



TC03031

Appeal number: TC/2012/07640

INFORMATION NOTICE—whether information privileged – whether information reasonably required – notice upheld with one small change – due date for compliance now two weeks from date of this decision

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EDWARD C BEHAGUE

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 6 November 2013

The appellant did not attend and was not represented, nevertheless written representations were provided by Baxendale Walker Ltd

Mr P Massey, HMRC Officer, for the Respondents

DECISION

5 1. HMRC opened an enquiry on 20 November 2007 into Mr Behague's self assessment for the year ended 5 April 2005. On 23 April 2012 HMRC issued Mr Behague with a Notice to provide information and documents under paragraph 1 of Sch 36 of the Finance Act 2008 ("Sch 36"). On 21 May 2012 Mr Behague lodged an appeal with this Tribunal against the notice.

10 2. The grounds of appeal were that (a) the documents were subject to legal professional privilege ("LPP") and (b) not reasonably required for the purpose of HMRC's enquiry. HMRC drew Mr Behague's attention to the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009/1916 ("the LPP regulations").

15 3. Mr Bahague then made an application to the Tribunal on 22 June 2012 under paragraph 5(5) of the LPP regulations. This application claimed privilege over only two documents:

(a) Engagement letter dated 10 May 2005 between Baxendale Walker Solicitors and Mr Behague;

20 (b) Report in relation to the trust arrangements prepared by Baxendale Walker Solicitors dated 1 July 2005.

4. The two documents were, as required by the LPP regulations, delivered to the Tribunal. The Tribunal directed that the matter of LPP be determined on the papers after submissions by both parties. The decision of the Tribunal was issued on 21 October 2013 and was that

25 (1) The client engagement letter was not subject to LPP save to the extent that it set out the legal advice for which Baxendale-Walker was retained and as itemised at §27 of the decision;

(2) The report dated 1 July 2005 including its schedules was subject to LPP.

30 5. On 6 November the appeal against the issue of the Information Notice was heard. Mr Behague did not attend and was not represented at the hearing. Nevertheless I was satisfied that Mr Behague had been notified of the hearing as there was a copy letter to Baxendale Walker LLP on the file and a skeleton argument was received from Baxendale Walker Ltd ("BWL") in accordance with my directions. I
35 was satisfied it was in the interests of justice to proceed with the hearing particularly as the appellant's representative's skeleton argument indicated that the appellant would not attend and be represented and asked the Tribunal to consider the written submissions.

Evidence

6. At the hearing evidence was given by Mr Evill, an HMRC officer, about the progress of the enquiry into Mr Behague's remuneration trust which was the main focus of the enquiry into his tax affairs. Mr Evill was in overall charge of HMRC's enquiries into Mr Behague's tax affairs and also of enquiries into the tax affairs of other taxpayers who had implemented similar arrangements. He met with Mr Behague on 5 July 2012 and produced a note of the meeting.

Legal professional privilege

7. BWL's submissions indicate that it considers that the LPP issue has largely been resolved (in Mr Behague's favour) and that it plans to disclose to HMRC that part of the client engagement letter which was the subject of the LPP hearing which I ruled was not subject to LPP.

8. No notice under Sch 36 can require the production of LPP material: see regulation 23 of that schedule. To the extent it required information which was plainly subject to LPP, I would allow the appeal against the notice. However, the schedule to the notice which set out the documents required provided:

"All documents, including correspondence, file notes, notes of meeting, notes of telephone conversations and e-mails between Mr EC Behague and all other parties involved, concerning the creation and operation of the Edward Charles Behague Chartered Surveyor Remuneration Trust.

[there followed a non-exhaustive list of items]

The items should include all communications with Baxendale Walker LLP, Smith Cooper & Partners Accountants and all other persons involved in creating and/or operating the arrangement or advising the partners on it."

9. None of the named parties are, so far as this Tribunal aware, giving advice as solicitors or barristers. As the schedule applies to "all other persons" it clearly has the potential to apply to correspondence with solicitors acting as such, such as Baxendale Walker Solicitors. Such correspondence might well be privileged, although BWL do not appear from their skeleton argument any longer to be asserting LPP on any documents other than the two in respect of which this Tribunal has already given its decision.

10. HMRC's view is that the effect of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009/1916 ("the LPP regulations") was that, to the extent documents sought by an information notice were privileged but nevertheless the appellant did not make an application under the regulations for the Tribunal to determine that issue, the appellant must be taken to have waived any claim to LPP. In other words, Mr Massey's view is that even if there are more documents than the two produced to the Tribunal which are subject to LPP, Mr Behague has waived that claim and they must be produced.

11. BWL made no submissions on this issue, but in any event I am unable to agree with Mr Massey. There is clear superior judicial authority to the effect that legislation would not be interpreted to overrule legal professional privilege other than where there are very clear words to that effect. See *R v. Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd* [2002] UKHL 21 where Lord Hoffman said:

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“[7] First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.”

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[8] Secondly, the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication.”

12. Nowhere in Schedule 36 or the LPP regulations is it stated that the effect of failing to take advantage of the dispute resolution mechanism offered by the LPP regulations would be to waive a claim to LPP.

13. I think that there is no such waiver of LPP. What, then, is the point of the LPP regulations if the position is that an information notice can never require the production of privileged information?

14. I think that the purpose of the regulations is to give the taxpayer a route by which a claim to LPP can be determined without the clock ticking on the information notice. It is of course open to the taxpayer to appeal the information notice and stop the clock ticking; but this is an inappropriate route if the taxpayer has no genuine grounds of appeal and merely wishes to withhold such information as is subject to LPP. The LPP regulations offer a route by which the claim to LPP can be determined. To the extent the outcome is unfavourable to the taxpayer, he avoids penalties for non-compliance because he followed the procedure: see Regulation 7 of the LPP regulations.

15. Therefore, in this case, I do not agree that there has been any waiver of LPP and I do not agree with HMRC that, save with respect of the material the subject of my earlier decision, the appellant is bound to produce material subject to LPP.

16. I would therefore be likely to allow the appeal if I considered that the information notice only or largely sought privileged material. However, as a matter of fact it seems to me that while the schedule to the information notice might include privileged material, that would only be a small part of what was actually required, and as (a) legally LPP is a defence to production of such documents and (b) as the Notice itself stated that it did not extend to privileged material, there is nothing the appellant can complain of on the grounds of LPP in this notice. The schedule clearly applies to

much un-privileged material and the notice itself states privileged material need not be produced. I would not allow the appeal on this ground.

Reasonably required for the purpose of checking Mr Behague's tax position?

17. The next ground of appeal is that the information is not reasonably required for the purpose of checking Mr Behague's tax position. The appellant's grounds for saying this appear to be:

- (a) To the extent it exists it has already been disclosed;
- (b) To the extent documents exist they are not in the appellant's power or possession
- 10 (c) The notice is vexatious;
- (d) The taxpayer has provided all the information requested;
- (e) It is for HMRC to prove that the documents exist and are in the appellant's power or possession;
- 15 (f) HMRC do not need disclosure as there are publically available textbooks which describe remuneration trusts;
- (g) HMRC's case is hypothetical.

Ground (a), (b), (d) and (e) – all extant documents in Mr Behague's possession have been disclosed?

18. HMRC have been provided with:

- 20 (a) The trust deed;
- (b) Written resolutions signed by the taxpayer;
- (c) Loan agreements by trust with Mr Behague;
- (d) Bank account statements showing the deposit with the trust;
- (e) Letters of wishes from Mr Behague to the trustee;
- 25 (f) Some letters between Mr Behague and the trustee.

19. BWL suggest that the documents required by HMRC either do not exist or are not within Mr Behague's possession or control and that it is for HMRC to prove otherwise.

20. I consider that the burden of proof rests on the taxpayer. The authorities are that in tax cases the burden of proof normally rests on the taxpayer. See *Tynwydd Labour Working Men's Club and Institute Ltd* [1979] STC 570 per Forbes J at page 581b. The reason for that, in my opinion, is that the taxpayer controls the information: see my decision in *J & B Massey t/a Hilden Park Partnership* [2013] UKFTT 391 (TC). Therefore, in an appeal against an information notice, the same position pertains: only the taxpayer can know what information he possesses and therefore the taxpayer has the burden of proof.

21. And I have not been satisfied that the documents required by the information notice either do not exist or are not in the taxpayer's possession or power. While it may be the case that less documentation exists than HMRC might expect to exist, I am not satisfied that what exists has all been disclosed. One reason for this is because
5 I accept Mr Evill's evidence that (1) he was shown by Mr Behague at their meeting an email Mr Behague had sent to Baxendale Walker LLP in May 2012 with some 18 attachments with a view to them being disclosed but that no disclosure was ever made to HMRC following this and (2) that at that same meeting Mr Behague had indicated
10 he had three very large files of documents all relating to the trust. Another reason is that the stated purpose of the trust was to satisfy constructive obligations of Mr Behague's business and it is reasonable to expect that there would be some documentation relating to the existence of such an obligation and documentation showing the discharge of that obligation, yet none has been provided.

Ground (c) – is the notice vexatious?

15 22. BWL suggest that HMRC's actions, including the issue of the Information Notice, were vexatious. Certainly it is the case that I should allow the appeal if the appellants can show that the information is not reasonably required.

23. I find that Mr Behague's self assessment return for the year in question showed an unusually high turnover and an unusual claim for an unusually high amount (a
20 payment of about £750,000 into a remuneration trust). I consider it reasonable for HMRC to check whether this deduction was made in accordance with GAAR and whether it was wholly and exclusively for the purpose of Mr Behague's trade.

24. Further, I find that even before the Information Notice was issued HMRC had some reasonable grounds for suspecting that the claim should not have been made; I
25 find that the meeting with Mr Behague after the issue of the Notice can only have strengthened these concerns.

25. I do not consider the notice vexatious and I am satisfied that it is reasonable for HMRC to request the documents which they have requested.

26. BWL do not suggest that the notice is onerous and I do not consider that it is.
30 While the reference to "all other persons" is clearly very wide, nevertheless the requirement is narrowed to only those documents relating to the operation and creation of the trust. The creation of the trust is highly relevant to its tax status and the question of whether the payment to it was properly deductible: the operation of the trust may well demonstrate the purpose for which it was established and that goes to
35 the question of deductibility of the payment. I do not consider the notice onerous in these circumstances.

(f) disclosure unnecessary as HMRC can rely on textbooks

27. HMRC are enquiring into the facts surrounding the establishment of this particular trust. This is not something a textbook can assist with. This ground is
40 dismissed.

(g) HMRC's case is hypothetical

28. HMRC's case is that they need this information to check the validity of a large tax deduction. There is nothing hypothetical about this: the deduction was not hypothetical and it is entirely reasonable for HMRC to enquire into its validity for the reasons already given.

In summary I dismiss all the appellant's grounds of appeal.

Footnote – the client engagement letter

29. Mr Massey asked for the Tribunal to order the disclosure of the client engagement letter the subject of the LPP hearing to the extent that my earlier decision found that it was not subject to LPP.

30. My decision is that I can only uphold the Information Notice if and to the extent I have not been satisfied that the information is not reasonably required. I have already seen the client engagement letter (and as it was on the file it would have been available to any Judge hearing today's hearing). I did not consider that the non-privileged part of it contained anything relevant to Mr Behague's tax affairs and in particular the trust.

31. Mr Massey's view was that even if the non-privileged part of it was irrelevant, the document as a whole was relevant and HMRC was entitled to it albeit redacted in so far as privileged. I do not agree. The Information Notice could only apply to the redacted version of the letter as the rest of it is privileged: the Information notice should only apply to documents reasonably required. It would not be reasonable to require irrelevant documents. The redacted client engagement letter was, in my view, irrelevant and did not have to be disclosed and should not be the subject of the Information Notice.

Decision

32. I dismiss the appeal against the Information Notice. Nevertheless under regulation 32(3)(b) of Schedule 36 I vary the notice so that it does not apply to the engagement letter between Mr Behague and Baxendale Walker Solicitors which was the subject of my earlier decision. Otherwise the notice stands as issued on 23 April 2012 with the exception that the date for compliance is now two weeks from the date of issue of this decision.

Costs

33. BWL applied for their costs on the grounds that HMRC had wasted them. I do not consider, however, that HMRC have behaved unreasonably: on the contrary they issued an information notice which I have upheld in its virtual entirety. The application for costs by BWL is refused.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 8 November 2013