TC02217

Appeal number: TC/2012/000980

APPLICATION FOR HEARING IN PRIVATE — well-known taxpayer fearing adverse publicity — criteria to be applied — application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHRISTOPHER DAVID MOYLES **Appellant**

- and –

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

TRIBUNAL: JUDGE COLIN BISHOPP

Sitting in London on 4 July 2012

Ms Harriet Brown, counsel, for the Appellant

Ms Aparna Nathan, counsel, for the Respondents

REASONS FOR DIRECTION

1. Mr Christopher David Moyles is a well-known broadcaster. He has appealed against an amendment made by the respondents, HMRC, to his tax return for the tax year 2007-08. HMRC take the view that what Mr Moyles acknowledges was a marketed tax avoidance scheme does not achieve its purpose of generating a tax loss, unmatched by an economic loss, which Mr Moyles can set off against his income for the year so as to reduce the tax payable. The amendment amounts to a rejection of his claim for loss relief, not because the scheme is abusive but because, HMRC say, it simply does not work. Mr Moyles is one of many who entered into similar arrangements, and some of the other participants have also appealed against determinations of the same kind. I am not concerned at this stage with the merits of the appeal, though I should perhaps make it clear that it is no part of HMRC's case that Mr Moyles conduct was unlawful.

2. Mr Moyles made an application for a direction that his appeal should be heard in private, and that the resulting decision be published, if at all, in anonymised form. I refused the application, and these are my reasons for doing so. The application gives rise to some issues of principle and I have accordingly concluded that these reasons should be published, though without identifying Mr Moyles in case there should be a successful appeal.

3. The basis of Mr Moyles application is that there is currently considerable media interest in tax avoidance schemes, and in particular in their use by celebrities. It is a matter of record that Mr Moyles appears frequently on television and radio, and there is no doubt that he is prominent in popular culture. He is already the focus of media interest for other reasons, much of it hostile (and several examples of hostile press comment were produced to me, some relating to his financial affairs), and he is, I was told, fearful that, if it were to become public knowledge that he had availed himself of a tax avoidance scheme, whatever the outcome of this appeal, there would be increased adverse media comment to the extent that, as may have been the consequence for other celebrities whose use of tax avoidance schemes has recently been exposed, his career might be damaged and his earning capacity reduced.

4. Harriet Brown, counsel for Mr Moyles, argued that such an outcome, or potential outcome, infringed Mr Moyles "right to respect for his private and family life", protected as it is by art 8 of the European Convention on Human Rights. While it was true that there was a public interest in ensuring that all citizens paid their taxes and that, consistently with that public interest, tax appeals were normally heard in public, there were exceptional cases (of which this was one) for which rule 32 the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provided. Rule 32, so far as material, is 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;

(b) in order to protect a person's right to respect for their private and family life;

(c) in order to maintain the confidentiality of sensitive information;

(d) in order to avoid serious harm to the public interest; or

(e) because not to do so would prejudice the interests of justice.

(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.…

(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."

5. It is clear from sub-rule (1), as Ms Brown acknowledged, that the presumption is that hearings are to be in public. That presumption, and rule 32 as a whole, are consistent with article 6(1) of the Convention, which, so far as presently relevant, provides that

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing …. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial … where … the protection of the private life of the parties so require[s], or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

6. The usual practice in this tribunal is not only to hold its hearings in public, but also to make no attempt to conceal, either during the course of the hearing or in its published decisions, the details of a taxpayer's income and other financial circumstances relevant to the appeal. Redaction of such details, as Ms Brown acknowledged, was exceptional. But, she said, the practice of the Special Commissioners, one of the predecessor bodies to this tribunal, in interpreting regulation 15(2) of the Special Commissioners (Jurisdiction and Procedure) Rules 1994, which was to materially the same effect as rule 32, was generally to allow a hearing in private where it was necessary to do so in order to protect a taxpayer's right to private life. Regulation 15, as originally enacted, gave the taxpayer the right, on demand, to a private hearing (the Inland Revenue had such a right only if a Special Commissioner agreed); until the 1994 Regulations were enacted, hearings before the Special Commissioners were always in private, not because of any rule to that effect, but as a result of long-standing custom and practice. However, the General Commissioners and Special Commissioners (Jurisdiction and Procedure) (Amendment) Regulations 2002 removed the right to a private hearing, by replacement of the regulation. Regulation 15(2), as so replaced and as it applied from 31 December 2002 until the Special Commissioners' jurisdiction was transferred to this tribunal in 2009, was in these terms:

> "A Tribunal may direct that all or part of a hearing shall be in private
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> (a) upon the application of all parties by notice to the Clerk;
>
> (b) upon the application of any party by notice to the Clerk;

(c) of its own motion,

if in each case, a Tribunal is satisfied that a hearing in private is necessary

(i) in the interests of morals, public order, national security, juveniles or for the protection of the private life of the party; or

(ii) it considers that publicity would prejudice the interests of justice."

7. Ms Brown relied particularly on *Businessman v Inspector of Taxes* [2003] STC (SCD) 403, one of the first of the cases in which the application of the replacement regulation was considered. At para 3 the Special Commissioner (Dr John Avery Jones CBE) said:

> "The reasons given for making the application were (1) that the appellant has committed no wrong, the case turns on a purely technical matter of construction, the facts are agreed and no witnesses are to be called and (2) that for reasons that were mistaken, in the past the appellant has suffered personal attacks in the national press resulting from his directorship of the principal concern involved; accordingly he is concerned and sensitive about any publicity from that perspective, and also wishes to ensure that his private financial affairs are not exposed to the curiosity of his friends and acquaintances, both business and social; and that he was concerned about the effect of a hearing in public, resulting in details of his private financial affairs and his wealth becoming public knowledge, being detrimental to both his business and social relationships. The inspector had no objection to the hearing in private."

8. He then proceeded to grant the application, setting out his reasons at para 4:

> "As this is one of the first such applications under the amended rule I am setting out my reasons for granting the application in the decision for the benefit of those reading this decision when it is published in an anonymised form. The rules clearly state that consent of both parties is in itself not enough; I must be satisfied about the matters set out in (i) or (ii) of reg 15(2). There is a public interest in open hearings and a presumption that sittings will be in public unless sufficient reasons are shown that one of those matters is satisfied. In this case given the circumstances of the previous adverse press publicity I consider that sitting in private is necessary for the protection of the private life of the appellant to a greater extent than would ordinarily be the case. Protecting the taxpayer's private life could not be achieved if part of the hearing were in private. Accordingly I agreed that the hearing would be in private. However, I should add that I do not consider that reason (1) above is relevant, or that preventing the appellant's private financial affairs being exposed to the curiosity of his friends and acquaintances is sufficient in itself to require a hearing in private in order to protect the private life of the taxpayer. Cases will be judged on their merits, and I would be receptive to omitting figures that are not necessary to the decision."

9. The same Special Commissioner also granted a privacy application in *Red Discretionary Trustees v Inspector of Taxes* [2004] STC (SCD) 132, in which the reasons given for the application were that

> "the company concerned with the bonus issue in question owns a high profile asset that has attracted a considerable amount of press attention, although it has since been sold; the settlor's family wealth has made the family a target for theft and violence and they have in fact suffered a serious

> personal attack in which the settlor and members of his family were handcuffed by four robbers at his home and in which a substantial amount of property was stolen. Press reports of the event were provided. The inspector had no objection to the hearing in private."

10. This case, said Ms Brown, was directly comparable with those, and I should adopt the same approach. The risk of adverse press publicity, which was a real risk here, had plainly been considered by Dr Avery Jones to be a material factor pointing towards a private hearing. The press coverage of Mr Moyles in the past showed that it was virtually certain that he would be subject to the same scrutiny and attacks as others with a high public profile who had also used tax avoidance schemes, with consequent damage to his reputation which, for a person in his position, was likely to have a serious effect on him and his career. Even if this were not a tax avoidance case, Mr Moyles would be fearful of the adverse publicity of any further investigation into his finances, which was likely should any appeal in which he was involved be heard in public; the fact that this was a tax avoidance case made such publicity virtually certain.

11. So fearful was he of those consequences that Mr Moyles might feel it necessary to withdraw the appeal, a result which must be regarded as contrary to the interests of justice (I interpose to observe that Ms Brown refrained from saying that he *would* do so). It was not possible to deal with the matter by simply redacting details; it was public knowledge of his connection with a tax avoidance scheme, rather than any detail of it, which would be likely to cause harm to his interests.

12. The extracts from Dr Avery Jones' decisions set out above show that the Inland Revenue, as it was, did not oppose the applications; here, they appeared by Ms Aparna Nathan in order to do so. In essence, HMRC's position is that the threshold a taxpayer must surmount in order to secure a private hearing is a high one, and the embarrassment Mr Moyles may suffer, however acute it might be, is not enough. Ms Nathan referred me to a Practice Note issued by the Court of Appeal in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 in which, at [67], the Master of the Rolls observed that "the Court of Appeal should not depart from the general rule that litigation is to be conducted in public, unless a judge of that court is persuaded that there are cogent reasons for doing so." Although the observation was made in relation to the Court of Appeal, it provided guidance of general application which should be heeded by this tribunal. There was no cogent reason for a private hearing in this case—reputational damage being insufficient—and the application should be refused.

13. In my judgment the presumption of a public hearing is nowadays stronger than it might have been perceived even a few years ago. The modern view in relation to tax appeals was, I think, well put by Henderson J in *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] STC 1930:

> "[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.

> [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."

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.

15. There is in my view no good reason for a private hearing in this case, nor any basis on which I might properly direct an anonymised or redacted decision. Accordingly I refused the application.

16. 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.

COLIN BISHOPP
CHAMBER PRESIDENT

RELEASE DATE: 11 July 2012