005. Formally, Mr Clunes' appeal is against a closure notice by which his self-assessment return for the year 2012-13 was amended so as to disallow the claimed expense.

2. I should make it clear from the outset, lest it be thought otherwise, that this is not a tax avoidance case, and HMRC do not suggest that it is. It is also not part of HMRC's case that the amount claimed is excessive or subject to attack for any similar reason, and it is undisputed that Mr Clunes has paid the entirety of the amount for which he has claimed relief. The only question in the appeal is whether the relief must be denied because, as s 34 puts it, the expense was "not incurred wholly and exclusively for the purposes of the trade".

3. Mr Clunes, represented before me by a chartered accountant, Mr Dave Morrison, seeks a direction that his appeal should be heard in private, and that any resulting published decision should be anonymised. HMRC, represented by a presenting officer, Mrs Gill Cawardine, argue that this is not an appropriate case for such a direction as the relevant criteria are not met. The question is not one to which adversarial argument wholly lends itself, since it does not require so much a finding of fact or a determination of law, although either or both may be relevant, as the exercise of judgment by the tribunal in the light of the facts of the case or the circumstances of the individual, in each case against the background of the overriding objective and the public interest in open justice. It is nevertheless helpful to hear argument both in favour of and against the making of a privacy direction.

4. The overriding objective is to be found in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The parts relevant to the question before me are as follows:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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> (a) …
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; …
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> (3) The Tribunal must seek to give effect to the overriding objective when it—
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> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

5. Although that rule explains the considerations which inform every case management decision, and in doing so makes it clear that the tribunal has a wide discretion in the manner in which it seeks to do justice between the parties, it says nothing about the criteria which specifically fall for examination in the case of an application of this kind. They are identified in rule 32, the material parts of which are as follows:

> "(1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified—
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> (a) in the interests of public order or national security;
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> (b) in order to protect a person's right to respect for their private and family life;
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> (c) in order to maintain the confidentiality of sensitive information;
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> (d) in order to avoid serious harm to the public interest; or
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> (e) because not to do so would prejudice the interests of justice.…
>
> (6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private."

6. Mr Clunes' case, in summary and with some paraphrasing, is that although there is a public interest in the deductibility of the cost of cosmetic treatment incurred by an actor it is not necessary for the public to know the identity of the actor—the same considerations would apply whoever the actor might be, and the public's understanding will not be enhanced by learning that Mr Clunes is the actor in question, nor impaired if his identity is concealed. If, however, his identity is revealed he might become the target of mockery and jokes and, more importantly, his public perception, or what might be described as his celebrity persona, will be damaged—as Mr Morrison put it, fans like to retain a certain image of the actors and others whom they admire, an image which Mr Clunes has a legitimate interest in maintaining. Paragraph (2)(b) of the rule should be used in order to protect that interest. The expense in question here was not mundane and unlikely to attract attention, as (for example) travelling expenses might be, but related to treatment about which, because of its very nature, Mr Clunes felt sensitive. Paragraph (2)(c) of the rule, Mr Morrison argued, was directly in point. In addition, if the application were not granted Mr Clunes would probably withdraw his appeal for that very reason, a consequence which would offend para (2)(e) of the rule.

7. This was not a case, Mr Morrison added, like *Moyles v Revenue and Customs Commissioners* [2012] UKFTT 541 (TC) (a decision of mine, reported as *A v Revenue and Customs Commissioners* [2012] SFTD 1257) in which a well-known taxpayer was trying to secure anonymity in order to conceal his participation in something of which the public might disapprove, in that case a tax avoidance scheme; rather, Mr Clunes was seeking to protect the confidentiality of information in circumstances in which he had a legitimate interest in doing so. The tax question in *Moyles* had nothing to do with Mr

Moyles' work; here, Mr Clunes' case is that the expense he incurred is intimately connected with his work. The better comparison is with that of a magician who would not be required to disclose anything which might reveal how he performed his tricks.

8. Mrs Cawardine did not disagree with the proposition that this case differed from *Moyles*; the proper comparison, she said, was with the judgment of Henderson J, as he then was, in *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] EWHC 1229 (Ch), [2009] STC 1930. In that case the taxpayer, an active registered medical practitioner, sought anonymity in her appeal against a revenue amendment to her self-assessment return which disallowed a deduction for certain expenses she had incurred; her argument was that knowledge of the dispute might harm her in her patients' eyes. In the course of his judgment Henderson J said:

> "[34] … In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.
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> [35] It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

9. In *Moyles* I quoted that extract from the judgment in Banerjee, and then said this, at [14]:

> "I respectfully agree. This case is not on all fours with *Banerjee*, but the issue is similar: whether the taxpayer is entitled to pay less tax because, in that case, she had incurred some expenses and, in this, because he has suffered a loss, whether or not real. There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances. The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity, and protection from the scrutiny which others cannot avoid. That plainly cannot be right."

10. If Henderson J's observations in *Banerjee* and mine in *Moyles* are taken together they make it clear that I cannot properly grant the application. Any taxpayer who was not in the public eye but who, for example, would prefer his friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be. Moreover, the structure of rule 32 makes it quite clear that there is a strong presumption in favour of public hearings, and that the circumstances in which that presumption may be overridden are wholly exceptional.

11. I have some sympathy with Mr Clunes in that I recognise that the revelation of his identity does have the potential to cause him some collateral embarrassment of a different character from the reputational damage which was feared in *Moyles*. However, and even disregarding what I have already said about the presumption in favour of public hearings, it seems to me that the reasons on which Mr Clunes relies to support his application are the very reasons why it would not be sufficient to identify him, in the decision released after the hearing of his appeal, simply as an actor. The question in the appeal will not be whether male actors, as a group, can legitimately claim relief for expense of the kind in issue, but whether, in Mr Clunes' case, the expense was incurred wholly and exclusively for the purposes of his trade. It is entirely possible that expense of the kind in issue here might be incurred by actor A for undeniable qualifying reasons, while the same expense incurred by actor B could be described only as a vain indulgence, and there are plainly many possible positions between those extremes. I do not see how the tribunal will be able to determine where on the scale Mr Clunes falls without reference to him as an individual, and by reference to his personal characteristics; and I do not see how the public interest in the fair administration of tax can be satisfied by the release of a decision which, by concealing those characteristics, makes it impossible for the reader to reach a full understanding of the reasons why the appeal has been determined as it has.

12. For those reasons I refuse Mr Clunes' application.

Appeal rights

13. 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.

JUDGE COLIN BISHOPP
CHAMBER PRESIDENT

RELEASE DATE: 19 DECEMBER 2016