



TC07068

INHERITANCE TAX - PROCEDURE - Costs - Application to opt-into the complex track regime out of time - Application allowed - Disclosure - Application by Appellant for HMRC to disclose certain documents underlying its determination - Application dismissed

Appeal number: TC/2017/08145

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THELMA KERSNER

Appellant

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

**Sitting in public at Tribunals Service, Alexandra House, 14-22 The Parsonage,
Manchester M2 3JA on 28 February 2019**

Mr Brian White, a tax agent, of Brian White Ltd for the Appellant

Mr David Miller, an Officer of HMRC, for the Respondents

DECISION

1. This is a complex track appeal. The Tribunal released case management directions on 12 July 2018.
2. By way of an Application Notice, issued on or about 23 January 2019, the Appellant's representatives make the following applications:
 - (1) An application to opt-out of the complex track costs regime;
 - (2) An application in relation to disclosure;
 - (3) An application in relation to the inclusion of certain documents in the bundle;
 - (4) An application in relation to the correct nomenclature of a document arising from a meeting which took place on 13 April 2018, and which appears at Page 90 of the hearing bundle.
3. In order to reflect upon the submissions and materials which were put forward, I decided to reserve my case-management decisions.

Issue 1 - Costs

4. The appeal was made by way of a Notice of Appeal dated 8 November 2017. The case was allocated to the complex track, meaning that 'costs shifting' in principle arises. A letter notifying this to the Appellant was written by the Tribunal on 18 November 2017. On 5 July 2018, the Appellant's representative sought to opt out of the costs regime. That was notified to HMRC on 2 August 2018, and HMRC responded on 13 August 2018, indicating that it was opposed to that application. That opposition was maintained before me at the hearing.
5. Rule 10(1)(c) provides that the Tribunal may only make an order in respect of costs (i) if the proceedings have been allocated as a Complex case and (ii) the taxpayer has not (within 28 days of receiving notice that the case has been allocated as a Complex case) sent or delivered a written request to the Tribunal for the proceedings to be excluded from potential liability. Therefore, once a case is allocated to the Complex track (which is done by the Tribunal of its own initiative) then it is a case within the costs-shifting regime of Rule 10(1) unless the taxpayer sends a request that it should not be.
6. If such a request is made, timeously, then there appears to be no discretion either for the Tribunal to refuse the request, or for HMRC to object.
7. Here, it is common ground that no such request was made until 5 July 2018.
8. However, there is significant uncertainty in relation to the true course of events in this regard before then. Some of this uncertainty emerged at the hearing. Some has emerged since then, in the circumstances set out below.

9. In effect, what is being applied for is an extension of time to 5 July 2018, pursuant to Rule 5(3), which empowers the Tribunal to extend time for compliance with any rule.

10. In my view, this calls for an application of a structured discretion. Consistently with the guidance of the Upper Tribunal in *Martland v HMRC* [2018] UKUT 0178 (TCC) I regard the right approach to be (i) the length of the delay, and whether it is serious or significant; (ii) the reason(s) for any delay so identified, and whether the reason(s) is/are good ones; and (iii) the circumstances of the case.

11. If the letter of 18 November 2018 was operative - that is to say, if it started the clock running - time would have expired on or about 16 December 2018. On the face of it, that would give rise to a delay of about 5 and a half months.

12. However, this would be to ignore important aspects of the underlying reality. The Tribunal's file indicates that on 13 December 2017 (that is to say, on any view before the 28 days had elapsed) HMRC made a request, with the consent of the Appellant's representatives, to extend the time for its Statement of Case (otherwise due by 16 January 2018) to 11 May 2018. Good reasons were given for that request, which was approved by the Tribunal on 25 January 2018.

13. It seems to me that this equated to a standstill. During this period, an ADR meeting took place on 30 April 2018.

14. The net effect of this is that the true delay (even on a set of facts least favourable to the Appellant) was from mid May to early July - a period of weeks and not months. In the context of this case, and giving particular weight to the standstill (which was by consent, and endorsed by the Tribunal) a delay of this length does not strike me as either serious or significant.

15. But, even if I were wrong about that, and this delay were a serious or significant one, there is nonetheless another good reason to extend time.

16. The Tribunal's letter of 18 November 2017, notifying the Appellant that this appeal had been allocated to the Complex track, was apparently sent, only by post, and only to Mrs Kersner in Israel. It was not sent - whether by post, or by email - to her representative, Mr White in Manchester.

17. Alongside this, there is a second letter of the same date from the Tribunal (again, sent only by post, and sent only to Mrs Kersner) that the Tribunal would not communicate with her representatives (despite the fact that they had given their address and email address in the Notice of Appeal) unless Mrs Kersner gave written notice by way of completing an Authorisation of Representative form (Form T239).

18. No completed Form T239 was received by the Tribunal until mid January 2018 - it seems in response to an email from the Tribunal to Mr White on 9 January 2018. However, and judging from the print-out of the Notice of Appeal which I have seen, representative approval had already been given, electronically, on 8 November 2017.

19. There was a suggestion by Mr White that neither of the letters of 18 November 2017, sent through the post, reached his client.

20. In my view, there is a genuine likelihood that some error has crept in here, which does not seem to have been the fault of the Appellant or her representatives. It is not readily apparent to me why the Tribunal did not communicate directly with Mr White (whether by email, or by post) since 'Representative Approval' was attached to the Notice of Appeal on 8 November 2017, but instead sent letters to Israel.

21. On close scrutiny, the address which the Tribunal used on its letters of 18 November 2017 is not the exact same address as that given for the Appellant on the Notice of Appeal. Nor is it in the same format. I do not know enough about the geography of Israel, or its postal conventions, to understand how letters to Israel should be correctly addressed, or indeed whether, in this instance, 'Renana' is the same place as 'Renana' (or indeed, whether either of these are the same as 'Ra'anana', which is the address given on some of the witness statements, or 'Ra'anana' which is given in HMRC's Statement of Case) and how the Israeli postal authorities treat mis-addressed mail (e.g., whether the postcode governs everything else, or whether it is subordinate to the address).

22. Moreover, the 28 days allowed to an Appellant by Rule 10 takes no account, on the face of it, in differences in postal delivery times of items sent by the Tribunal to other addresses in the United Kingdom, and to items sent abroad. As a matter of common sense, communicating by post to Israel is probably going to take more time than doing so to an address in the United Kingdom. This type of scenario is recognised by the Civil Procedure Rules which afford 22 days to a Defendant in Israel to acknowledge civil proceedings served by an English or Welsh Claimant (CPR 6 B PD 6.1) as opposed to the usual 14.

23. I am fortified in my conclusion that something went wrong with the post because, following the hearing, the Tribunal contacted me to inform me that the Notice of Hearing, sent to Mrs Kersner by post on 8 November 2018, had been received back at the Tribunal as undelivered in late March 2019.

24. The prejudice to the Appellant if her application is not allowed is that Rule 10(1) will continue to apply and she will be potentially liable to pay HMRC's costs of this appeal. Of course, if she remains in the Rule 10 regime, the converse is also true: if successful in her appeal, she would be able to apply for an order that HMRC pay her costs. But that is obviously not an option which she wants available to her.

25. The prejudice to HMRC - if I extend time and take the Appellant out of the costs-shifting regime - is equal and opposite.

26. I do not detect that the Applicant acted tactically, in the sense that she and her representatives deliberately chose not to opt out of the complex costs regime but had second thoughts down the line.

27. The Rule 10 opt-out is not a substantive step, at least not in the same sense (for example) that disclosure or witness statements are. When it comes to the efficient

management and progress of this appeal, nothing really turns on it (except, perhaps, that the matter has had to be dealt with at a hearing).

28. There is nothing in the papers before me to suggest that the parties have actually acted in reliance on the absence of an opt-out, in the sense that either party has taken decisions as to how this litigation is conducted, or have taken any steps, which can be said to have been informed or influenced by the costs regime and the Appellant's failure to opt-out.

29. The appeal has not yet been listed for a final hearing. The appeal will not be listed for hearing in the window originally contemplated. The parties have not yet provided dates for a hearing. On the footing that both parties propose to instruct Counsel for what is anticipated to be a 4 day hearing, that hearing may not be listed for some months yet.

30. In all the circumstances, and taking the above into account, I treat the Appellant's representatives' email of 5 July 2018 as an in-time notification for the purposes of Rule 10(1) and I direct that this appeal is not subject to the costs-shifting provisions of the Rules.

Issue 2 - Disclosure

31. The Appellant challenges the adequacy of HMRC's disclosure, which was made by list on 17 August 2018.

32. The thrust of this part of the Appellant's application is that *'the Appellant is still in the dark as to how HMRC came to their assessment conclusion based on the evidence, and therefore requests HMRC to disclose all documents ... which were generated by HMRC during the period 2014 (when the enquiry was opened) until the liability decision in 2018 which relate to HMRC's decision to assess.'*

33. It is submitted that *"this is critical to this case to establish how HMRC have used the factual matrix provided to ascertain that Mrs Kersner is no (longer) domiciled in the UK"*.

34. The decision under challenge was the decision in HMRC's letters of 8 June 2017 and 4 July 2017, upheld at departmental review on 27 October 2017. The decision was a determination under section 221 of the Inheritance Tax Act 1984 of £1.277m.

35. The Appellant's arguments, in summary, are these:

- (1) Rule 5(3)(d) permits the Tribunal to require a party to provide documents, information or submissions;
- (2) Rule 5(3)(d) is subject to the overriding objective in Rule 2, and the particular features set out in Rules 2(2)(a),(b),(c), and especially (e);
- (3) In complicated appeals involving large amounts of money and serious allegations, there should be a presumption that both parties will disclose

relevant material to each other: see, for example, the Tribunal's remarks in *Tower Bridge GP Limited v HMRC* [2016] UKFTT 54 (TC) (Judge Jonathan Richards), especially at Paras [1]-[6];

(4) The Tribunal should not adopt an unduly narrow approach to granting disclosure: see *HMRC v Ingenious Games LLP and others* [2014] UKUT 062 (TCC) per Sales J, especially at Paras [67]-[68];

(5) The disclosure sought is not onerous, is limited in scope and time.

36. HMRC's arguments, in summary, are as follows:

(1) The Tribunal's direction was to disclose documents '*which that party intends to rely on or produce in connection with the appeal*', and that is what HMRC has done;

(2) The Tribunal does have the power under Rule 5(3) to require either party to disclose documents other than those on which they rely;

(3) Relevance is a key feature;

(4) The appeal primarily concerns an issue of fact, namely whether the Appellant is domiciled in Israel, which will be considered on consideration of the evidence, and not on consideration of the underlying decision-making process. Documents going to the underlying decision-making process are not relevant.

37. I was invited to consider the Tribunal's decision in *Staysure.co.uk Ltd v HMRC* [2018] UKFTT 0584 (TCC) (Judge Jonathan Richards). That was a wide-ranging application for disclosure, the scope of which was roughly akin to that sought in this case. That hearing dealt with the question of whether HMRC should disclose '*any internal documents which relate to the evidence considered by HMRC to be relevant*' as well as internal emails reports or notes which related to the delay in raising an assessment: see Para [10].

38. Judge Richards considered the remarks of Sales J in *Ingenious Games* [2014] UKUT 0062 (TCC) and remarked as follows (at Para. [17]):

"It is clear from that decision that the Tribunal should consider any application for disclosure in the light of the overriding objective, of dealing with cases fairly and justly, set out in Rule 2 of the FTT's Rules. That was necessarily involve an assessment of whether considerations of fairness point in favour of disclosure and whether it is proportionate to direct disclosure, taking into account, among other matters the nature of the issues arising and the overall amount at stake. The relevance or otherwise of the material requested will be at the heart of the Tribunal's assessment but it does not follow that merely because material is relevant, the Tribunal will inevitably direct that it be disclosed."

39. There is nothing controversial in Judge Richards' remarks and I respectfully adopt them.

40. I have decided to dismiss the Appellant's application for disclosure, for the following reasons.

41. The nature of the Tribunal's jurisdiction: The Tribunal's jurisdiction in this appeal is fully appellate, as opposed to jurisdiction of a narrower, supervisory, character. In my view, the underlying decision-making process is simply not relevant because this appeal will not determine whether HMRC's decision to issue the determination was flawed in a public law sense. The reasonableness (I use that word in the conventional public law sense) of the decision is not justiciable in this Tribunal. If the Appellant genuinely considered that HMRC's decision was (for example) irrational and/or unreasonable (in both instances, in the public law sense) then the appropriate route of challenge was not by way of appeal to this Tribunal, but was elsewhere. A fortiori, materials which led to the decision are, in my view, not relevant.

42. The nature of the burden: In this appeal, the Appellant bears the burden of displacing the determination. In terms of factual matters, her Grounds of Appeal are that she was UK domiciled at the time of gift and that spousal exemption applies. In short, either the Appellant was (meaning that she can demonstrate, to the appropriate standard of proof, that she was) or she was not.

43. HMRC's factual position in its Statement of Case: HMRC's position is that the Appellant had acquired an Israeli domicile of choice by 1 June 2009, which had not been abandoned by 1 June 2012, when her husband, Mr Michael Kersner, made a gift of shares to her. HMRC has set out, in its Statement of Case (15 June 2018), its view of the 'relevant background facts'. Paragraph 20 avers that, 'as far as HMRC are aware, the Appellant has been resident in Israel and has not been resident in the UK for tax purposes' since 1983. HMRC does not put this forward as a bare assertion, but sets out certain facts and matters in support of this at Paragraphs 21-24 of its Statement of Case. Amongst other things, HMRC refers to possession of an Israeli passport and driving licence; residence of children and grandchildren in Israel; absence of business ties or business interests in the UK; occasional visits to the UK. In this regard, I do not agree with the criticism levied by Mr White at HMRC's Statement of Case (see Paragraph 4 of his Application). In my view, the Statement of Case does set out HMRC's factual case in this regard, in sufficient detail that Mrs Kersner and her representatives know the case that they have to meet.

44. The remainder of the Grounds of Appeal (and HMRC's Statement of Case) deal with legal matters, which will fall to be determined by the Tribunal as a matter of law, and which do not turn on the antecedent iterative processes of either party.

45. Relevance: The Tribunal did not order either party to disclose materials upon which they did not rely. Even if the scope of the disclosure obligation were widened to include documents which were adverse to a party's case (in a way similar to the standard disclosure obligation operative until recently in the civil courts under Part 31 of the Civil Procedure Rules) I still do not see how the documents sought would be relevant to the decision which the Tribunal has to reach.

46. The overriding objective: It is not fair, just, proportionate, or in accordance with the overriding objective to order the disclosure of documents which are not relevant.

47. The scope of the disclosure sought: Moreover, and even if I were mistaken as to the foregoing, I disagree that the disclosure sought is limited in time and scope. It self-evidently is not. It represents a years-long trawl through the Respondent's documents - from '2014' (presumably, 1 January 2014, although this is not stated) to '2018'.

48. As an additional factor, I do not understand how documents which post-date the decision can be said to be relevant; nor, put another way, how HMRC can be said to have relied on post-decision documents when arriving at its decision.

Issue 3 - Other documents

49. As I understand it, the dispute as to the inclusion of an identified list of documents has fallen away, on the basis that those documents are included at Tab 22 of the hearing bundle.

50. Insofar as there is dispute as to the document at page 82 of the bundle (a letter dated 18 August 2017 from Mrs Kersner to HMRC regarding an FOI request and certain disobliging comments about an HMRC officer) I do not see that anything evidential or substantive turns on it, and it can be placed before the Tribunal at the substantive hearing.

51. The document at page 88 (an email from HMRC to Mr White and others dated 16 April 2018) likewise can be placed before the Tribunal at the final hearing.

52. This is inconsequential and time-consuming wrangling. Neither document seems to me to be even remotely capable of being described as resolute or determinative of the dispute as to Mrs Kersner's domicile on 1 June 2009 and whether, if Israeli, this had been abandoned by 1 June 2012. I do seek to encourage the parties to engage (as the Rules require them) with the true issues in this dispute.

Issue 4 - nomenclature

53. At the outset of the hearing, I asked for the parties' views as to whether the Tribunal's time and resources were appropriately directed towards a dispute which seemed only to concern the heading of the document at page 90. The dispute seemed to me to be a sterile one where both parties were apparently agreed that the substance or body of the document was both admissible and should be admitted.

54. Having heard brief submissions, I am bound to confess I am not much the wiser as to the true nature of the dispute. Agreed Statements of Fact can be useful and there is certainly a place for them in an appropriate case. But the utility of the exercise is diminished, and capable of absorbing a disproportionate part of the parties' and the Tribunal's resources, if it descends to a satellite dispute as to the heading of the document.

55. The document arises from an ADR meeting which took place on 13 April 2018. It was apparently produced by a non-lawyer at HMRC, in good faith, and perhaps without an understanding of the finer nuances of the law of privilege, but both parties agree that it is open and can be relied upon in evidence.

56. The document is headed "Statement of facts agreed at a meeting". The Appellant's position is that the document should be headed "Statement of Evidence provided by Thelma Kersner and not challenged by HMRC at the ADR meeting".

57. I do not think that the heading matters.

58. If the catalyst for the dispute (as the Appellant's suggested title seems to indicate) is that HMRC 'did not challenge' those facts, with the inference that HMRC cannot now challenge those matters (i.e., the things said at the meeting are deemed to give rise to a form of res judicata) then that point would - with respect - not take the Appellant anywhere. An example was given: "Mrs Kersner says that she is a housewife". Even if Mrs Kersner did actually say that she "is a housewife", the note simply records that she said it. If that document falls for further consideration at the final hearing, the Tribunal dealing with the final hearing will doubtless afford it such weight as the Tribunal considers appropriate, in the context of the other evidence, including any oral evidence which can be tested in cross-examination.

59. This document contains full findings of fact and reasons for the decisions. 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.

**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 03 APRIL 2019