[2020] UKFTT 428 (TC)

TC07905

PROCEDURE – HMRC's application to withdraw Statement of Agreed Issues – Appellant's application for directions including for further and better particulars – HMRC's application allowed and the Appellant's application refused – directions issued – Tibbles *considered*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/07008

BETWEEN

KEVIN McCABE **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal makes this interlocutory Decision on the papers, having considered:

- HMRC's application dated 19 December 2019 to withdraw the Statement of Issues filed on 13 December 2019;
- submissions from Mr Hickey of Counsel, instructed by Mazars LLP on behalf of the Appellant, filed on 3 April 2020;
- submissions from Mr Stone of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents, filed on 22 April 2020; and
- the documents in the Bundle filed by the Appellant to accompany the submissions made on his behalf.

DECISION

Introduction

1. On 10 October 2018, the Tribunal directed that the parties file and serve an Agreed Statement of Issues ("ASOI"). The parties complied with that direction on 13 December 2019. On 19 December 2019, HMRC made an application to withdraw the ASOI and asked that it be "replaced by an amended version". The Appellant objected to the withdrawal.

2. On 13 March 2020, I directed that this dispute be resolved on the papers. As part of his submission on behalf of the Appellant, Mr Hickey applied for the Tribunal to direct that:

(1) the ASOI stand as the statement of issues of law and the position of the parties on the law for all purposes in these proceedings; and

(2) HMRC shall file and serve further and better particulars of their Statement of Case relating to the applicable legal principles (and specifically the case law) on which they rely in support of their case against the Appellant and its application to the facts of the case.

3. For the reasons explained in the main body of this decision, HMRC's application to withdraw the ASOI is **allowed** and the Appellant's application for the directions set out above is **refused.**

4. In addition:

(1) the Appellant made an application for disclosure, which I refused;

(2) I disagreed with the Appellant's submission that HMRC had not failed to comply with the Tribunal's direction in relation to the ASOI; and

(3) I issued further directions for the future conduct of the appeal.

FINDINGS OF FACT

5. I make these findings of fact based on the evidence in the documents bundle provided for the hearing. They are made in order to decide the procedural issues in dispute, not the substantive issues which are yet to be considered by the Tribunal.

The procedural history

6. On 28 April 2016, HMRC closed enquiries into the Appellant's tax returns for 2006-07 and 2007-08 and amended those returns, increasing the tax payable by £4,219.34 in relation to the first year and by £1,498,598.70 in relation to the second year, on the basis that the Appellant had remained UK resident. Those decisions were upheld on statutory review, and on 2 December 2016, the Appellant notified his appeal to the Tribunal.

7. On 21 February 2018, HMRC filed and served their Statement of Case ("the SoC") and on 14 September 2018, the Appellant issued a SoC in response ("the Appellant's SoC").

8. At some date before 10 October 2018, the parties filed draft directions for the further conduct of the appeal, and these were endorsed by Judge Kempster on 10 October 2018. They included the following direction ("the Direction"):

> "No later than 26 October 2018 the Appellant shall provide the Respondents with a draft Statement of Agreed Facts ["SOAF"] and a draft [ASOI] for determination by the Tribunal.

> (i) Within 14 days of the date in [the above direction] the Respondents shall state whether the draft [SOAF and ASOI] are agreed and in the event that they are not agreed shall indicate which parts are not agreed and if appropriate suggest an alternative form of wording.
>
> (ii) The parties shall at all times use their best endeavours to reach agreement as to the form, wording and content of the [SOAF and ASOI] and the parties shall file such documents with the Tribunal no later than 30 November 2018."

9. There was considerable slippage in those compliance dates, and on 13 December 2019, Mr Anand, a trainee solicitor at HMRC's Solicitor's Office, sent an email to Mr Cockburn at Mazars, the Appellant's representative, saying that HMRC needed a further extension of time in relation to the SOAF, but adding "I am open to the submission of the statement of issues as evidence of the work we have done". Later that day, Mazars filed the ASOI.

10. On 19 December 2019 at 11.53, Mr Anand emailed Mr Cockburn again, saying:

> "It appears we are going backwards on this with numerous points that we discussed still being problematic. I, therefore, do not think it will be possible to have this agreed this afternoon. I accepted the filing of [the ASOI] in recognition of the fact that the SOAF was close to agreement, but as this is not the case and it seems there will need to be substantial amendments to the document, can you please write to the Tribunal withdrawing this and requesting an extension to filing the SOAFI as a whole."

11. The Appellant refused to agree, and at 17.05 on the same day, Mr Anand emailed the Tribunal asking for an extension of time for the SOAF and adding:

> "The Respondents also respectfully request that the Tribunal allows the Statement of Issues filed by the Appellant on 13 December 2019, in partial compliance of direction 3(ii) be replaced by a revised version…The Respondents contend that this will allow the parties to amend the document as necessary to assist the Tribunal with issues that may arise as the parties come to an agreement on the Statement of Agreed Facts."

12. Mr Anand went on to say that the Appellant had refused to agree to the withdrawal and asked the Tribunal to decide the matter. On 23 January 2020, HMRC provided Mazars with a revised version of the ASOI ("the revised SOI").

13. The parties were unable to resolve their disagreement, and on 5 March 2020 HMRC applied to the Tribunal for the issue to be decided on the papers. The Appellant objected and asked for an oral hearing. On 13 March 2020, I decided that it was in the interests of justice for the dispute to be decided on the papers and issued directions for both parties to make submissions.

The Statement of Case

14. HMRC's SoC was drafted by Mr Stone of Counsel. It sets out sections 2 and 9(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA"); section 355 of the Income and Corporation Taxes Act 1988 and refers to section 10A of the TCGA. It includes passages from *Grace v HMRC* [2009] STC 2707 and *R (Gaines-Cooper) v HMRC* [2011] STC 2249 ("*Gaines-Cooper*"), as well as mentioning *Lysaght v CIR* (1928) 13 TC 511 and *Loewenstein v De Salis* 10 TC 424.

15. The SoC then states at [22] (my emphasis):

> "It is common ground that in order to become non-resident in the UK the appellant had to effect **a distinct break in the pattern of his life in the UK**. At this stage it is inappropriate to comment in detail on the evidence because it has yet to be presented and tested. However, at least the following facts are clear and are relied upon in showing that the appellant never made the necessary distinct break. The Respondents reserve their right to rely upon further facts that emerge from the evidence."

16. The SoC then set out a list of 15 factual points, before moving on to consider the Appellant's alternative argument that he was in any event resident in Belgium during the relevant tax year under the terms of the Double Tax Convention ("DTC").

The Appellant's Statement of Case

17. As noted above, the Appellant's SoC was filed and served on 14 September 2018. It was drafted by Mr Patrick Way QC. *Inter alia*, it challenged HMRC's interpretation of the relevant case law, in particular, in relation to *Gaines-Cooper*.

The ASOI

18. The ASOI began by stating that the first issue in dispute was whether the Appellant was "neither resident nor ordinarily resident in the UK". This was followed by three extracts from *Gaines-Cooper*, together with statements as to how those extracts were relevant to the Appellant: each of these was said to be "common ground".

19. The second issue was stated to be whether the Appellant was resident in Belgium for the purposes of the DTC. That was followed by further details, including four subparagraphs which relate the Appellant's position to the provisions of the DTC. Each of these subparagraphs begin with the words "it is common ground that". The third issue was the quantum of the tax charged by HMRC's amendments to the Appellant's returns.

The revised SOI

20. The revised SOI, which HMRC have invited the Appellant to accept, contains the same three issues, but excludes (a) the passages which refer to *Gaines-Cooper* and (b) the paragraphs about the DTC which began "it is common ground that". HMRC have suggested alternative wording in relation to the DTC, none of which refer to any "common ground".

WHETHER TO ALLOW HMRC'S APPLICATION

21. HMRC have applied to withdraw the ASOI. In response, the Appellant has applied for the Tribunal to direct that HMRC be bound by the ASOI.

Mr Stone's submissions on behalf of HMRC

22. Mr Stone submitted that the summary of the law in the ASOI was incomplete and that, in particular, it is erroneous to suggest that *Gaines-Cooper* provides the sole legal test. Since ASOI is not an agreed document, he said that the position is as follows:

> "The way in which the relevant case law is to be understood and applied to the facts of this case is a matter for legal submissions – both in writing in advance of the hearing and in opening/closing submissions. It is not appropriate to seek to reach agreement on this in a statement of issues, where no such agreement exists."

Mr Hickey's submissions on behalf of the Appellant

23. Mr Hickey submitted that it was in the interests of justice for HMRC to be bound by the ASOI. He described its purpose as:

> "to enable the Appellant to understand the case against him on all issues of law, and to then further identify all appropriate and relevant evidence to be relied upon by the Appellant in answering HMRC's position on the law. The ASOI serves the purpose of ensuring that there is transparency between the parties as to the legal issues in dispute, where there is common ground on the law, and the appropriate legal test to be applied. If there is any dispute as to the legal test to be applied, or appropriate case law, then that would (and should) be addressed in the ASOI."

Discussion and decision

24. Neither party referred me to any case law which specifically considered whether a party could change legal submissions contained within an ASOI. However, there is clear and binding authority on the question of whether a party can change its legal arguments. In *Tower M'Cashback v HMRC* [2011] UKSC 19 at [15], Lord Walker approved the following passages from the High Court judgment of Henderson J (my emphases):

> "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 s 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."

25. Lord Walker also approved the following passage from *D'Arcy v IRC* [2006] STC (SCD) 543, a decision of Special Commissioner Avery Jones (again, my emphasis):

> "It seems to me inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal. It follows that **either party can (and in practice frequently does) change their legal arguments**. Clearly any such change of argument must not ambush the taxpayer and it is the job of the commissioners hearing the appeal to prevent this by case management."

26. As Moses LJ put it in the Court of Appeal when deciding the same case, "any evidence or any legal argument relevant to the subject matter may be entertained by the tribunal subject only to [the Tribunal's] obligation to ensure a fair hearing".

27. Although those authorities concern the scope of a closure notice, it must follow from the clear statements of principle there set out, that (a) a party is free to change its legal arguments at any point, as long as this does not vitiate the fairness of the Tribunal proceedings, and (b) the term "fairness" is to be understood in a case management context.

28. That is the position here. The statements said to be "common ground" in the ASOI no longer reflect HMRC's current view of the law as it applies to the Appellant. There is no

case management difficulty with allowing this change of position. HMRC sought to withdraw the ASOI a mere six days after it had been filed and served at the end of 2019. The hearing is currently in the process of being listed to take place at the end of 2021. The Appellant has more than ample time to consider and take into account HMRC's refusal to be bound by the ASOI.

29. I therefore allow HMRC's application to withdraw the ASOI and refuse the Appellant's application for a direction that HMRC be bound by what is stated within it.

WHETHER TO DIRECT FURTHER AND BETTER PARTICULARS

30. The Appellant also applied for a direction that HMRC provide "Further and Better" particulars as to their position on the law, and HMRC objected to that application.

Mr Hickey's submissions on behalf of the Appellant

31. Mr Hickey submitted that by "resiling" from the ASOI, HMRC were refusing "to fully and clearly share their position on the law and its application to the Appellant's case". He said this was " unfair and prejudicial to his preparation for the substantive hearing" and that "the lack of meaningful detail on the law" in the SoC was "extraordinary". He continued:

> "it now appears that the Respondents are determined to make the Appellant wait until the release of their skeleton argument to discover the substance of their case against him on the law. This is a deeply unsatisfactory and unfair."

32. He added:

> "the Appellant does not understand HMRC's legal case such that he can consider his position, meet HMRC's case, identify any further potential defences, and adduce relevant evidence on the legal issues…In order to meet HMRC's case in these proceedings, the Appellant must know precisely HMRC's position on the law, whether *Gaines-Cooper* is accepted as the correct statement of law on residence (and if not, why not), and the case law on which HMRC rely in relation to residence. In the absence of those particulars, the Appellant will not be able to fairly prepare for the substantive hearing.

33. Mr Hickey sought to rely on *Allpay v HMRC* [2018] UKFTT 273 (TC) (*"Allpay"*), a decision of Judge Mosedale, and the authorities she considered in coming to her conclusion in that appeal that "both parties should set out the key parts of their legal and factual case in advance".

Mr Stone's submissions on behalf of HMRC

34. Mr Stone submitted that:

> "HMRC's case is amply set out in their Statement of Case, by reference to relevant statute and case law, which is then applied to the most pertinent facts. Leading Counsel instructed by the appellant was able to plead the appellant's Statement of Case without any further elaboration or clarification. The appellant does not need any further particularisation of HMRC's case in order to properly prepare his appeal."

35. He added that:

> "The Appellant is not prejudiced, because he understands HMRC's case, can prepare his evidence to meet that case, and can make whatever submissions he sees fit as to the appropriate test at the appropriate time."

Discussion and decision

36. As set out earlier in this decision, the SoC first refers to certain leading judgments as to whether a person is UK resident, and then says that the issue to be decided was whether, on the facts, the Appellant had effected "a distinct break in the pattern of his life in the UK".

37. In *Allpay* Judge Mosedale cited *Three Rivers v Bank of England (No 3)* [2001] UKHL 16 at [185] and *McPhilemy v Times Newspapers* [1999] 3 All ER 775 at p.792. In the former Lord Millett said that "the function of pleadings is to give the party opposite sufficient notice of the case which is being made against him". In the latter, Lord Woolf said that the purpose of pleadings was:

> "to mark out the parameters of the case that is being advanced by each party. In particular they are…critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

38. Here, the Appellant is seeking more detail as to how HMRC consider that *Gaines-Cooper* applies or does not apply to his case. This is not a necessary part of marking out the parameters of the case, but a detailed point to be argued on the basis of the facts as found in the light of all the evidence before the Tribunal. The general nature of the pleaded case is clear, namely that HMRC do not accept from the evidence they have seen that the Appellant made the necessary break with the UK. Exactly what the law means by a "break" and whether or not the Appellant meets that legal test is a matter to be decided by the Tribunal, after it has heard the evidence and the parties' submissions at the hearing of the substantive appeal.

39. I reject Mr Hickey's submission that "the Appellant does not understand HMRC's legal case such that he can consider his position, meet HMRC's case, identify any further potential defences, and adduce relevant evidence on the legal issues". As Mr Stone says, Mr Way QC was able to plead the Appellant's SoC "without any further elaboration or clarification".

40. I therefore agree with HMRC that the detail provided in the SoC is sufficient to meet their obligation to set out their case so that the Appellant knows what he has to prove, the burden in this appeal being on him.

41. The position is entirely different from that in *Allpay*, where HMRC sought to argue that an issue they had not previously raised was nevertheless before the Tribunal. Here, both parties are clear what is in dispute: namely whether the Appellant had made the requisite break with the UK, and if not, whether the DTC decides the residence issue in his favour.

42. I refuse the Appellant's application for a direction that HMRC provide Further and Better particulars of the case the Appellant has to meet.

OHER MATTERS

43. A number of other matters were raised by Mr Hickey on the Appellant's behalf, each of which I address below.

Whether HMRC had failed to comply with the Direction

44. Mr Hickey pointed out that the Direction required at (i) that:

> "the Respondents shall state whether the draft [SOAF and ASOI is] agreed and in the event that they are not agreed shall indicate which parts are not agreed and if appropriate suggest an alternative form of wording"

45. He submitted that HMRC "have not said that they disagree with any of the contents of the ASOI" and were thus "not compliant" with the Direction.

46. I cannot accept that. HMRC have made it plain that they disagree with certain parts of the ASOI (see §10 and §14) and have also provided an alternative form of wording. HMRC have not failed to comply with (i) of the Direction.

47. Mr Hickey also submitted that HMRC were not compliant with (ii) of the Direction, namely that "the parties shall at all times use their best endeavours to reach agreement as to the form, wording and content". Again, I disagree: HMRC have been seeking to obtain the Appellant's agreement to the revised SOI since January 2020, and have used their "best endeavours" to agree a new form of words which reflects both parties' actual positions.

Whether the Appellant had failed to comply with the Direction

48. HMRC have not sought to argue that it is the *Appellant* who has not used his "best endeavours" because he has adamantly refused to accept that HMRC can change their position.

49. However, perhaps seeking to pre-empt that submission, Mr Hickey said that the Appellant had complied with the Direction by agreeing to the ASOI as filed. He added that the directions do not impose any requirement on the Appellant to agree to HMRC's revised SOI and that the Appellant does not intend to do so.

50. I accept that there has been no explicit breach of the Direction, because the Appellant did agree the ASOI which was filed with the Tribunal.

51. However, it is in the interests of justice for the position to be clarified. I have therefore issued the further directions at the end of this Decision.

Application for disclosure

52. Mr Hickey also makes the following application:

> "that the Tribunal directs HMRC to disclose such internal exchanges of emails etc (redacted to the extent necessary if they are legally privileged) as make clear the nature and extent of the purported error by Mr Anand in agreeing to the submission of the ASOI. Clearly, the Appellant has incurred costs in dealing with Mr Anand in agreeing the ASOI (and SOAF) on the basis that HMRC has held Mr Anand out as having authority to bind HMRC."

53. To the extent that this application is made in the context of the Appellant's objection to HMRC's withdrawal application, it is irrelevant. It is plain, for the reasons set out earlier in this decision, that HMRC have the right to change their legal arguments. Whether or not Mr Anand had the authority to agree that the ASOI be filed is nothing to the point.

54. To the extent that this application is made in the context of the Appellant's costs, it is refused. It was the Appellant who insisted that HMRC be bound by the ASOI, despite their position being plain within six days of that document being filed, and so has caused HMRC to incur the costs of instructing Counsel to (a) draft a formal application to withdraw the ASOI, and (b) respond to the Appellant's application for Further and Better particulars.

55. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires the parties to co-operate with each other and with the Tribunal. Given the well-

established case law on the parties' freedom to change their legal arguments, the Appellant would have acted consistently with that Rule had he either agreed with HMRC that a new ASOI be filed, or in the alternative, asked the Tribunal to amend the Direction because the parties could not come to an agreement.

DECISION, DIRECTIONS AND APPEAL RIGHTS

Decision

56. For the reasons set out above, HMRC's application to withdraw the ASOI filed with the Tribunal on 13 December 2018 is allowed and the Appellant's applications are refused.

Directions to the parties

57. By 28 days from the date of issue of this decision, the Appellant is to inform the Tribunal and HMRC whether he accepts the revised SOI.

58. If the Appellant does not accept the SOI, the directions endorsed on 10 October 2018 are amended so as to remove all references to an ASOI.

Reasons for directions

59. The Tribunal's normal case management does not include a requirement that the parties agree a Statement of Issues or a Statement of Facts. The parties in particular cases may decide that either or both would be of assistance and ask that the Tribunal make that direction. Occasionally the Tribunal may decide of its own motion that for a particular reason one or both of these documents are required, but that is relatively uncommon. When that does happen, the Tribunal normally includes provision as to what is to happen if the parties cannot agree. For example, it may state that no SOI be filed, or that both parties are to file their own versions of the SOI for the Tribunal to consider. In this case, the parties provided draft directions which were endorsed by the Tribunal. The Direction did not cover the possibility that the parties might not agree.

60. Once the Tribunal endorsed the directions, they became binding. However, Rule 5(2) of the Tribunal Rules states that (emphasis added):

> "The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, **including a direction amending, suspending or setting aside an earlier direction.**"

61. In *Tibbles v SIG plc* [2012] EWCA Civ 518 ("*Tibbles*") at [39]-[41] the Court of Appeal considered whether the court could revoke an earlier order. The relevant rule was CPR r 3.1(7), which is similar to Rule 5(2) in that it reads: "a power of the court under these Rules to make an order includes a power to vary or revoke the order". The leading judgment was given by Rix LJ, who said:

> "[CPR r 3.1(7)] is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion."

62. He continued by noting that the authorities "all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise" but that nevertheless those authorities had "laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately

exercised". One of situations when orders can be changed is when there has been "a change of circumstances".

Relevance to the Direction?

63. I am doubtful whether the *Tibbles* criteria are properly applicable to a case management direction such that in issue in here. The purpose of the Direction was to help the parties to prepare for their hearing. In contrast, in *Tibbles* the parties were arguing over a costs order, and when *Tibbles* was considered by the Supreme Court in *Thevarajah v Riordan* [2015] UKSC 78, that dispute was about a debarring order. In those contexts, it is entirely appropriate to talk about "considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal". The same is not true of a case management direction for the provision of a Statement of Issues.

64. Even if *Tibbles* were applicable:

(1) the starting point is that the Court of Appeal warned "against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise", and this is a case where it is entirely appropriate for the Direction to be amended if the Appellant refuses to agree the revised SOI; and

(2) the circumstances of the case have in any event changed. When the parties put forward the directions to the Tribunal for agreement, they must have been of the view that they would be able to agree a Statement of Issues. This is no longer possible unless (contrary to the position taken by Mr Hickey in his submission), the Appellant now agrees with the revised SOI.

Conclusion

65. In my judgment enough time has been spent on this matter. If the Appellant does not agree HMRC's revised SOI, it is not in the interests of justice for the parties and the Tribunal to spend more resources trying to agree a further draft. The Direction will instead be amended, so that parties will set out the issues and their submissions in their skeleton arguments, as is the normal position following HMRC's SoC.

Appeal rights

66. 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 Rules. 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.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 28 OCTOBER 2020