TC02824

Appeal number: TC/2012/05868

Information notice, Schedule 36 Finance Act 2008, paragraphs 1(1), 21(1), 21(3) and 21(6)(a)—whether documents reasonably required for purpose of checking taxpayer's tax position and whether condition B met—held: condition B not met—appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEVIN BETTS **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL PEREZ
LESLEY STALKER

Sitting in public at 45 Bedford Square, London WC1 on 12 September 2012

Mr Keith Gordon of counsel for the appellant, instructed by Hazlewoods

Mr Christopher Birkett of HMRC for the respondents

DECISION

1. This was an appeal under paragraph 29(1) of Schedule 36 to the Finance Act 2008 (c.9) ("Schedule 36", introduced by section 113 of that act). The appeal was against a notice given under paragraph 1 of that schedule requiring documents to be supplied to HMRC by the appellant. By summary decision, we allowed the appeal and set aside the notice under paragraph 32(3)(c) of Schedule 36. At HMRC's request, we now give our full decision.

2. In our summary decision, we concluded that condition B in Schedule 36 was not met and that paragraph 1(1) of Schedule 36 was not satisfied either. We now however reverse our conclusion that paragraph 1(1) was not satisfied. We conclude that it was satisfied, for reasons explained later in this decision. That does not however make a difference to the outcome of this appeal, given our conclusion on condition B.

3. Given that we are changing our mind as to paragraph 1(1), we gave the parties the opportunity to comment on our draft decision. This was in line with paragraph 53 of *Space Airconditioning Plc v Guy & Anor* [2012] EWCA Civ 1664 (14 December 2012). HMRC's response was to welcome our revised conclusion on paragraph 1(1). As to the appellant's response, we address that in the part of this decision relating to paragraph 1(1) of Schedule 36.

Background

4. The appellant submitted a tax return for the tax year ended 5 April 2009. The return showed that he had self-assessed his status for tax purposes as not resident, and not ordinarily resident, in the UK.

5. HMRC purported to open an enquiry into the tax return.

6. The appellant's case on residence, as put to HMRC, was that he had emigrated on 22 March 2008. He said he first went to Malaga for a short stay, and then moved to Gibraltar. He told HMRC that he had put his car and home on the market. He said however that he then rented out his former home, rather than selling it, due to the poor property market. He told HMRC that he owned another property in the UK which his daughter occupied.

7. HMRC sought a variety of information in the course of the purported enquiry. The appellant provided information as requested, except that he refused to supply bank, building society and credit card statements requested.

8. In light of that refusal, HMRC gave formal notice seeking those documents. The notice was given under paragraph 1 of Schedule 36 and was dated 15 February 2012. That is the notice under appeal ("the notice"). It sought "Statements for all Bank/Building Society and credit card accounts operated between 22 March 2008 to 5 April 2009" ("the statements sought"). It was common ground that those dates were inclusive.

9. When HMRC first gave the notice, HMRC believed that they were giving it in the course of an enquiry. They later accepted that the notice was not so given. They did not however withdraw the notice; instead they relied on different grounds to justify it, as explained below.

10. The tax year in relation to which the notice sought documents was 2008-09. But, as seen above, the notice also sought documents in relation to a short period (22 March to 5 April 2008) preceding that tax year. This was in light of the appellant's assertion that he had, by the start of that tax year, ceased to be resident in the UK. It was common ground that the relevance of that assertion was this: that the appellant's dividends from a UK company would be chargeable at a higher rate of tax if he were UK-resident than if he were non-resident. The difference in tax was said by HMRC to be approximately £200,000.

11. By letter dated 14 March 2012, the appellant appealed to HMRC against the notice. An HMRC internal review upheld the notice on 24 April 2012. The appellant appealed to this tribunal by notice dated 18 May 2012.

The legislation

12. Schedule 36 provides, so far as relevant—

> "1.—(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.
>
> (2) In this Schedule, "taxpayer notice" means a notice under this paragraph.
>
> […]
>
> 6.—(1) In this Schedule, "information notice" means a notice under paragraph 1, 2, 5 or 5A.
>
> […]
>
> 7.—(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—
>
> (a) within such period, and
>
> (b) at such time, by such means and in such form (if any),
>
> as is reasonably specified or described in the notice.

[…]

21.—(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.

[…]

(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.

[…]

(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.

[…]

29.—(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

[…]

32.—(1) [Not relevant].

(2) [Not relevant].

(3) On an appeal that is notified to the tribunal, the tribunal may—

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

[…]

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.".

The test for a valid notice to be given

13. By virtue of paragraphs 1(1) and 21(1) and (3) of Schedule 36, two requirements must be met for a valid notice to be given under paragraph 1 of that schedule. The first requirement, in paragraph 1(1), is that the information or document sought by the notice must be reasonably required, by the officer giving the notice, for the purpose of checking the taxpayer's tax position. The second requirement, by virtue of paragraph 21(1) and (3), is that at least one of conditions A to D must be met.

14. It was common ground that the burden of proof was on HMRC to show both that paragraph 1(1) was satisfied and that one of conditions A to D was met.

15. When the notice was issued, HMRC believed it to be issued in the course of an enquiry such as is mentioned in condition A in paragraph 21(4) of Schedule 36. HMRC's initial position therefore was that condition A was met and that the notice was justified on the grounds that condition A and paragraph 1(1) were both satisfied.

16. However, HMRC had, by the time of the hearing, accepted that they had not effected valid service to open an enquiry. They accepted therefore that there was no valid enquiry for the purposes of condition A, and that condition A was therefore not met. HMRC relied instead on condition B in paragraph 21(6) of Schedule 36.

Condition B – paragraph 21(6)(a) Schedule 36 – as regards the appellant, has an HMRC officer reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed?

17. We found that condition B was not met for the following reasons.

18. The way in which HMRC relied on condition B was put in their statement of case as follows—

> "29. HMRC's contention is that the information already provided by Mr Betts gives a partial picture of his movements and more particularly his ties to the UK in the relevant period. Furthermore, based on that information there remains a doubt that he had left the UK permanently by 6 April 2008 to become not resident. The requested information will complete that picture and, if it shows that his ties remained substantially in tact [sic], condition B is satisfied. The Inspector will be able to show that an amount which ought

to have assessed [sic] may not have been. The information is therefore reasonably required for the purpose of checking Mr Betts tax position and the appeal should be dismissed.". [emphasis added]

19. There are three ways in which condition B may be met. These are set out in paragraph 21(6)(a) to (c) of Schedule 36. Mr Birkett explained that his reliance on condition B was based on the first of those three ways, in paragraph 21(6)(a) of Schedule 36. That paragraph provides that "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".

20. We asked Mr Birkett whether he was really saying, as indicated in paragraph 29 of HMRC's statement of case (set out above), that he needed the information in order to satisfy condition B. Mr Birkett replied "yes".

21. Mr Gordon submitted that that response from Mr Birkett would seem to kill the case. Mr Gordon asked us therefore to allow the appeal on the basis of that response.

22. We agreed with Mr Gordon that it appeared to be the wrong way round to seek the documents in order to satisfy condition B. The position appeared rather to be that condition B must be satisfied in order for the documents to be validly sought. We thought it fair however to explore HMRC's position further.

23. Mr Birkett submitted that "the 'reason to suspect' [for the purposes of paragraph 21(6)(a)] is that if the appellant was resident in the UK, then there will be an amount that ought to have been assessed". We asked Mr Birkett whether the "reason to suspect" which he asserted was just a general statement of the taxation regime; that is, if you are resident, then you pay tax (which Mr Gordon accepted as a general principle). Mr Birkett replied "that is correct". Mr Birkett further submitted that it was the respondent's view that the bank statements "will support or not" the assertion that the appellant was not resident in the UK.

24. We asked Mr Birkett what it was that made him think that the appellant was UK resident in the tax year in question. Mr Birkett replied that the nature of the enquiry that had been undertaken meant that there were very many complex factors; not simply where the appellant was, but also his personal ties to the UK.

25. We asked Mr Birkett "But what is your reason to suspect that the appellant was resident? Or, do you not have a reason, but if you had the information, that would clarify whether you did have a reason?". Mr Birkett replied "Thank you. That is correct".

26. Mr Gordon again submitted, in light of that response, that HMRC had no reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed. That appeared to us to be a correct summary of HMRC's position as stated up to that point. We remained concerned however to ensure that HMRC had adequate opportunity to explain their case and whether that was a correct summary of their position.

27. We therefore invited Mr Birkett to expand further on his case.

28. Mr Birkett told us that new information had emerged from information provided by the appellant to HMRC. Mr Birkett submitted, in reliance on *R on the application of Davies and another and Gaines-Cooper v HMRC* [2011] UKSC 47 ("the *Gaines-Cooper* case"), that the test for residence was "multi-factorial". His statement of case had explained this at paragraph 15—

> "15. Key to the question of whether an individual has left the UK, and may be considered not resident, can hinge on the extent to which personal, family, social and business ties have been maintained or retained in the UK and the extent frequency and reasons for their return to the UK.".

29. HMRC's review conclusions letter of 24 April 2011 had set out the following grounds for requiring the statements sought—

> "the fact that:
>
> - you stayed in Malaga rather than Gibraltar between 22 March and 3 April 2008 during which your partner's daughter accompanied you both on what was for her a "study holiday"
> - you returned to the UK on 3 April 2008
> - it can't be demonstrated that you did not stay at one of your UK based properties between 3 and 6 April 2008
>
> then [sic] there are sufficient grounds to request sight of the relevant statements in order to check that your lifestyle and personal expenditure was commensurate with the statement that you became non UK resident on 22 March 2008 and not on some later date.".

30. So, HMRC relied, in their review conclusions letter of 24 April 2011, on three grounds for requiring the statements sought. Those were that the appellant first went to Malaga accompanied by his partner's daughter on what was for her a study holiday; that the appellant returned to the UK on 3 April 2008; and that it could not be demonstrated that the appellant did not stay at one of his UK properties between 3 and 6 April 2008.

31. At the hearing, Mr Birkett submitted that the case presented by the appellant to HMRC in relation to his tax return was of breaking of ties with the UK. Mr Birkett went on to list nine factors which he said were relevant to that case and were significant in the information received from the appellant. Mr Birkett later summed up those nine factors under four headings: first, that the appellant still had a flat that his daughter lived in; second, that the appellant still owned a property that was available to him (the Walsall property); third, that the appellant had a continuing business in the UK and was financially reliant on the income from that business; and fourth, that the appellant had made repeated visits to the UK in the tax year in question.

32. Despite those four headings, we think it fair to HMRC's case that we should address all nine factors which Mr Birkett presented to us. We deal also, as a tenth factor, with the first of the grounds in the review conclusions letter (that the appellant first went to Malaga accompanied by his partner's daughter on what was for her a study holiday); it was not clear that Mr Birkett had abandoned that ground.

33. The nine factors on which Mr Birkett relied, plus a tenth taken from the review conclusions letter, were—

(1) the appellant's daughter occupied the appellant's property;

(2) the appellant owned another property in the UK;

(3) the appellant was physically present in the UK at midnight on 5 April 2008 (that is, at the start of the tax year in question);

(4) the appellant made 22 visits to the UK during the tax year in question;

(5) the appellant's principal source of income was in the UK in the tax year in question;

(6) the appellant's departure from the UK was "so close" to the end of the preceding tax year;

(7) the appellant had drawn no dividends in the two tax years preceding the tax year in question;

(8) Gibraltar "is a known low-tax place";

(9) the amount of the dividend which the appellant drew in the tax year in question;

(10) the appellant stayed in Malaga rather than Gibraltar between 22 March and 3 April 2008 during which his partner's daughter accompanied them both on what was for her a "study holiday".

34. Mr Gordon did not dispute the truth of factors 1, 2, 3, 4, 7, 9 and 10. Since this is not an appeal against a decision as to residence, we do not make findings on those factors. We proceed however, for the purposes only of the present appeal, on an assumption that those factors are true. (As to the other factors listed above, factor 5 was not accepted by Mr Gordon. Factors 6 and 8 were subjective assertions rather than assertions of fact.)

Consideration of factors on which HMRC relied

35. We deal with each of Mr Birkett's stated factors in turn.

(1) Appellant's daughter's occupation of appellant's property

36. The first factor which Mr Birkett said was significant was that the appellant's daughter remained in the UK after the appellant left the UK and that she was living in a property owned and mortgaged by the appellant which he had bought for her to live in.

37. Mr Birkett accepted however that the appellant did not himself live in the property. And Mr Birkett did not suggest that the appellant had, or even may have, bought the property with a view to living in it himself in the future, and in particular, with a view to living in it in the tax year in question. Nor did Mr Birkett suggest that the appellant had, or even may have had, any intention at any relevant time of living in the property himself.

38. In addition, Mr Gordon pointed out that the appellant's daughter had attained the age of 18 on 22 January 2008. That was some months before the appellant ceased to reside in the UK. Mr Birkett did not dispute that the appellant's daughter had attained majority on that date. Mr Gordon submitted that the appellant did not therefore have a dependent daughter in the UK at the time that the appellant ceased on the appellant's case to be UK-resident. We accept that.

39. Mr Gordon submitted that, in any event, owning a property occupied by one's major daughter is not the test for residence. Mr Birkett did not dispute that either.

40. In our judgment, therefore, Mr Birkett's first factor did not help him to show that condition B was met.

41. We accept however that, while any one single factor may not give "reason to suspect" within the meaning of paragraph 21(6)(a), a number of factors may combine to give such reason to suspect. (This applies too for our consideration of the other nine factors.) As we set out later in this decision however, that was not asserted in this case.

(2) Ownership of another property in the UK

42. The second factor which Mr Birkett said was significant was this: that the appellant owned another property in the UK, 80 Gillity Avenue ("the Walsall property"), and, he said, the possessions were not removed from that property until 18 April 2008, nearly two weeks into the tax year. Mr Birkett accepted that the property was rented out in June 2008.

43. Mr Birkett's submission was that the Walsall property was available to the appellant from when the appellant left the UK on 22 March 2008, so from prior to the start of the tax year in question, until June of that year, including during the appellant's UK visit spanning the start of the tax year. That visit was what the appellant's agent called, in his letter of 18 January 2012 to HMRC, "an unexpected return to" the UK from Thursday 3 April 2008 to Sunday 6 April 2008. That letter said that the Walsall property "was not used by [the appellant] post the 22 March 2008" and that the accommodation during the visit was at Inn Keepers.

44. This second factor, availability of the Walsall property, overlapped with the second and third of the grounds mentioned in the review conclusions letter dated 24 April 2011.

45. It appeared that HMRC's argument as to residence, based on the Walsall property, would be twofold. It would be based on the mere availability of that

property to the appellant, even if he did not stay in it. It would also be based on the notion that that availability meant that the appellant may have stayed in that property.

46. We accept that the Walsall property was available to the appellant in the period from 22 March to the time it was rented out in June 2008, including during the appellant's UK visit of 3 to 6 April 2008. By "available", we mean "available in the limited sense that the property was not occupied by anyone else". The appellant did not suggest that the property was not so available during that period. Our finding on this is relevant to the tribunal's conclusion later in this decision that paragraph 1(1) of Schedule 36 was satisfied.

47. That availability does not however assist HMRC in showing that condition B was met. The mere availability of the property, in the circumstances of this case, did not in our judgment give HMRC reason to suspect that the appellant may have been resident in the UK at some time during the period of that availability. We so find in view of what we say below about the possessions being packed up. Nor did the availability of the Walsall property give HMRC reason to suspect, in our judgment, that the appellant may have stayed in the property. We so find for two reasons. The first relates to the possessions being packed up. The second relates to the council tax exemption.

Ownership of Walsall property - Possessions packed up

48. The first reason that the availability of the Walsall property does not help HMRC on condition B is this: Mr Birkett accepted that the possessions in the Walsall house were packed up in March 2008. He also accepted that the reason the possessions were not shipped out of the UK until 18 April was "due to the haulier's schedule". It was not clear whether it was asserted and accepted that all the furniture was packed up (that is, whether "possessions" included all furniture). But, in any event, Mr Birkett's assertion was that any possessions which were packed up were still in the property, rather than at a storage unit.

49. It was not clear from the evidence before us whether the possessions remained in the Walsall property in their packed-up state, or whether they had, by the time the appellant arrived in the UK on 3 April, been moved to a storage unit. On the one hand, there was the Invoice & Order Confirmation dated 11/04/08 from Elite European Ltd (page D57). That invoice envisaged collection from the Walsall property rather than from a storage unit. On the other hand, there was the appellant's letter to the council dated 20 March 2008. That letter requested a council tax exemption and said that the appellant "has made arrangements for furniture at the property for 2 or 3 days after [22 March] to be removed and placed in storage". There was also an email on the appellant's behalf from a Mr John Locke dated 14 April 2008 (page D59). That email might suggest that the possessions remained at the property. The email was not however clear on that point.

50. It was not however necessary for us to make a finding as to whether the possessions, and which of them, remained in the Walsall property in their packed-up state prior to being shipped out of the UK (especially as this was not an appeal against

a decision on residence). Even if the possessions did remain in the property in their packed-up state, Mr Birkett had accepted that they were packed up. That acceptance was in our judgment an acceptance that such of the possessions as were packed up were not readily available for use during a stay at the property.

51. That does not of course mean that it was impossible for the appellant to stay in the property; we address that later in this decision in our conclusion on paragraph 1(1) of Schedule 36 (paragraphs 113 to 129 below). But there is nothing in our judgment in or arising from the evidence about the packed-up possessions to give reason to suspect that the appellant may have stayed in the Walsall property during the tax year in question. Nor did mere availability of the property give reason to suspect that the appellant had not sufficiently broken the tie with the UK that the Walsall property might be said to represent; even on HMRC's case, the property was not readily usable. Finally, there was nothing in the mere availability of the property in its unready state to give reason to suspect that ties to the UK other than that property had not been sufficiently broken (indeed, Mr Birkett did not suggest otherwise).

Ownership of Walsall property - Council tax exemption

52. As to HMRC's point that the appellant may have stayed in the Walsall property, we said above that there are two reasons why the availability of the property does not help HMRC. The first reason is at paragraphs 48 to 51 above. The second reason is that Mr Birkett did not dispute that the appellant was granted a council tax exemption from 25 March 2008 for the Walsall property on the ground that the Walsall property was unfurnished. Mr Gordon told us that the reason that the exemption ran from 25 March rather than from 22 March (the day on which the appellant said he had moved out) was that the appellant's letter to the council (D54) seeking the exemption said that the appellant had arranged for the furniture to be removed from the property "2 or 3 days after" 22 March 2008. Mr Birkett did not appear to dispute that that was the reason that the exemption commenced three days after 22 March. Nor did he say that there was evidence to suggest that the exemption may have been wrongly granted.

53. Mr Birkett told us that he did not know whether he had reason to suspect that the appellant had, or even may have, stayed at the Walsall property during the appellant's UK visit of 3 to 6 April. In view of that, and of paragraphs 45 to 52 above, we find that HMRC have not shown that availability of the Walsall property from 22 March until June 2008 gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

54. Mr Birkett did not address us on whether there was any reason to suspect that the appellant had, or may have, stayed at any other of the appellant's "UK based properties".

(3) Appellant was physically present in the UK at midnight on 5 April 2008

55. The third factor which Mr Birkett said was significant was that the appellant was physically present in the UK at midnight on 5 April 2008 (during the visit of 3 to 6

April). In other words, the appellant was (which the appellant accepted) in the UK at the start of the tax year in question.

56. The agent's letter dated 18 January 2012 explained that this visit was for one meeting with the appellant's solicitors, due to take place on Friday 4 April. The letter also explained that there was no flight available for the return journey on the Saturday; instead the appellant was booked, said the letter, on the 7 am flight out of the UK on Sunday 6 April (as it happened, the meeting was brought forward to the Thursday according to the letter). Mr Birkett did not dispute that the appellant had left the UK again on the 7 am flight on Sunday 6 April.

57. Two points prevented HMRC from showing that this factor gave "reason to suspect" within the meaning of paragraph 21(6)(a) in our judgment. First, Mr Birkett accepted that the appellant's visit to the UK of 3 to 6 April was a business visit. Second, Mr Birkett accepted too that, as Mr Gordon submitted, being physically present in the UK at midnight on 5 April 2008 did not of itself undermine the appellant's claim to have become non-resident by then.

58. In our judgment, therefore, Mr Birkett's third factor did not help him to show that condition B was met.

(4) 22 visits to the UK during the tax year

59. The fourth factor which Mr Birkett said was significant was that the appellant had made an admitted 22 visits to the UK during the tax year in question. Mr Birkett confirmed that HMRC accepted that the visits listed at pages D3 to D6 were the only visits the appellant made to the UK during the tax year in question. There was some suggestion in the papers that the number of admitted visits was in fact 26, not 22. But that point was not in issue and we do not need to decide it. What was important was what Mr Birkett accepted, which we consider undermines his reliance on this fourth factor. He accepted—

(1) that although the visits accounted for 68 days' presence in the UK, the appellant spent only 42 midnights in the UK in the course of those visits;

(2) that four of the visits comprised purely four connections in the UK between connecting flights in the course of two holidays;

(3) that the remaining visits (whether that amounted to 18 or 22) were for business; and

(4) that repeated business visits did not of themselves necessarily amount to residence.

60. Mr Birkett submitted nevertheless that repeated business visits suggested that the appellant had not broken all ties with the UK. Mr Gordon replied, in reliance on the *Gaines-Cooper* case, that the appellant did not have to have broken all ties with the UK in order to have ceased to be UK-resident for tax purposes. Mr Birkett did not dispute that.

61. In light of what Mr Birkett accepted in relation to the admitted visits, those visits did not in our judgment give HMRC reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

62. In our judgment, therefore, Mr Birkett's fourth factor did not help him to show that condition B was met.

63. We do however find that the admitted visits gave HMRC cause to want to check the appellant's tax position. This finding is relevant to the tribunal's conclusion later in this decision as to paragraph 1(1) of Schedule 36.

(5) "Appellant's principal source of income was in the UK"

64. The fifth factor which Mr Birkett said was significant was that the appellant's principal source of income for the tax year in question was in the UK. Mr Birkett based this assertion, he said, on the fact that the dividend from the appellant's UK company was by far the biggest part of the income on the appellant's tax return.

65. Mr Birkett submitted that this suggested that the appellant was financially reliant on the UK. That in turn suggested, said Mr Birkett, a tie that had not been broken with the UK.

66. Mr Gordon submitted that it was not necessarily the case that the appellant's principal source of income was in the UK. He pointed out that there could be substantial offshore income that would not be shown on the tax return. Mr Birkett did not dispute that. Mr Gordon submitted therefore that Mr Birkett's assertion that the appellant's principal source of income for the tax year in question was in the UK was a mere assumption and not a fact or evidence. Mr Birkett did not dispute that either.

67. In our judgment, therefore, Mr Birkett's fifth factor did not help him to show that condition B was met.

(6) Appellant's departure from the UK was "so close" to end of preceding tax year

68. The sixth factor which Mr Birkett said was significant was that the appellant's date of departure from the UK was so close to the end of the preceding tax year.

69. Mr Birkett did not however explain why this gave him reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

70. It was of course open to the appellant to choose to be non-resident in the UK for the tax year in question. It would not be surprising that, if he did make that choice, he would depart shortly before the beginning of the tax year in question. In our judgment, that does not without more give reason to suspect that the appellant was, or may have been, only "pretending", as Mr Gordon put it, to have ceased to be resident by the start of the tax year.

71. In our judgment, therefore, Mr Birkett's sixth factor did not help him to show that condition B was met.

(7) No dividend drawn in the preceding two years

72. The seventh factor which Mr Birkett said was significant was that the appellant had drawn no dividends from his company in the preceding two years.

73. Mr Birkett did not however explain why this gave him reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

74. Mr Gordon explained that no dividend had been taken in previous years because the appellant took his income by way of salary in those years. That did not appear to be disputed by Mr Birkett. It was not in any event clear that it was relevant.

75. In our judgment, therefore, Mr Birkett's seventh factor did not help him to show that condition B was met.

(8) Gibraltar "a known low-tax place"

76. The eighth factor which Mr Birkett said was significant was that "Gibraltar is a known low-tax place presenting a risk because people like to say they live in Gibraltar so as to pay less tax".

77. Mr Birkett did not however explain why, if at all, this gave him reason to suspect that the appellant may be only pretending to have ceased to be UK-resident. Nor did Mr Birkett explain why, if at all, it gave him reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

78. In our judgment, therefore, Mr Birkett's eighth factor did not help him to show that condition B was met.

(9) Amount of dividend

79. The ninth factor which Mr Birkett said was significant was that the appellant drew a dividend from his UK company in the tax year in question of some £808,000. Mr Birkett said that that had triggered HMRC's belief that the appellant would have a reason to be treated as not resident in the UK.

80. Mr Gordon accepted that, "if a dividend is paid of that magnitude, and the taxpayer is not resident, then the tax bill will be lower. That quite understandably gives the Revenue reason to be interested. But that is not the same as having a reason to suspect". We agree. In addition, a person may choose to be non-resident in the knowledge that that will assist his tax position. But we do not accept that that choice, of itself, gives reason to suspect that the appellant may be only pretending to be non-resident, as Mr Gordon put it. Nor do we accept that that choice, of itself, gives

reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

81. In our judgment, therefore, Mr Birkett's ninth factor did not help him to show that condition B was met.

(10) Appellant stayed in Malaga rather than Gibraltar between 22 March and 3 April 2008 accompanied by partner's daughter on what was for her a "study holiday"

82. It was not clear that this tenth factor was still relied on by HMRC. Mr Birkett did not develop it before us. The significance, from HMRC's point of view, of the stay in Malaga seemed to be that the appellant did not go direct to Gibraltar prior to the start of the tax year. However, that was explained in the appellant's agent's letter of 18 January 2012. Mr Birkett did not address us on whether and how the Malaga stay was nevertheless significant. We did not discern for ourselves anything in this tenth factor which gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

HMRC's closing submission as to condition B

83. In light of the nine factors on which he expressly relied, Mr Birkett submitted that "we have been presented with an argument that the appellant had become not resident. But the picture that has emerged does not give that clarity. The bank statements may help; I cannot say that they will help".

84. Mr Birkett did not submit that any one of the nine factors on which he expressly relied gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant. But nor did Mr Birkett submit that, taken together, those factors gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

85. Rather, Mr Birkett submitted that "the factors were part of the reason to suspect. But the bank statements may give us other factors which add to the overall picture. And that could be for or against. And the inspector will, once in possession of that, make that informed decision; that is, whether there are sufficient factors present to say that there was a loss of tax".

86. This meant, Mr Birkett submitted, that without the bank, building society and credit card statements, HMRC were not in a position to dispute any of the detailed explanations of the appellant's case set out in the agent's letter of 18 January 2012. That letter set out details such as the appellant having disposed of his car, where he stayed and why he first went to Spain. Mr Birkett said that HMRC had not been able to dispute any of the assertions in that letter, but that "the bank statements may assist".

87. In fairness to HMRC, we note that HMRC do not have to be in a position definitely to dispute any of the appellant's assertions as to residence, including those in the agent's letter of 18 January 2012. The test in paragraph 21(6)(a) for condition B to be met is not that there be reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period was not assessed. It suffices to meet condition B if, as regards the appellant, there is reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed. So, having reason to suspect (as opposed to merely suspecting without reason) that the appellant's assertions may not be true would suffice.

88. But Mr Birkett did not assert that either. We had given him the opportunity to explain away, in effect, his initial position, which was that he needed the statements sought in order for condition B to be met. His closing position (paragraphs 83 to 86 above) brought him however full circle; he needed the statements, he said, because they "may" give him reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed.

Conclusion as to condition B

89. On HMRC's case as summed up by Mr Birkett, condition B was in our judgment clearly not met. He was in agreement that none of the information held by HMRC, either singly or taken together, gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant. Mr Birkett's case was that he sought additional information on the basis that the additional information may, when added to the information already held by HMRC, give the "reason to suspect" required by paragraph 21(6)(a).

90. But it is clear, in our judgment, that in order for condition B to be met, there has to be reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant. That is the plain and ordinary meaning of paragraph 21(6)(a), and we see no reason to go behind that. Seeking information or documents in order to try to meet condition B is simply the wrong way round in our judgment.

91. We did however attempt to discern for ourselves whether the factors on which Mr Birkett relied gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

92. We found that they did not, for the following reasons.

93. First, at their highest, all that the nine factors showed, even on HMRC's own case, was that there remained some ties with the UK; in particular, a major daughter, a tenanted property and income from a UK company. But Mr Birkett did not dispute Mr Gordon's contention that the appellant did not have to have broken all ties with the UK in order to have ceased to be UK-resident for tax purposes.

94. Second, Mr Birkett did not point us to anything at all that he could say might give reason to suspect that any part of the appellant's case as to residence may not be true. Mr Birkett fairly and commendably accepted certain points, and did not dispute others, as set out above under each of the factors he mentioned. His position on those points undermined in our judgment Mr Birkett's ability to rely on the nine factors as giving reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant.

95. We accept that some if not all of the nine factors on which HMRC relied may have given HMRC cause to be interested in whether the appellant's case as to residence was true. After all, there was a lot of tax at stake. But the notice under appeal was not, as Mr Gordon pointed out, given in the course of an enquiry. HMRC had lost that opportunity. They could not therefore rely on the more generous terms of condition A as compared with those of condition B. Being interested does not suffice to meet condition B in our judgment.

96. In our judgment, therefore, HMRC did not discharge the burden on them to show that condition B was met. That suffices to mean that the appeal must succeed, regardless of our conclusion on paragraph 1(1), to which we now turn.

Paragraph 1(1) of Schedule 36 – were the statements sought reasonably required for the purpose of checking the appellant's tax position?

97. We said above that we are reversing our initial conclusion as to paragraph 1(1) of Schedule 36.

98. Paragraph 1(1) provides—

> "1.—(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.".

99. Our conclusion is that paragraph 1(1) of Schedule 36 was indeed satisfied. That is, the statements sought, or at least those statements so far as they showed expenditure in the tax year in question, were reasonably required by HMRC for the purpose of checking the appellant's tax position.

100. Our reasons for concluding that paragraph 1(1) was satisfied are set out at paragraphs 113 to 129 below.

101. We supplied this decision in draft to the parties. On advice from their counsel, the appellant's agents asked, in response to that draft—

> "It is unclear what has caused the Tribunal's change of heart concerning paragraph 1(1). The Appellant is aware of no communications from HMRC making additional submissions and would wish to assume that none was made which has not been copied to him. The Tribunal is respectfully asked to clarify the position.".

We confirm that we received no post-hearing correspondence of any kind from HMRC except their submission in response to the appellant's costs application (which of course we did not take into account in writing this decision). We would not take into account a submission unless we were sure that the appellant had had the opportunity to respond to it. The only reason for our change of mind concerning paragraph 1(1) is that our deliberations in drafting the full decision led us unanimously to conclude that we were initially wrong on paragraph 1(1). We considered it just and proper to correct that error in the full decision, having first given the parties the opportunity to comment, as we have done.

HMRC's submissions as to paragraph 1(1) of Schedule 36

102. Mr Birkett submitted that the statements sought were reasonably required because, when someone is moving abroad, they can make new banking arrangements, although they would not have to. He said however that he would not expect to see on the statements payments for mobile 'phone bills, utility bills, supermarket bills and social expenditure in the UK. He said that the statements could also show the interaction between the appellant and the UK company from which the appellant drew a dividend or between the appellant and an employer. The implication from Mr Birkett's submission was that the presence of such items on the statements sought could suggest that the appellant's ties with the UK had not been sufficiently broken to cease residence.

103. Equally however, Mr Birkett pointed out that the statements sought may actually reflect expenditure consistent with that of a visitor, that is, of a person who is not UK-resident. In other words, said Mr Birkett, the statements may actually support the appellant's case as to residence. Mr Birkett gave hotel bills as an example of expenditure which may be shown on the statements sought and which could support the appellant's case as to residence. Mr Birkett emphasised that the request for the statements was "neutral". He said it was consistent with residency enquiries and that it was reasonable in order to check all the facts. He cited the *Gaines-Cooper* case in support of the proposition that enquiries as to residence are multi-layered. He cited *Hankinson v HMRC* [2009] UKFTT 384 (TC) and *Barrett v HMRC* Spc00639 (27 September 2007) in support of the proposition that bank statements are important as part of the evidence-gathering process.

104. In response to Mr Gordon's reliance on the HMRC Charter and manuals (paragraphs 108 to 112 below), Mr Birkett submitted that "the manuals apply to a majority of enquiries, but residency is unique".

Submissions for the appellant as to paragraph 1(1) of Schedule 36

Lifestyle indicators

105. Mr Gordon submitted that all the "lifestyle indicators" suggested by Mr Birkett as being potentially evidenced by the statements sought were already accepted by the appellant.

106. Mr Gordon explained this as follows. If, he said, the appellant owns a property in the UK, there are very likely to be transactions through the UK bank account which relate to that property. In particular, said Mr Gordon, the appellant did not dispute that the appellant paid for utilities for the Walsall property in the tax year in question, since it was not rented out until June 2008, which Mr Birkett had accepted. So the statements sought would, said Mr Gordon, show utility bill payments for the Walsall property. But, he said, that would do no more than confirm what the appellant had already told HMRC.

107. Similarly, Mr Gordon submitted, if the appellant knows he is going to have ongoing visits to the UK, the appellant might well maintain a UK sim card. But, submitted Mr Gordon, the tribunal's main concern is not which mobile 'phone operator the appellant used; the tribunal's main concern is, he said, residence. He submitted that "social activity has already been highlighted as negligible", and that the appellant had passed through the UK en route to other parts of the world.

HMRC guidance

108. Mr Gordon took us to an extract from the HMRC Charter. He had cited it as follows in his skeleton argument—

> "Furthermore, it is respectfully suggested that the HMRC Charter can be invoked when determining what is and what is not reasonable. That provides, so far as is relevant:
>
> **3 Treat you as honest**
>
> We know that the great majority of people want to get things right. Unless we have a good reason not to,
>
> we will:
>
> - presume you are telling us the truth
> - accept that you will pay what you owe and only claim what you are entitled to
> - explain why we need to ask you questions and why we have decided to check your records
> - only question what you tell us if we have good reason to."

109. Mr Gordon said that no reason had yet been suggested by HMRC to rebut the presumption of honesty, and that there was no suggestion by HMRC that any facts asserted by the appellant were suspected to be incorrect.

110. Mr Gordon also relied orally on the following HMRC manuals, which he had supplied to us on the morning of the hearing—

- "CH207320 – How to do a compliance check: establishing the facts: asking for information: private bank accounts"

- "EM1561 – Opening the Enquiry: Information Request: Full Enquiry – Business Taxpayer"

- "EM1570 – Opening the Enquiry: Information Request: Full Enquiry – Non Business Taxpayer".

111. Mr Gordon cited from manual CH207320 that—

> "non-business bank accounts should not be requested as a matter of course".

He also cited the following from manuals EM1561 and EM1570—

> "In checking entries for business income you may consider that sight of the non business bank, building society or credit card details is required. You can ask for private records at the start of your enquiry if means have been identified as a risk or you have already established, for example through telephone contact with the agent, that the accounts are not based on a complete and effective record keeping system. See CH207320+ for further guidance on requesting private accounts." (EM1561)

> "As with a return for a business taxpayer, you should only ask to see private bank statements at this stage if you can demonstrate their relevance to the return and that you reasonably require them for the purpose of checking its accuracy." (EM1570).

112. Mr Gordon submitted, in light of those extracts from the manuals, that requesting the statements sought from the outset was "completely opposed" to the HMRC manuals.

<u>Conclusion as to paragraph 1(1) of Schedule 36</u>

113. Our reasons for concluding that paragraph 1(1) was satisfied are as follows.

Utility bill payments for the Walsall property

114. We accept that one of the "lifestyle indicators" that Mr Birkett mentioned might be shown on the statements sought. That is, the utility bill payments for the Walsall property. We accept Mr Gordon's submission that the inclusion of such payments on the statements sought would not necessarily take HMRC's investigations further. Our reasons for this finding are as follows; they are not quite the same as the reasons suggested by Mr Gordon.

115. We accept Mr Gordon's submission that the statements sought will show utility bill payments for the Walsall property for the period when the appellant said it was empty (22 March 2008 until when it was rented out in June). However, if the property was indeed occupied at any time in that period, contrary to what the appellant told HMRC, then we find that the payments on the statements sought may

well be higher than if no-one had stayed in the property in that period. So if the utility payments were indeed higher for that period than if the property were empty, that would be a clue, in our judgment, that the appellant, or someone at least, had stayed in the property during that period. To that extent, therefore, we do not accept Mr Gordon's submission that utility payments shown on the statements sought would be explained away by the appellant's ownership of an empty property.

116. However, we find that the statements sought would be unlikely of themselves to show that the utility bill payments were higher than they would have been had the property been empty. For that, a comparison would need to be made between utility usage at the property when it was occupied and utility usage at the property throughout the period from 22 March 2008 when the property was said to be unoccupied. The statements sought are unlikely to suffice for such a comparison. The utility bills would be needed for that, in our judgment.

117. We said above that our reasons in relation to utility bills are not quite the same as those suggested by Mr Gordon. That is because we do not agree with Mr Gordon (paragraph 106 above) that the utility payments on the statements sought would necessarily be explained by the appellant's ownership of an empty property. Nevertheless, for the reasons at paragraphs 114 to 116 above, we judge that the statements sought would not of themselves indicate that the appellant had stayed at the property at a time when he professed not to have stayed there.

118. The fact that the statements sought would show utility bill payments for the Walsall property does not therefore, in our judgment, render the statements sought reasonably required for the purpose of checking the appellant's tax position.

Other expenditure that might be shown on the statements sought

119. However, other expenditure might be shown on the statements that would, contrary to Mr Gordon's submission, take HMRC's investigations further in our judgment. That possibility does in our judgment render the statements sought reasonably required for the purpose of checking the appellant's tax position.

120. In particular, we find that there might be expenditure, including utility bill payments, for a property other than the Walsall property. We find that there might, as Mr Birkett submitted, be supermarket expenditure. We find that there might be expenditure indicating social activity beyond that to be expected of a non-resident. We say this because, although Mr Gordon said that social activity had been "highlighted as negligible", we do not find that that was what HMRC accepted; it was merely what was submitted for the appellant. Examples of other expenditure that might be shown on the statements sought are membership or other subscriptions, or payments relating to socialising or hobbies. These are, though, merely examples of the kind of social expenditure that might be shown on the statements sought. There might also, we find, be payments suggesting employment in the UK. Evidence of any of this other expenditure may, in our judgment, show something about the appellant's movements and activities, and ties with the UK, that contradicts his case on residence.

121. We find that HMRC's position left open the possibility that evidence of such other expenditure might further their investigations. We so find because, although Mr Birkett fairly and commendably accepted a number of points, he crucially did not accept two in particular—

(1) Mr Birkett did not accept that the appellant had not stayed in the Walsall property during the visit of 3 to 6 April 2008. It was open to Mr Birkett in our judgment to take that position despite his acceptance that the possessions in that property were packed up. He had maintained that the Walsall property was available to the appellant during that visit, and indeed for the whole of the period from 22 March 2008 until the time it was rented out in June 2008. It was not suggested that the possessions could not be unpacked, or partially unpacked, to support a three-day stay at the property; we find that they could be unpacked, or partially unpacked, to support such a stay. We find that, alternatively, the possessions may not need to be unpacked for such a short stay;

(2) The second point that Mr Birkett did not accept was that the appellant was not employed in the UK in the tax year in question. Mr Birkett did not say whether or not he accepted that the appellant was not employed in the UK. However, his assertion that the appellant had continuing business in the UK, a financial reliance on that business, and made repeated visits to the UK which were described as "business in the UK" was a strong indication that he did not accept that the appellant was not employed in the UK.

122. That is not to say that Mr Birkett disputed those two points; he accepted that, without further information, he was not in a position to dispute them (which acceptance contributed to his inability to show that condition B was met). But the fact that he did not accept those points meant that he had not bound HMRC to a position on those points regardless of what evidence might come to light. That in turn left open in our judgment the possibility that the statements sought would give evidence that would further HMRC's investigations as to residence.

123. Equally however, we agree that the statements sought might actually confirm the appellant's case as to residence. That possibility does not prevent the statements sought from being reasonably required for the purpose of checking the appellant's tax position. The purpose of "checking" the appellant's tax position is not to contradict his case as to residence, but merely to check it, as Mr Birkett rightly and fairly pointed out. That check might, as Mr Birkett said, result in confirmation or contradiction of the appellant's case.

124. We do not therefore accept Mr Gordon's submission that HMRC's failure to point to any reason to doubt the information provided meant that paragraph 1(1) was not satisfied. That failure did mean that condition B was not met. But paragraph 1(1) does not need HMRC to show that there is any reason to doubt the information provided. It suffices if the statements sought are reasonably required for the purpose of checking the appellant's tax position, if only to verify the information provided, as Mr Birkett rightly submitted.

125. Nor do we find that the extract on which Mr Gordon relied from the HMRC Charter assists the appellant on paragraph 1(1). Mr Gordon relied on that extract not to argue that the appellant had a legitimate expectation (which would be unlikely to succeed in this forum) but to argue that the extract effectively added a gloss to the phrase "reasonably required" (paragraph 108 above). We disagree. Whether the statements sought are reasonably required for the purpose of checking the appellant's tax position is an objective test and was, for the reasons set out above, satisfied.

126. The HMRC manuals which Mr Gordon cited do not in our judgment assist the appellant either.

127. As it happens, one of the passages which Mr Gordon cited from the manuals could equally well have been cited in support of HMRC's case—

> "As with a return for a business taxpayer, you should only ask to see private bank statements at this stage if you can demonstrate their relevance to the return and that you reasonably require them for the purpose of checking its accuracy.".

This extract could have been viewed as helpful to HMRC's position, if the manuals were relevant at all, given HMRC's position that the statements sought were reasonably required for the purpose of checking the accuracy of the return.

128. But the manuals do not assist the appellant in any event. Mr Gordon did not suggest that the appellant had formed a legitimate expectation in reliance on the manuals (and if Mr Gordon had made such a suggestion, we would have needed persuading that such an argument could be advanced in this forum). What ultimately governs the case is whether the statements sought are reasonably required for the purpose of checking the appellant's tax position. The manuals do not alter the fact that that is an objective test. And we find that that test was satisfied.

129. For these reasons, the tribunal's conclusion is that the statements sought, or at least those statements so far as they showed expenditure in the tax year in question, were reasonably required by HMRC for the purpose of checking the appellant's tax position.

130. Paragraph 1(1) of Schedule 36 was therefore satisfied. But that does not alter the outcome of this appeal.

131. The appeal is allowed. The notice is set aside under paragraph 32(3)(c) of Schedule 36.

132. In commenting on the draft of this decision, the appellant's agents said—

> "It is Counsel's recollection that the question of paragraph 1(1) was not fully argued at the Hearing on 12 September 2012".

We were not aware that that was counsel's view. It is understandable if counsel considers that he did not make submissions regarding paragraph 1(1) as forcefully as he might have done, given his oral submission that HMRC's position effectively

"killed the case". But counsel did in fact make oral submissions reflecting the points at paragraphs 34 and 36 of his skeleton, to the effect that HMRC have no reason to suspect that the information given by the appellant was not true. Counsel also made oral submissions regarding the HMRC Charter and about HMRC guidance. We have considered fully those points, as well as counsel's other points regarding paragraph 1(1), as set out above.

Costs

133. The appellant applied for costs. We will consider costs once the parties have had the opportunity to make further submissions on costs in light of this full decision.

134. We direct that the parties may make further submissions on costs within 21 days of the day on which this decision is released. If either party needs longer, that party should, before the expiry of the 21 days, ask the tribunal for extra time.

135. Paragraphs 1 to 131 above contain full findings of fact and reasons for the decision contained in them. Pursuant to paragraph 32(5) of Schedule 36, that decision is final.

RACHEL PEREZ
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2013