[2022] UKFTT 00079 (TC)

TC 08410/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02610
TC/2019/03874

INCOME TAX – information notices – whether reasonably required – no – application upheld

BETWEEN

JACK GEORGE YEROU
PANAYIOTA YEROU **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO
DR SMALL

The hearing took place on 11 August 2021. The hearing was held via the Tribunal video hearing platform due to restrictions arising from the COVID-19 pandemic. The documents to which were referred were the parties' hearing bundles, authorities bundles, witness statements and skeleton arguments.

Ms Montes-Manzano, counsel for the Appellant

Mr Vallis, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This is an application raised by the appellants in respect of certain information notices raised by the respondents, as set out below.

2. The appellants had produced witness statements for two witnesses. One of the witnesses was unexpected unable to attend the hearing. The parties were willing to proceed without her, on the basis that we were unable to give any significant weight to her witness statement. We note that, in the context of our conclusion, the witness statement would not have contributed to the decision.

Applications made at the start of the hearing

3. The appellants contended that the skeleton argument provided by HMRC set out a different case to that contained in their Statement of Case and Officer Cafer's witness statement. No application had been made to amend the Statement of Case nor Officer Cafer's witness statement. In particular, no reference had been made to the transfer of assets abroad legislation or the settlements legislation.

4. The appellants indicated that the Statement of Case had focussed, instead, on the question of whether beneficial ownership was retained by the appellants. Further, HMRC's skeleton argument had set out substantive details on the reasons to suspect which featured in neither HMRC's view of the matter letter, nor Officer Cafer's witness statement.

5. It was submitted that the Tribunal should refuse permission to HMRC to introduce new arguments at this stage, on the basis that it would be unfair to the appellants as they had not had time to consider the arguments and prepare a response.

6. HMRC contended that they had not raised new arguments and the appellants were well aware of HMRC's suspicions, which had been detailed in a letter dated 12 February 2021. The possibility of the application of the settlements legislation had been raised in a letter dated 23 July 2018.

7. HMRC further submitted that this was an ongoing enquiry and the parties should be expected to deal with matters proportionately; it was not appropriate to have to require HMRC to apply to amend their Statement of Case each time a new line of enquiry was considered.

8. There was, it was submitted, no prejudice to the appellants who were represented by counsel and a tax adviser; JY was also an accountant.

Decision

9. Having considered the papers referred to, and noting that this is an application in respect of an information notice rather than a substantive appeal hearing, we conclude that HMRC were entitled to raise the relevant arguments in their skeleton argument. Considering in particular the correspondence between the parties, we do not consider that these arguments were being raised for the first time at the hearing and consider that the appellants should have been aware that HMRC were considering these arguments.

Background

10. The appellants are Mr Yerou (JY), the sole director and a shareholder of Ascot Sinclair Associates Limited (the 'Company') and Mrs Yerou (PY), the company secretary and also a shareholder in the Company.

11. On 12 July 2012, PY transferred 100 B shares in the Company to JY's father (GY). GY was, and remains, resident in Cyprus.

12. The Company subsequently paid the following dividends:

(1) 4 January 2013 - £200,000 to GY

(2) 2 September 2013 - £260,000 to GY, £30,500 to JY and £29,500 to PY

(3) 30 July 2015: £210,000 to GY and £23,500 to PY

(4) 31 March 2016: £140,000 to GY and £2000 to JY

(5) 16 December 2016: £100,000 to GY and £5,000 to JY

13. On 5 February 2018, HMRC opened enquiries into JY and PY's tax returns for the tax year ended 5 April 2017.

14. On 11 October 2018, HMRC issued two information notices to JY, in which the relevant requests in respect of which this application is made are:

(1) a schedule of UK bank and building society accounts

(2) a schedule of overseas bank accounts

(3) copy statements for these accounts

15. These were requested for accounts in JY's name, or those of his minor children, or to which he was a signatory, or the periods 12 July 2012 to 5 April 2017 (in aggregate between the notices).

16. On 9 January 2019, HMRC issued an information notice to PY, requesting (as relevant) the same information in respect of the same period. PY was also asked (as relevant) to provide an analysed copy of her loan account for each company for which she was an officer in that same period.

17. JY and PY appealed the information notices on 16 April 2019 (JY) and 24 May 2019 (PY). In each case, the grounds were that the information sought was not reasonably required for the purpose of checking their tax position, and/or that the statutory conditions for the issue of an information notice were not met. JY also appealed on the basis that the information notice requests documents which are more than six years old without the agreement of an authorised officer.

18. Discovery assessments have been issued under s29 Taxes Management Act (TMA) 1970 as follows:

(1) Year ended 5 April 2014: to JY on 15 March 2018

(2) Year ended 5 April 2015: to JY on 1 April 2021, to PY on 30 March 2021

(3) Year ended 5 April 2016: to JY on 30 March 2020, to PY on 30 March 2021

(4) Year ended 5 April 2017: to JY on 1 April [CHECK YEAR - 2021?], to PY on 30 March 2021

19. On 24 August 2020, the appellants' advisor informed HMRC that the majority of the dividends paid to GY had been made available to JY and PY, as follows:

(1) £128,371.10 paid towards their children's school fees

(2) £136,000 loaned to JY on 10 January 2013

(3) £260,000 loaned to JY on 12 September 2013

(4) £220,000 loaned to JY on 6 April 2016

Relevant law

20. Paragraph 1 of Schedule 36 Finance Act 2008 ("Schedule 36") provides that:

> (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")–
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position …

21. Paragraph 21 of Schedule 36 provides that:

> (1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.
>
> (2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.
>
> (3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.
>
> (4) Condition A is that a notice of enquiry has been given in respect of–
>
> (a) the return, or
>
> (b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),
>
> and the enquiry has not been completed so far as relating to the matters to which the taxpayer notice relates
>
> (5) In sub-paragraph (4), "notice of enquiry" means a notice under–
>
> (a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or (b) paragraph 24 of Schedule 18 to FA 1998.
>
> (6) Condition B is that, as regards the person, an officer of Revenue and Customs has reason to suspect that–
>
> (a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed, (b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or
>
> (c) relief from relevant tax given for the chargeable period may be or have become excessive.
>
> (7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking the person's position as regards any tax other than income tax, capital gains tax or corporation tax.
>
> (8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of

checking the person's position as regards any deductions or repayments of tax or withholding

of income referred to in paragraph 64(2) or (2A) (PAYE etc).

Whether the information is reasonably required (paragraph 1 of Schedule 36)

HMRC submissions

22. HMRC submitted that there are potential tax charges that may apply to JY and PY, being:

(1) a charge under the transfer of assets abroad legislation, on the basis that JY and/or PY have power to enjoy the income of a person abroad as a result of a relevant transfer (s721 Income Tax Act 2007); or

(2) JY and PY are the beneficial owners of the 100 B shares and are entitled to the dividend income from those shares either directly or under the settlements legislation (Chapter 5 of Part 5 Income Tax (Trading and Other Income) Act 2005), and thereby taxable on those dividends.

Transfer of assets abroad

23. In a letter dated 12 February 2021, Officer Cafer of HMRC advised the appellants that he believed that there had been a relevant transfer (the 100 B Shares) by PY to GY. The transfer of the shares meant that income had become payable to a person abroad (GY) and JY and/or PY had the power to enjoy that income. The income payable to GY would be taxable in the UK if it were income of JY and/or PY and received in the UK.

24. That letter concluded that HMRC had a clear prima facie case that a tax charge should apply to the appellants under the transfer of assets abroad legislation.

25. Further, HMRC considered that the loans provisions within the transfer of assets abroad legislation could give rise to an income tax charge on the appellants as a result of the loans stated to have been made by GY.

Beneficial ownership or settlement

26. HMRC contended that they also suspected that the appellants may have declared a trust over the transferred B shares such that they retained the beneficial ownership of those shares. Alternatively, the arrangements could amount to a settlement and be subject to charge under the settlements legislation, on the basis that the appellants should be regarded as settlors who have retained an interest in the property.

27. These suspicions arose because GY had been paid the "lions share" of the profits of the Company although he had little or no involvement in the business. The substantial dividends had started shortly after the shares had been transferred. HMRC contended that the appellants' explanation, that the shares were given to assist JY's parents in their retirement and allow them to have a comfortable life, were inconsistent with the fact that a significant proportion of the dividends have been made available to the appellants.

28. HMRC contend that paragraph 21 of Schedule 36 was satisfied on the basis that they need the requested bank statements in order to check the extent of the funds made available to JY and PY by GY and determine whether potential tax charges should apply. As such, HMRC contend that the statements are reasonably required for the purpose of checking the tax position of both JY and PY, in accordance with para 1, Schedule 36 [ACT]

29. PY's directors loan account details were reasonably required in order to be able to determine the extent to which receipts in her bank statements were loans from the companies with which she is involved.

30. To the extent that the appellants contended that the request amounted to no more than a fishing expedition, HMRC submitted that in *Spring Capital Ltd* [2015] UKFTT 0008 (TC) Judge Mosedale had concluded ([34]) that:

> "HMRC are entitled to check the taxpayer's tax position and they are entitled to any documents or information reasonably required for the purpose of doing so. In other words, HMRC are entitled to undertake 'fishing expeditions' when checking returns: they do not need suspicion in order to check a tax return."

Appellants' submissions

31. The appellants submitted that the test of "reasonably required" indicated that "a request for information or documents cannot be unreasonable, or entirely without foundation, but that does not rule out an element of uncertainty or speculation on HMRC's part." In addition, the test "incorporates an obligation to consider whether [the requests] are proportionate" (per *Gold Nuts Limited* [2017] UKFTT 84 (TC) at [202], [204]).

32. Further, the decision in *Perfectos Printing Inks Co Ltd* [2019] UKFTT 388 (TC) noted that the starting point for HMRC is to treat the taxpayer as honest unless there is good reason to the contrary. Perceived reticence is not sufficient to show the information is reasonably required (at [29]). In addition, the same decision had noted that HMRC's information and enquiry powers had to be balanced with a taxpayer's right to finality and privacy.

33. The appellants contended that they had provided all of the information required by HMRC, with full explanations of the payments made and received by the parties and their relatives, including:

(1) Schedules and explanations of dividends paid by the Company to the Appellants and to GY as a third shareholder.

(2) Signed and witnessed loan agreements providing evidence of loans made by GY to JY.

(3) Evidence of JY having used the funds to set off against his private residence mortgage.

(4) GY having provided evidence of gifts made to his three children of substantial six figure sums.

(5) Letters from GY's children confirming the gifts received, and that they have not paid any monies back to their parents.

(6) Letters from GY's bank confirming that neither of the Appellants have been or are acting under a power of attorney to manage the bank account of GY.

(7) Banks statements from GY's banks evidencing the explanation of movement in the account and including source of funds to purchase shares in the Company at market value (to address previous questions of HMRC).

(8) JY evidencing repayment of a £100,000 loan made by his father.

(9) Details from GY and his wife as to how their estate will be split equally between their children.

(10) Extensive detail of property ownership, evidence of funding and outstanding mortgage loans.

34. It was contended that this was ample evidence for HMRC to determine the tax liability arising from the dividends paid by the Company. The appellants submitted that the decision in

Taylor v Bratherton (2004) SpC 448 indicated that personal bank statements should not be required if information could be provided in other ways.

35. Further, the requests for information were unreasonable as HMRC had already reached final conclusions and issued discovery assessments which have been appealed. It was submitted that to allow HMRC to continue to issue and enforce information notices after the issue of an assessment and the submission of a related appeal would usurp the powers of the Tribunal, including those relating to disclosure and witness summons, which apply to both parties in equal measures.

36. It was submitted that the passage of time since the first dividend was paid to GY meant that the appellants were at risk of prejudice if HMRC were permitted to continue with a fishing expedition.

37. HMRC had, it was submitted, shown that they had a very clear view of the way in which the shares were transferred and dividends paid. This was demonstrated by their discovery assessments.

Whether the provisions of paragraph 21 of Schedule 36 are satisfied

HMRC's case

38. HMRC contended that two of the alternate conditions within paragraph 21, at least one of which must be met for an information notice to be valid, apply to the information notices in this case.

Condition A

39. Condition A is that a notice of enquiry has been given in respect of the return and the enquiry has not been completed. HMRC submitted that the bank statements are required in respect of the open enquiries in relation to the tax year ended 5 April 2017.

40. The information is required for years in which dividends were paid to GY in order to check whether there is a pattern of behaviour that would indicate a trust or similar arrangement which would affect the tax position with regard to the tax year ended 5 April 2017.

Condition B

41. In the alternative, HMRC contended that Condition B, which applies where HMRC has reason to suspect that tax may not have been assessed, is met. It was submitted that the phrase "reason to suspect" is a low hurdle, per Newton [2018] UKFTT 513 (TC) at [50].

42. Officer Cafer's evidence was that he was concerned by the inconsistencies in the evidence and explanations put forward by the appellants, such that he had reason to suspect that there had been an understatement of tax. In particular:

(1) JY had built up a successful business, but the scale of the dividends paid to GY meant that JY had effectively given away approximately 90% of the accumulated value;

(2) the explanation that the appellants wished to support GY in his retirement was not consistent with the subsequent return of a substantial proportion of the dividends to the appellants and their relatives;

(3) there were inconsistencies in some of the documents, particularly the loan notes.

43. HMRC submitted that the fact that discovery assessments have been appealed did not affect the validity of the notices. The decision in *The Queen on the Application of Derrin Brother Properties Limited* [2014] EWHC 1152 (Admin) at [19] (AB, 232) noted that the fact that Schedule 36 does not allow HMRC to request documents relevant to "the conduct of a pending appeal" (paragraph 19(1)(a)) suggests that "the reverse is the case" for documents which are not within this category.

44. It was also submitted that, as the threshold for issuing discovery assessments is the same "reason to suspect", Condition B could not be precluded by the making of a discovery assessment.

Appellants' case

45. The appellants contended (in summary) that HMRC had failed to show that they had reasons to suspect an under-assessment of tax. The "suspicion" that JY had benefited from dividends paid to GY was not a reason to suspect but, instead, only a remote possibility based on assumption. HMRC had, at best, a suspicion that they might find reasons to suspect if they had access to the bank statements. This was, it was submitted, not the same has having a reason to suspect an under-assessment.

Discussion

46. HMRC contended that JY and PY maybe be subject to tax in respect of dividends paid to GY because they either own the shares beneficially (whether by direct arrangement or under the settlements legislation) or as a result of the transfer of assets abroad legislation.

47. We note that the tax charge is in these cases based on the entire amount of the dividends, whether or not actually received by JY and/or PY.

48. The relevant information requested is (in summary) bank account statements, and directors' loan account information from PY. HMRC submitted that the outstanding information is required in order to provide explanations and justifications for the decision to pay GY 96.25% of the Company's dividends throughout the relevant periods.

49. Officer Cafer stated that he required the remaining documents in order to satisfy himself that JY and PY are not the beneficial owners of the 100 B shares, and that JY and PY have not utilised the dividends paid to GY for personal & private purposes, whether overseas or in the UK. He stated that, for example, if almost all of the dividends have 'found their way back' to JY and/or PY, this would impact on their explanation they were not the beneficial owners of the shares. His evidence was that JY had declined to answer when asked whether he had benefitted financially from the payments made to GY.

50. On review of the information put to the Tribunal, we consider that it is clear that HMRC have concluded that there is a tax charge and have raised discovery assessments accordingly. The appellants have argued that there should be no such tax charge, and HMRC wish to check the appellants' arguments as to this point. That is, HMRC wish to check the appellants' explanations as to their tax position. That is, we consider, seeking information to check the appellants' tax position.

51. The question is whether the information is reasonably required to check the tax position. The appellants have provided explanations but have declined to make available information which HMRC say they require in order to satisfy themselves that (as stated by Officer Cafer) these explanations are accurate and that JY and PY are not the beneficial owners of the shares or have not otherwise benefitted from the dividends.

52. HMRC clearly believe that there has been an understatement of tax, and now require the information in order to test the appellants' explanations, rather than to establish whether there has been an understatement.

53. The appellants have, by appealing the information notice, declined to provide HMRC with the means of checking their explanations. In context, it seems very unlikely that the parties will come to any agreement as to their tax position even if the requested information were to be provided before Tribunal proceedings are substantively underway.

54. On the facts of this particular case and taking into account the overriding objective, we do not consider that any useful purpose would be achieved by prolonging matters by ordering that the information notice be complied with before any Tribunal proceedings are entered into. We do not consider that the information is therefore reasonably required, in context, for the purpose of checking (prior to any appeal to this Tribunal) the appellants' tax position or their explanations as to what they consider to be their tax position.

55. Whilst it will often be desirable for matters to be resolved without recourse to the Tribunal, the appellants in this case have effectively demonstrated that they do not wish to facilitate an early resolution to the disputes.

Conclusion

56. For the reasons set out above, we do not consider that the information - on the specific facts of this case - is reasonably required in order to check the appellants' tax position, interpreting the word 'reasonably' in the context of proportionality and the overriding objective.

57. Given our conclusion above, we have not considered further the parties' submissions with regards to reasonable suspicion or the validity of the request in respect of older documents.

58. The application is therefore upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

Release date: 23 FEBRUARY 2022