[2016] UKFTT 0201 (TC)

TC04989

Appeal numbers: TC/2014/06593
TC/2014/06698

INCOME TAX — Request for information under Schedule 36 Finance Act 2008

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR SAMIR ALVI

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD NOWLAN
JANET WILKINS

Sitting in public at the Royal Courts of Justice in London on 18 November 2015

Stephen Hackett, counsel, on behalf of the Appellant

Marie McGregor of HMRC's Appeals & Reviews unit on behalf of the Respondents

DECISION

Introduction

1. This was an appeal in relation to three requests for information made by HMRC under the provisions of Schedule 36 to Finance Act 2008 to the Appellant, all in relation to a tax avoidance scheme that had been indirectly marketed to the Appellant by the promoter, Baxendale-Walker LLP.

2. The purpose of this Decision is not of course to consider the substantive matter of whether the scheme achieved its hoped-for effect, but in due course we will need to indicate the basic details of the scheme in order to render the information requests intelligible. In short, the claim was that by providing £4,500 and contributing that to a trust, the scheme would enable a trading deduction to be obtained for £50,000 by the Appellant, a doctor in private practice and not an employee.

3. As regards the various information requests, three different questions were put to us in relation to these requests.

4, The first was whether HMRC's requests were reasonable, sufficiently clearly stated and necessary for HMRC's consideration of the tax results of the various transactions. The Appellant's contention in relation to this issue was that some of the questions were so broadly phrased that they breached the Appellant's human rights, in particular his right to privacy. Our answer to this first point is that all the requests were perfectly reasonable and sensible; they were all quite clearly expressed and they were all inherently related to a proper consideration of the Appellant's tax liabilities and none requested private information that might have infringed any human rights point.

5. The second question was whether we considered that the Appellant had documentation in his possession or indeed non-documented information that he remembered in relation to the various steps in the scheme and how it was meant to operate. The Appellant's contention was that he had read a book fully explaining the particular scheme, and indeed written by Baxendale-Walker, prior to being introduced to Baxendale-Walker by his immediate adviser, Foy Wealth Ltd, and since he therefore understood everything in relation to the scheme, it was superfluous for him to be given documented summaries of the scheme and its various steps, and indeed even verbal advice as to the steps in the scheme. Accordingly there were no documents that he could provide because he had none, and there had been no oral summaries of the steps that he could now relay to HMRC. Rather perversely, in the context of his claim that further information was irrelevant because he had fully understood everything in advance after reading the book, when he was cross-examined in relation to various steps in the scheme and their purpose, he appeared to be quite oblivious as to how the scheme worked, although he had brought a copy of the book to the hearing, and offered to make it available.

6. We are not prepared to conclude, as HMRC invited us to conclude, that there were available documents in the Appellant's possession that he could produce, and that he was simply lying when he said that there were no documents. It may be true that he actually possessed no such documents. He might also have declined the opportunity to be given any oral summary of the scheme, though his assertion that he declined any such explanation because he thoroughly understood the scheme, having read the book, appeared distinctly unconvincing. It is though possible that he simply understood the claimed end result of the scheme, and could not be bothered with either the detail, or indeed the fundamentals, of the scheme. Since the Appellant's claimed ignorance appears to us to be highly damaging to one of the key features of the scheme, and to the question of whether on the substantive issue the scheme will or will not succeed, it seems unlikely that the Appellant would have made a false claim of ignorance. We will explain this point below.

7. The final issue was whether the Appellant should supply the requested documents because even if they were not in his possession, he had power to obtain them. In response to this it was contended on behalf of the Appellant that a person had no power to obtain documents when the power to obtain them was a qualified power, dependent on obtaining consent for the provision of the documents from some third party. Therefore it was said that the Appellant had no power to obtain documents either from the trustees of the trust to which we referred to in paragraph 2 above or from the promoter of the scheme. We decide that the Appellant does have power to obtain documents from the trust and the promoter, though whether either will actually provide documents obviously remains to be seen. All relevant parties, other than the Appellant, appear to be outside the jurisdiction, and experience on the part of HMRC in dealing with others who have effected the same scheme, and in seeking information directly from the trust and promoter have proved either fruitless or potentially futile.

8. One factor that we consider to be of some significance is that HMRC does already have considerable information about the steps in the scheme, and the inability of the Appellant to answer certain questions appears to be somewhat damaging to the Appellant's substantive claim for the tax deduction for £50,000. We are not thereby suggesting that any of the original questions were superfluous and not therefore reasonable. We simply say that lack of answers on the part of the Appellant, to date, do not seem to be too damaging to HMRC having a sufficient understanding of the scheme.

The scheme

9. The scheme appeared to operate as follows. A special off-shore trust was created to which the Appellant ranked as an "Adhering Entity", contributing £4,500 to the trust. The Appellant had then in some way authorised others to act on his behalf in requesting a loan from the trust, whereupon the trust appeared to lend the Appellant £4,500. With repeated rotations, the Appellant then contributed the second contribution of £4,500 to the trust, and borrowed back that amount and so on until when there had been sufficient rotations, such that the Appellant had contributed £50,000 to the trust, and borrowed back either £50,000 or £45,000 from the trust. We were shown a sheaf of letters, all dated on the same date and none of them indicating to which particular contribution and

loan and rotation they related. Oddly there seemed to be more than 10 in each category (i.e. effecting contributions and borrowing), and more significantly, the requests for loans issued by Dr Alvi indicated that the loans were to be "upon commercial terms to be agreed, for the purposes of general investment." The letters in the reverse direction, approving the loans referred to "approving the loan of £4,500 to the bank account of Dr Samir Alvi." We are certainly not concerned to enquire whether in fact the Appellant's bank account did reflect the numerous rotations, though we were told by Peter Lara of Foy Wealth Ltd that, while he himself had no understanding of the mechanics of the scheme, he did think that Baxendale-Walker had devised some other mechanism for evidencing the various rotations, without money passing into and out of the Appellant's bank account. If that was right, then seemingly the trustees had failed to understand the new twist for documenting the rotations.

10. The other significant document was described as a written resolution of the sole trader. One paragraph included the wording that "After due and careful consideration, it is resolved that contributions by the Sole Trader for the accounting period ended 30 September 2012 and subsequent years may be made on a weekly, monthly, annual or other periodic basis as may be appropriate for the commercial cash flow circumstances of the Sole Trader. It was noted that such periodic contributions would reflect part of the economic cost to the Sole Trader of earning its profits for that period." This resolution was signed by the Appellant and when we asked the Appellant what the last sentence meant, he said that he did not know. We considered this response to be rather remarkable because one would generally expect a trader claiming a tax deduction for a payment on the basis that it was a realistic cost of earning the business profits to know why that might be asserted.

11. We might finally mention in relation to the documentation that we did see that the resolution just referred to indicated that the first contribution, said to be "the first of a series of such contributions" was put at £50,000, in error for either £4,500 or £5,000.

12. The Appellant said that he did not know how a tax deduction for £50,000 was claimed for a payment of £4,500 or £5,000, and as we have also just indicated he said that he did not know what he had meant when he had resolved that the contribution to the trust would constitute "part of the economic cost of earning the business profits".

General observations in relation to the provision of information

13. While we will deal below with each particular request for information or documents, and the relevant objections to the requests, we should indicate that in general terms, the Appellant's evidence was fairly unsatisfactory, and it would be inappropriate not to observe that the whole tenor of the responses to HMRC's requests for evidence have been obstructive and best described as "stone walling". It may indeed be that the Appellant does not have in his possession the requested documents, but there is certainly every indication that the aims of the trust and the original promoter of the scheme were and are to be as unhelpful and uninformative as possible. So far as the Appellant himself is concerned, the obvious tension between saying that he had "read the book", and not just "read bits of the book", and had understood everything so that he

did not need any further explanation, then to reveal to us that he had understood absolutely nothing about the scheme, all seemed extraordinarily unconvincing.

The first information request

14. The first request, periodically referred to as one requesting trust information, was as follows:

> "Please provide all marketing, advice, technical and guidance communications, information and documentation between Dr Alvi and all other parties in relation to the creation and operation of the trust arrangements. This includes but is not limited to Foy Wealth Limited, Baxendale Walker LLP, Bay Trust International and Bay Management Services Limited."

15. This request has been challenged on behalf of the Appellant on the basis that it is unclear, unreasonably widely phrased and that it breaches the Appellant's human rights. For instance it could extend to asking about conversations with the other doctor who first mentioned the scheme to the Appellant, and that is a personal matter.

16. Without considering that we need to supply the obvious reasons for our decision, we certainly decide that the above request was perfectly clear, definitely reasonable, potentially material to the Appellant's tax affairs, and that it did not remotely undermine the Appellant's human rights.

17. Whilst we are somewhat surprised by the assertion that the Appellant has no marketing material, and no other information or knowledge in relation to the scheme, we do not decide that he was lying in this regard. The truth may well be that he bought the book; read virtually none of it and simply absorbed the fact that if he did what Baxendale Walker told him to do, he would secure a tax deduction for 10 times the realistic outlay, and that that is all that he may have understood. He might then have indicated that he could not be bothered with further descriptions.

18. So far as the alternative question of whether the Appellant had power to obtain the information is concerned, we are not satisfied that the suggested consent of a third party is required in this situation. The position is that the Appellant is required to obtain the information if he has the power to obtain it. It appears to us to be virtually certain that as regards the trust, in relation to which the Appellant was the major settlor, and from which he has borrowed all the trust funds, the Appellant must have a right, vis a vis the trust, to call for and obtain whatever trust information he asks for. The response to date, on the part of the trust appears to have been that the trust will not supply information because it says that the information is confidential and it does not want it to be furnished to third parties. That of itself is very unlikely to be true in that the real reason for not furnishing the information is that the trust wishes to block the Appellant's ability to meet the requests from HMRC, in some supposed effort to make it more difficult for HMRC to challenge the scheme. Whatever the trust's motivation, however, once, as we conclude, the Appellant must have a right and a power to call for the information, then the trust should supply the information, because it is simply discharging its implicit obligation to supply information to the settlor and borrower. That obligation cannot be

qualified simply because the Appellant calls for the information because he has a statutory duty to supply it to HMRC.

19. Requests for the information should accordingly be made by the Appellant to the trust and the promoters and other parties mentioned in the first information request. We consider it to be even more obvious that the promoter of a scheme, in contrast to the trustees, has an unqualified duty to supply information to its client. Whether of course off-shore parties will ignore the requests may remain to be seen.

The second information request

20. The outstanding items in the second information request are the following points, giving their original numbering in the request:

> "Point 1 - Please explain the method by which the £5,000 contribution was applied to become a £50,000 deduction.
>
> Point 2 - Please clarify the order in which the documents entitled "Baxendale Walker LLP Client Account Memorandum" are intended to be read.
>
> Point 7 - Please reconcile each "Client Account Memorandum" document provided with your letter of 5 February 2014 to the total £50,000 claimed.
>
> Point 9 - What steps did he take to ensure the purported loans were actually made to him and received by him?"

21. All these questions are manifestly reasonable. One would have thought that in general terms almost anybody attending the hearing, and certainly the Appellant, would have been able to advance in general terms the answer to the first question. The sheaves of documents, contributions and borrowings back, and the rotations made the explanation obvious.

22. We can well appreciate that the Appellant may not have known the answers to points 2 and 7 particularly when we note that nothing appeared to establish the order in which each document related to which rotation of funds, and more relevantly, the somewhat incompetent way in which the scheme appeared to have been implemented seemed to have generated more loan requests, and contribution documents, than the obviously required number of each to sustain the £50,000 figure.

23. As to question 9, the Appellant must know whether his bank account on the relevant day of the rotations included 20 items, 10 in each direction, or not. We suspect that it probably did not, in which case, the Appellant may well eventually face a question in defending his tax return as to whether the further loans were made at all. Our only observation on question 9 is that it is indeed highly relevant and that it might profit the Appellant to find out the answer to it.

The third information request

24. The final information request related principally to issues concerning the Appellant's business. Since a claim was made to deduct the entire £50,000 as a business expense, and the most obvious implications of the scheme were that:

(a) a trust and the beneficiaries of the trust potentially had the benefit of the net worth in the trust of £50,000;

(b) the Appellant himself had become indebted to the trust for £50,000 and beyond that onerous liability he certainly had himself no additional funds to apply in the business; and

(c) it was not remotely clear how the contributions to the trust might be sustained as part of the economic cost of earning profits in the business,

HMRC were plainly entitled to ask what the terms of business of the Appellant's medical practice were. Various earlier and tentative answers to some of the business questions appeared to have suggested that the supposed benefit to the business was that the beneficiaries of the trust were said to be "providers to the business" and that this was said "to facilitate and to be in the interests of the business." Answers had been along the lines that there was no legal obligation for the provision of the benefits and that the Appellant did not wish to expand on the earlier answer for fear of creating a legal obligation. We utterly fail to understand what benefit it is suggested might flow to the business, and as this is the essential question on which the claimed tax deduction may very well depend, it is certainly to be hoped that the Appellant will have an entirely convincing answer to this question.

Summary

25. All of HMRC's requests for information have been entirely proper, reasonable and directly concerned with the Appellant's potential tax liabilities.

26. In overall terms, the Appellant's conduct and the matching conduct of all other parties has been obstructive.

27. While the Appellant's claim that he has no documentation and received no instruction that he can now relay to HMRC is very strange, and the Appellant's claim that he fully understood the scheme from having read the book now appears to be ridiculous, it is possible that the Appellant just understood the hoped for and magical end result, and he decided to do whatever he was told. Beyond that he must have been disinterested in documents and instruction, albeit that this attitude is utterly inconsistent with his claim of having read the book and understood everything fully. At least his protestation of total and rather curious ignorance was entirely convincing.

28. We decide that HMRC should insist that the Appellant obtain documents from the trust and all other material parties, and we do not regard simple motivation by such parties (generally of course to ensure that the Appellant can be uninformative) to constitute rights to withhold information requested by the Appellant. We also consider it implicit and obvious that a trust would expect to provide trust information to the principal settlor and the person who had borrowed the entirety of the trust's funds. We also consider it absolutely implicit that a promoter of a scheme should provide information to its client, and that this obligation cannot be blocked by the fact that the

client needs and requests the information in order to comply with statutory duties to provide it.

29. HMRC has sought no order in respect of penalties, and so we ignore that issue.

HOWARD NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 27 JANUARY 2016