[2016] UKFTT 0772 (TC)

TC05499

Appeal number: TC/2012/08116

PROCEDURE – Appeal against discovery assessment - Case management directions for progress of appeal – Whether appellant or respondents should open the hearing – Order of disclosure of documents and witness evidence

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN HARGREAVES **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, Strand, London on 11 November 2016

David Goldberg QC and Conrad McDonnell, instructed by KPMG LLP, for the Appellant

Akash Nawbatt and Christopher Stone instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The purpose of this decision is to explain my reasons for the directions, which have been issued to the parties separately from, but at the same time as, this decision.

2. This is the second case management hearing for directions to progress this appeal to a hearing. The decision of Judge Gort in the first case management hearing in May 2013, to dismiss the appellant's application for a preliminary hearing to consider the competence of a discovery assessment under s 29 of the Taxes Management Act 1970 ("TMA"), led to unsuccessful appeals by the appellant, Mr John Hargreaves, to the Upper Tribunal and the Court of Appeal. On its return to the Tribunal, and unable to reach agreement on how the appeal should proceed, the parties had initially sought implementation of their own draft directions. But by the time of this hearing they had moved closer together with the appellant making suggested amendments to HMRC's revised draft directions attached to their skeleton argument of 4 November 2016.

3. However, notwithstanding this partial coming together, the following issues remained outstanding:

(1) Whether the directions should be made at this stage to determine who should open the substantive hearing; and

(2) Whether HMRC should provide disclosure of documents and witness evidence in advance of appellant.

4. Mr Hargreaves was represented by Mr David Goldberg QC and Mr Conrad McDonnel and HM Revenue and Customs ("HMRC") by Mr Akash Nawbatt and Mr Christopher Stone.

5. Given the parties familiarity with s 29 TMA I have not set out its provisions in the body of this decision but for convenience have, insofar as applicable to the present case, included it in an appendix.

Background

6. This was helpfully summarised by Nugee J in the Upper Tribunal (see *Hargreaves v HMRC* [2014] UKUT 395 (TCC), [2015] STC 905) as follows:

> "[3] Mr Hargreaves was born in the UK and it is common ground that he was resident (and ordinarily resident) in the UK until 2000. He lived in Lancashire, until 1988 at a family home with his wife, and from 1989 (after he separated from his wife) to 2000 at a house called the Coach House in Barton, initially alone and subsequently with his current partner. He was a very successful businessman and his main business was Matalan, a clothing retailer. He was the largest shareholder in Matalan plc and worked in it full-time. Matalan plc was floated on the London Stock Exchange in May 1998. Mr Hargreaves gave an undertaking at the time not to sell his shares for 18 months, but

in May 2000, after the undertaking had expired, he sold a tranche of his shares realising a substantial capital gain. If he were non-resident in the tax year 2000–01 that gain would not be subject to UK capital gains tax ('CGT').

[4] Mr Hargreaves therefore took steps with the aim of becoming non-resident which involved him and his partner going to live in Monaco, at first in March 2000 at a suite in a hotel, then from August 2000 on a yacht he bought which was based in the harbour, and then from December 2000 at an apartment which he had leased. He kept The Coach House however and continued to come to the UK on a frequent basis. In 2000–01 he says that he came to the UK 41 times, virtually all of them of short duration, and related to his work at Matalan where he had since March 2000 had a new contract as executive chairman. Most of the trips were to Matalan's head office in Lancashire, and on those occasions he would typically spend the night at The Coach House, accompanied by his partner.

…

[7] On 15 March 2000 PricewaterhouseCoopers ('PwC'), Mr Hargreaves' then tax advisers, sent to the Inland Revenue a completed form P85 confirming his departure from the UK. This form is headed 'Income tax form for those Leaving the United Kingdom' and indicated that Mr Hargreaves was leaving the UK on 11 March 2000 to go to Monaco and intended to live outside the UK permanently. PwC said in their covering letter that Mr Hargreaves 'will be regarded as provisionally not resident and not ordinarily resident in the UK with effect from 12 March 2000'.

[8] Mr Hargreaves' self-assessment tax return for 2000–01 declared his liability to tax on the basis that he was non-resident. It included two 'Non-Residence etc' pages which, as completed, said that he was not resident and not ordinarily resident in the UK, that the country in which he was resident was Monaco, that he had left the UK and intended to live outside the UK permanently, that he had spent 72 days (excluding days of arrival and departure) in the UK during the tax year and 77 since he originally left the UK. It added:

> 'I left the UK permanently on 11 March 2000 and I am regarded as provisionally not resident and not ordinarily resident with effect from 12 March 2000. I previously completed and submitted form P85.'

[9] On 9 January 2007 HMRC issued a notice of assessment to Mr Hargreaves for the tax year 2000–01. This was in the sum of £84m, made up of income tax (at 40%) on foreign income of £10m, and CGT (also at 40%) on a capital gain of £200m from the sale of his Matalan shares, and was on the basis that he was in fact resident in the UK for that tax year.

[10] On 20 June 2007 HMRC issued a notice of determination of ordinary residence to Mr Hargreaves. This was a determination by an officer of HMRC that he was ordinarily resident during the tax years 2000–01 and 2001–02.

[11] Mr Hargreaves appealed both the notice of assessment and notice of determination, but the appeals were not progressed as Mr Hargreaves also issued judicial review proceedings on 19 September 2007 seeking to quash the determination on the grounds that HMRC had failed to apply the terms of a booklet (IR20) issued by them in relation to the liability of residents and non-residents to tax in the UK; this claim was itself stayed behind *R (Gaines-Cooper) v HMRC* which raised similar issues. The Supreme Court handed down judgment in that case on 19 October 2011, rejecting by a majority the claims by the taxpayers for judicial review, following which Mr Hargreaves discontinued his own claim for judicial review.

[12] On 8 March 2012 HMRC issued a closure notice to Mr Hargreaves for the year 2001–02. On the basis that Mr Hargreaves was resident and ordinarily resident in the UK during the year, it amended Mr Hargreaves' assessment by adding an additional amount of tax of over £6m. Mr Hargreaves appealed the closure notice, again on the grounds that he was not resident in the UK.

[13] HMRC conducted a review of the decisions but the conclusion of the review, expressed in a letter of 24 July 2012, was that there was nothing to lead the reviewing officer to think that HMRC's conclusion that Mr Hargreaves remained resident and ordinarily resident in the UK in the years 2000–01 and 2001–02 was incorrect, based as it was on the substantial and continuing ties which Mr Hargreaves had with the UK.

[14] Mr Hargreaves appealed to the FTT by notice of appeal dated 16 August 2012 against (i) the notice of assessment for 2000–01; (ii) the notice of determination of ordinary residence for 2000–01 and 2001–02; and (iii) the closure notice for 2001–02.

[15] In respect of all three appeals Mr Hargreaves relies in his grounds of appeal on the contention that he was not in fact resident or ordinarily resident in the UK in either of the years in question, there having been, it is said, a distinct break in the pattern of his life in March 2000 when he left the UK for the settled purpose of living abroad permanently. I will call this question '**the substantive issue**'. It is agreed between counsel that the onus on this issue is on Mr Hargreaves.

[16] Mr Hargreaves relies on a further ground in respect of the appeal against the notice of assessment for 2000–01. This assessment was purportedly made under s 29 of the Taxes Management Act 1970 ('TMA 1970') which, as set out in more detail below, enables an assessment to be made where HMRC discover that there has been an under-assessment for the year. Mr Hargreaves contends that this discovery assessment (as it is called) was made without HMRC having any power to do so and so was invalid. I will call this '**the competence issue**'. It is agreed between counsel that in most respects (as set out in more detail below) the onus in relation to this issue is on HMRC.

[17] After HMRC had served its statement of case Mr Hargreaves applied for a direction that the competence issue be heard as a preliminary issue. It was this application which came before Judge Gort [in the First-tier Tribunal] and which she dismissed. In essence

> she relied on the decision in *Hankinson v Revenue and Customs Comrs* [2008] STC (SCD) 377 ('*Hankinson* (*SCD*)') in which Sir Stephen Oliver QC as a Special Commissioner had rejected a similar application in another residence appeal; dealt with each of the matters relied on by Mr Goldberg QC (who appeared for Mr Hargreaves as he did before me) as reasons for distinguishing that decision; and concluded that there was no proper reason for distinguishing it."

7. Nugee J upheld Judge Gort's decision that there should not be a preliminary hearing to determine the competence issue. Mr Hargreaves then appealed to the Court of Appeal (*Hargreaves v HMRC* [2016] EWCA Civ 174, [2016] STC 1652).

8. Arden LJ (with whom Underhill and Sales LJJ agreed) referred, at [32], to the "fundamental point" advanced for Mr Hargreaves that s 29(3) TMA, "provides a highly important protection for taxpayers." Although the Court of Appeal rejected the argument that the purpose of s 29 TMA is to give the taxpayer the right not to have to present his case under s 29(2) TMA until HMRC has proved that the s 29(4) or 29(5) TMA conditions (described in the Court of Appeal as "the conduct/officer conditions") have been met, Arden LJ said:

> "[42] … Even though the appeal raises other issues, Mr Hargreaves could at the end of HMRC's case, if HMRC open, submit that there was no case to answer on the conduct/officer condition. If he won on that, there would be no valid DA [discovery assessment]. If he lost on that, he could then call his evidence on the substantive issues in his appeal, including section 29(2). Of course he would have to plead his case and comply with any directions as to the service of witness statements and disclosure of documents but there is no suggestion that Mr Hargreaves could have some evidence or documents that he could hold back from HMRC in the course of its inquiry or otherwise. As to the purpose of the legislation, that depends on its true interpretation and Mr Goldberg cannot point to any provision which establishes a rule as to which party is to begin in every case.
>
> [43] Mr Goldberg then submits that Mr Hargreaves might be directed to open in which case he might have to give evidence on the issues in the substantive appeal first, and the burden on HMRC might have been subverted by the order in which the case had been taken. It is more than a matter of case management. I do not accept this submission. Mr Hargreaves would only be directed to begin where the FTT [First-tier Tribunal] considered that this was the just way of proceeding, and, while this is a matter for the FTT, my provisional view is that it is difficult to see how it would reach that conclusion in the present case."

She concluded, at [61]:

> "I would dismiss this appeal. In my judgment, on the true interpretation of section 29 TMA, a taxpayer has no right to a separate hearing to determine whether the conduct/officer condition [s 29(4)/(5) TMA] is satisfied. He receives the protection to which he is entitled on the hearing of the appeal through the exercise by the FTT of its powers of case management."

9. On 11 July 2016 the Supreme Court refused an application by Mr Hargreaves for permission to appeal against the decision of the Court of Appeal. The appeal therefore returned to the Tribunal and this case management hearing was listed on the application of HMRC.

10. I now turn to the issues.

Direction on who should open the substantive hearing

11. The arguments before me were not so much on who should open the substantive hearing but whether it was appropriate that such a direction should be made now.

12. Mr Nawbatt, who reminded me that there were two years under appeal and that the s 29 TMA issue only arises in one of these, contends that at this stage there should be a direction for a further case management hearing closer to the date of the substantive hearing. This should be before the judge who is to hear the appeal who, he says, would be in a better position to decide who should open. To do otherwise, he submits, in the absence of the statement of case, disclosure and witness statements of both parties would be premature and tie the hands of the hearing judge. He further submits that the appellant has not identified any prejudice should such a course of action be adopted.

13. Mr Goldberg, however, argues that the Court of Appeal considered the issue of who should open and that Arden LJ gave guidance for this particular case knowing that the s 29 TMA issue only arose in one of the two years under appeal when she said, at [43]:

> "… Mr Hargreaves would only be directed to begin where the FTT considered that this was the just way of proceeding, and, while this is a matter for the FTT, my provisional view is that it is difficult to see how it would reach that conclusion in the present case."

Arden LJ was, he says, as is clear from [45] of her decision, also aware of a potential overlap "between HMRC's case under the conduct/officer condition and Mr Hargreaves' case under s 29(2)" TMA in which the onus is on him.

14. As the Tribunal (Judge Short and Ms Newns) recognised in *Jerome Anderson v HMRC* [2016] UKFTT 565 (TC) at [85], before deciding that HMRC should open on the s 29 TMA point:

> "… there is no definitive guidance in the authorities for what the order of proceedings should be when a case involves arguments in which the onus of proof shifts between parties, even taking account of *Hargreaves*. The statements of Arden LJ in that case suggest that the question comes down to one of case management and the overall obligation of the Tribunal to deal with cases fairly and justly, which would usually mean that the party with the burden of proof should open the case."

15. In the present case, given that the guidance of Arden LJ was in relation to Mr Hargreaves' appeal and, as Mr Goldberg submits, she was aware of the factual circumstances in which the appeal arose, I consider that it would appropriate for HMRC to open and have directed accordingly.

16. This would enable Mr Hargreaves, if so advised, to make a submission of no case to answer on the s 29(4) or (5) TMA condition at the conclusion of HMRC's case and, if he chose to do so, subsequently call his evidence on the substantive issue. It would also allow the parties to prepare for the substantive hearing in full knowledge of the procedure to be adopted and directions regarding the order of the provision of skeleton arguments etc provide for this.

17. However, I should make clear for the avoidance of doubt, I reject Mr Goldberg's submission for a direction that there should be a short adjournment following the conclusion of HMRC's case. Although Mr Goldberg accepts that there is to be a single hearing to determine the both the competence and substantive issues the suggestion of such a pause in proceedings does appear, to me at least, to be an attempt to obtain a preliminary hearing (something rejected by the First-tier Tribunal, Upper Tribunal and Court of Appeal) by the back door. That said, it is a matter that can be left for the hearing judge who can decide whether a short adjournment is appropriate depending on the progress of the hearing eg if HMRC conclude their case in the morning or early afternoon and an application is made at that time.

18. In reaching this conclusion, although there are clearly benefits in having a case management hearing before the judge who is to hear the substantive appeal I consider these are outweighed by extra costs a further case management hearing would impose on the parties and, more importantly, given the all too real difficulties of listing a case management hearing and substantive appeal (eg the availability of counsel and witnesses), the need to avoid any further delay in a matter that concerns events which took place over 15 years ago.

Order of disclosure and provision of evidence

19. Mr Goldberg's case was that Mr Hargreaves did not wish to provide HMRC with the evidence to enable them to establish that the s 29(4) and/or (5) TMA conditions had been satisfied. Rather, he wanted HMRC to serve their evidence first so that it could be considered and allow him to proceed in an informed way by either making a submission of no case to answer in the 2000-01 appeal against the £84m assessment and possibly abandoning his appeal against the 2001-02 £6m amendment or alternatively calling his own evidence on the substantive issue. As Arden LJ put it at [3] of her decision:

> "Mr Hargreaves' wish is to stay silent as to the details of his own case as long as he can. He wants to be able to elect not to give evidence until HMRC have proved their case on the relevant conditions. He contends that HMRC will not be able to prove that the conditions are satisfied, and is prepared to abandon his challenge to an in time assessment for 2001-02 if a separate trial is ordered."

20. However, it is clear from of her decision that Arden LJ envisaged that, although Mr Hargreaves should be able to argue that there is no case to answer, he would be required to first plead his case, serve witness evidence and disclose documents. As she said, at [42]:

> "Of course he would have to plead his case and comply with any directions as to the service of witness statements and disclosure of documents but there is no suggestion that Mr Hargreaves could have some evidence or documents that he could hold back from HMRC in the course of its inquiry or otherwise."

21. HMRC served its statement of case in this appeal, on 30 October 2012. Since then the Upper Tribunal has held, in *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC), that it is for HMRC to establish the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met. Mr Nawbatt accepts that HMRC will need to address the issues raised in that case and for that reason the respondents have been directed to serve an amended statement of case.

22. Under rule 25(2) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 a respondent's statement of case must:

> (a) state the legislative provisions under which the decision under appeal was made; and
>
> (b) set out the respondent's position in relation to the case.

Therefore, on receipt of HMRC's statement of case Mr Hargreaves will know the facts and matters which are relied upon as the basis of the s 29 TMA assessment. As Arden LJ said, it will then be for him to plead his case, in the form of a statement of case. In order to progress the appeal Mr Hargreaves is also directed to provide HMRC with a draft schedule of agreed facts and as the substantive issue concerns his residence a "day count schedule" at the same time as his statement of case.

23. As the extent of the evidence and disclosure of documents required will only become apparent when the parameters of the appeal have been set by the pleadings, ie the respective statements of case of the parties, I do not consider it appropriate to direct any evidence be served before both parties have provided their respective statements of case to each other. Also, given the mixed burdens of proof in this case, HMRC in the competence issue and Mr Hargreaves in the substantive issue, and having regard, as I must, to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, to deal with cases "fairly and justly", I consider that a mutual exchange of lists of documents and witness statements to be appropriate and have directed accordingly.

Miscellaneous

24. The directions for the further progress of this appeal have in addition to the above matters taken account of the Tribunal's policy on delivery of documents, notification of compliance with the directions and provision of electronic copies of skeleton arguments and witness statements to the Tribunal. Also, given the nature of

the substantive appeal it would assist the Tribunal for there to be a core bundle. Provision in the directions has been made for this also.

Appeal rights

25. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 18 NOVEMBER 2016

Appendix

Section 29 Taxes Management Act 1970 (as in force 2006-07)

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) …

(7) …

(7A) …

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) …