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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

No. CO/3462/2021

Royal Courts of Justice

Neutral Citation Number: [2022] EWHC 566 (Admin)

Thursday, 3 March 2022

Before:

THE HONOURABLE MR JUSTICE LINDEN

B E T W E E N:

JOHAN ANDERS LUNDBERG Claimant

- and -

(1) FIRST-TIER TRIBUNAL (TAX CHAMBER) Defendants

(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

- and -

AMERICAN EXPRESS SERVICES EUROPE LIMITED Interested Party

MR S. GRODZINSKI QC and MISS N. PATEL (instructed by William Grace Law) appeared on behalf of the Claimant.

MR D. EDWARDS (instructed by the Government Legal Department) appeared on behalf of the Defendants.

THE INTERESTED PARTY was not present and was not represented.

J U D G M E N T

MR JUSTICE LINDEN:

Introduction

1 This is a renewed application for permission to claim judicial review, permission having been refused on the papers by Thornton J on 18 November 2021.

2 The claimant's challenge is to decisions of HMRC to seek, and the Tax Chamber of the First-tier Tribunal to approve, a third-party information notice requiring American Express Services Europe Limited to provide certain information to the Swedish Tax Authority (which I will refer to as "the STA") about the financial affairs of the claimant. The Notice was approved and issued, pursuant to paras.2 and 3 of Schedule 36 to the Finance Act 2008, at a hearing of the FtT on 3 August 2021.

Factual Background

3 The claimant is a Swedish national who has various business interests in Sweden, but who says that he has not lived there since March 2000. Under Swedish law there are three bases on which a person may be treated as a tax resident in Sweden with unlimited tax liability, namely: (a) where they are actually living in Sweden as their domicile or residence, (b) where they have a habitual abode in Sweden or (c) where they have previously lived there and have considerable connections to Sweden.

4 On 1 April 2020, the STA made a request to HMRC for assistance under the International Mutual Assistance Regime ("the Request"). The Request stated:

> "due to the extensive economic activities that Mr Lundberg has through his Swedish companies, for which he has been to Sweden frequently from what we can see from our investigation, the [STA] considers that he could have

> unlimited tax liability in Sweden. It is also possible that Mr Lundberg resides and/or stays in Sweden to such an extent that this will be the reason for his unlimited tax liability in Sweden".

5 The Request thus identified both residence in, and substantial connection with, Sweden as potential bases for finding that the claimant should be treated as a tax resident in Sweden. It asked for information about various AMEX and other cards issued in the name of the claimant or any company related to him in the United Kingdom, together with related information for the period 1 January 2014 to 31 December 2017. I will call this "the disputed information". Essentially, this was with a view to ascertaining where purchases had been carried out and the nature of the purchases, as this was relevant to the claimant's whereabouts and the frequency of his stays in Sweden during the period in question. The Request annexed correspondence, including requests for information going back to the beginning of 2019.

6 On 25 June 2020, the STA then sent the claimant an Order which said that:

> "STA's investigation so far shows that through direct and indirect ownership of several limited companies in Sweden, you have such an influence that provides a significant connection. You can thus be assumed to be obliged to provide information […]"[1]

7 The Order then required the provision of information related to the financial affairs of a list of companies, the extent of the claimant's interests in those companies and his voting rights in relation to them for the period 2014 to 2019.

8 On 15 September 2020, the STA sent the claimant another Order which was to provide a tax return for tax year 2014. The Order stated, so far as material as follows:

> "Under 3 kap. 3 § 1 st. 3 p. the Tax Procedure Act (TPA) a natural person who has previously resided in Sweden shall be considered as liable to unlimited tax here if the person has significant connection with Sweden. 3 kap. 7 § TPA specifies what should be taken into account when determining if there is a significant connection. A factor that has been given great importance in practice in the assessment is financial commitment, directly or

> indirectly, which gives great influence in business activities in Sweden. The STA's enquiry shows that you directly and indirectly own a number of Swedish limited liability companies operating in Sweden and that in 2014 you are a board member of 23 Swedish limited liability companies that you either own or that are linked to the companies you own. The STA therefore considers that you have such influence in Swedish business activities that you have significant connection to Sweden and are therefore liable to unlimited tax in Sweden. You are thus liable to provide information in accordance with 30 kap. 1 § TPA. In accordance with 37 kap. 2 § TPA the STA may require a person who has not fulfilled his obligation to provide information to file an income tax return.
>
> By this order you are obliged to submit an income tax return."

9 On the face of it, then, the STA had decided that the claimant had unlimited liability as a Swedish tax resident, at least for the purposes of tax year 2014, and the basis for that view was the third of the potential grounds for such a finding referred to above (i.e. that he had considerable connections with Sweden). There was no positive indication that he might also be liable on other grounds. or that residence continued to be investigated as a potential ground. But nor was there any indication that that the STA's inquiries were at an end, that the residence criterion was no longer under consideration by the STA or that the disputed information referred to in the Request was no longer sought.

10 On the contrary, there was then further correspondence involving the STA, HMRC and the claimant in the course of which, on 23 September 2020, the claimant was given notice by HMRC of its intention to apply to the FtT for approval of a third-party notice requiring provision of the disputed information. HMRC said, so far as material:

> "The Swedish tax authorities are currently checking your Swedish Tax position. They believe that due to a number of Swedish connections you have maintained during the period under review that you may be regarded as Swedish tax resident, and therefore have unlimited liability to tax in Sweden on your worldwide income. The Swedish Tax Agency has asked you to provide detailed information concerning your tax affairs. However, they maintain that they have not received full co-operation from you. Hence their request to HMRC to obtain American Express information in respect of cards used by you.

> The Swedish tax authorities hope that the American Express information will throw further light on both your residency position and income/gains assessible, with the ultimate aim of ensuring that you are charged and pay the correct tax due in Sweden."

11 The STA subsequently indicated that it no longer sought the disputed information in respect of 2014 but was still seeking it for 2015 to 2017. The Order of 15 September 2020 was also formally withdrawn by the STA on 4 December 2020.

12 There was then correspondence between the various parties in which representatives of the claimant, Swedish lawyers Lindahl, put forward various arguments to challenge the Request for the disputed information on the basis that it was relevant only to the claimant's place of residence, whereas this was not an issue in the STA's investigation. However, the STA continued to assert that the information was required.

13 By way of example, on 29 December 2020, Lindahl wrote to HMRC asserting that the disputed information had never been requested before, that there could be no dispute about the fact that the claimant was resident outside Sweden and that the scope of the STA's enquiry was limited to his personal and economic connections with Sweden, to which the disputed information was not relevant. I note that they did not assert that the STA's inquiries into the claimant' tax position were at an end because a decision or decisions had been taken, in June and/or September 2020, that he had unlimited liability.

14 Lindahl's representations were passed by HMRC to the STA and, on 26 January 2021, the STA replied, disputing a number of Lindahl's claims. The STA stated (a) that AMEX information had been requested as far back as 19 June 2019 and (b) that the STA's inquiries did encompass the question whether the claimant is or has been resident in Sweden since 2014. The STA identified questions which it had put to the claimant in 2019 which went to this very issue and said:

> "The purpose of these questions is for the Swedish Tax Agency to gather information which enables the Swedish Tax Agency to determine whether Mr Lundberg has resided or stayed in Sweden to such an extent that he should be considered tax resident in Sweden, and on which basis."

15 On 18 March 2021, Lindahl wrote to HMRC disputing the STA's request for the disputed information and advancing a number of arguments as to why it was misconceived. In a passage on which the claimant relies, Lindahl said:

> "As mentioned earlier, in an enquiry from the STA dated 15 September 2020, the STA has stated that Mr. Lundberg is not unlimited tax liable in Sweden due to residency. The only remaining reason for a possible unlimited tax liability must be if Mr. Lundberg has an essential connection to Sweden based on his financial connections to Swedish companies, for which the transactions on his American Express accounts are irrelevant."

16 Pausing there, the STA had not, in fact, said that and, to be clear, Mr Grodzinski QC did not suggest that it had. The STA had not said anything about the residence criterion in its 15 September 2020 Order, but had relied on the substantial connection ground. That Order had also been withdrawn, as I have said. Again, the 18 March 2021 letter did not assert that the STA's inquiry was at an end as a result of decisions taken in June and/or September 2020.

17 On 28 April 2021 the STA replied to HMRC, correcting the passage above in the letter of 18 March 2021. In an important passage in this letter, the STA said this:

> "**Grounds for liability to tax in Sweden**
>
> Ms Romell Stenmark claims that the STA has formally informed Mr Lundberg that the STA does not consider him tax resident in Sweden based on residency, when requesting him to submit income tax return for the year 2014 on 15 September 2020.
>
> This is not correct. What the STA stated in the request dated 15 September 2020 is that the STA considers Mr Lundberg to have close ties to Sweden, which makes him tax resident in Sweden and thus obliged to submit a tax return."

18 The letter went on to summarise the three bases on which a person may be found liable to tax as a Swedish tax resident. It then said this:

> "This does not mean that the STA has excluded the other criteria for tax liability in Sweden, i.e. that Mr Lundberg could have resided/lived in Sweden or had extensive stays (habitual abode) in Sweden.
>
> The response dated 2019-05-10 stated that Mr Lundberg has lived in Sweden to such a limited extent that he cannot under any circumstance be considered a permanent resident in Sweden. We have thus received information that Mr Lundberg has lived in Sweden but not to what extent. In order to establish to which extent he has lived in Sweden and fully assess his liability to tax in Sweden, the STA once more requested Mr Lundberg to specify in which country he has stayed day by day, where he has stayed during his visits in Sweden and to submit statements for bank and credit cards (see 3. Above regarding unanswered questions)."

19 On 18 June 2021, Lindahl wrote to HMRC reiterating the claimant's arguments as to why the disputed information ought not to be required to be provided and arguing, amongst other things, that:

> "The STA´s statement dated 25 June 2020 leads to the conclusion that if it already considers Mr. Lundberg an unlimited tax liable person based on his ties to Sweden, the request to HMRC would be unnecessary in order to establish his tax liability. It also clearly proves that the STA is misleading HMRC regarding the actual purpose of the EoI request."

20 Mr Grodzinski confirmed that that allegation of misleading in this passage is not pursued in these proceedings. I also note that Lindahl did not rely on the order of 15 September as the basis for the argument that the disputed information was no longer needed as a decision that the claimant had unlimited tax liability had been taken.

21 The FtT hearing took place on 3 August 2021 before Judge Poole. A note of the hearing was prepared by HMRC and this states at paras.3 and 5 as follows:

> "3. Judge Poole refer to the Taxpayer's representations. Judge Poole highlighted that the Lawyers representing Mr Lundberg had stated the STA were no longer pursuing the question of the time Mr Lundberg spends in Sweden. This was stated in their letter to HMRC dated 18/06/2021 **(Exhibit 7)** where they stated that the STA have already deemed that he has 'Unlimited liability' in Sweden, in effect forfeiting the enquiry. Judge Poole advised that he could not see evidence of the STA's rebuttal….

> 5. The Judge therefore questioned, if the STA have already considered that Mr Lundberg has 'unlimited tax liability' in Sweden why do they still require the AMEX ACCOUNTS.?"

22 I note that Judge Poole was apparently interpreting Lindahl's letter of 18 June 2021 as asserting that there was no longer any live enquiry as to the amount of time which the claimant spent in Sweden, given that there had been a decision that the claimant had unlimited liability. He therefore wanted to understand why the information was still required.

23 This interpretation of the note of the hearing is confirmed by the witness statement of Mr Thomas Gardiner, who appeared for HMRC at the hearing. His statement is dated 2 November 2021 and at para.19 it says:

> "…Judge Poole referred to the latest representations from Lindahls on behalf of Lundberg and their statement that the STA had deemed that Lundberg had 'unlimited liability' and had in effect made their final decision, rendering the case at an end. I explained to Judge Poole that I had made a decision not to seek further comment from the STA as in my opinion, we had sufficient responses from the STA which was presented in the documents before him. Judge Poole agreed, but stated that he needed to know the STA response as to why they required the AMEX Statements if they had already decided that he had unlimited liability…."

24 Judge Poole therefore adjourned the hearing until 3.30 in the afternoon so that enquiries could be made. At 12.31pm, HMRC wrote an email to the STA which said this:

> "……If we cannot get confirmation as follows by 15:30 UK, we will have to reapply to the court.
>
> > 1.The Lawyers representing Mr Lundberg have stated that you are no longer pursuing the question of the time Mr Lundberg spends in Sweden. This was stated in their letter to HMRC dated 18 June 2021, which we have not provided to you as we believed we have sufficient from you. Their specific line is that you have already deemed that he has 'unlimited liability' to tax in Sweden.
> >
> > 2. The Judge has therefore asked that if you have already considered that he has 'unlimited tax liability' in Sweden, why do you require the AMEX accounts."

In my view, this accurately reports the Judge's concern that it was being said by Lindahl that there was no longer a live enquiry as to the time which the Claimant spent in Sweden.

25 The claimant complains that, rather than leave it at that, HMRC's email went on to say,

> "I have agreed with the Judge that if you provide me written email confirmation today (urgently) as follows, then we can obtain his authority to obtain the records.
>
> That the Swedish Competent Authority and Investigation team are still evaluating the evidence available to them to confirm whether Mr Lundberg is resident in Sweden. That you continue to build your case on the question of his personal residence and that the AMEX records would support your investigator (sic) reach a final decision on whether there are grounds to believe that Mr Lundberg, based on all the facts, is resident in Sweden.
>
> We need you to confirm that you are continuing to build this evidence and that the statements are required. If we cannot, we would have to withdraw from Court."

He says that this was a leading question, and this is one of his grounds of challenge.

26 The STA responded an hour later as follows:

> "Please inform the court that the statements are still required and of great importance to the case the Swedish Tax Agency is building.
>
> The Swedish Tax Agency is still evaluating the evidence available to us to confirm whether Mr Lundberg is tax resident in Sweden. We continue to build our case and the AMEX record would support our investigator to reach a final decision on whether there are grounds to believe that Mr Lundberg, based on all the facts, is resident in Sweden. The information we are requesting from AMEX is something that we may later rely upon in court, if an appeal against a future tax decision is lodged."

27 The position of the STA was, therefore, that there very much was a live enquiry as to whether the claimant was tax resident in Sweden, including, for the purposes of deciding whether he was actually resident in Sweden. The disputed information was required for the purposes of the investigation, which was being carried out, and for the case which they were

seeking to build. The information which they were seeking might later be relied on in court if an appeal against a future tax decision was lodged.

28 Mr Gardiner also spoke to Ms Lindberg at the STA, who was the author of the email. According to para 20 of Mr Gardner's witness statement, she confirmed:

> "verbally that the STA still required the AMEX statements to identify the location of spend on the accounts, which would support understanding of where Lundberg spends his time and thus allow them to make a formal decision as to whether he had a limited or unlimited liability to tax in Sweden."

Paragraph 10 of the note of the hearing also reads as follows,

> "Telecon made between CA [Competent Authority] and TG [Thomas Gardiner], to discuss case and clarification. The Swedish CA advised that they are still pursuing/evaluation the information. Furthermore, she advised that in such cases, a specific or decision of Yes or No is not made. There is neither a separate decision on what tax to pay either and is normally a joint decision. If disputed, then an appeal can be made."

29 There was also an attendance note of the call which was broadly consistent with this note.

30 The note of the hearing then records that, when the representatives of HMRC went back into the hearing at 3.30 p.m.:

> "14. Judge Poole advised that he has read the response email sent by TG from the Swedish Competent Authority and wanted confirmation that the comments made with regards to Exhibit 7 whereby the comments made by the TPs representative the STA stating that STA were no longer pursuing the question of the time Mr Lundberg spends in Sweden and Sweden have already deemed that he has 'Unlimited liability' in Sweden, in effect forfeiting the enquiry was rebutted. TG advised that they had done so.
>
> 15. Judge Poole said he was content to sign the notice and request the revised notice to be sent for authorisation."

31 Mr Gardiner reports at paras.21 and 22 of his witness statement:

> "21……I had shared the supporting email response…from Gunilla Lindberg with Judge Poole. Judge Poole said that the email did not actually answer the

> view of Lindahls that the case was at an end. I confirmed that I had explained that to Lindberg and my understanding was clear, that the STA may hold a view that Lundberg had unlimited liability, but they have not formally closed their investigation and nor had they issued a formal decision. Lindberg had confirmed that they still required the statements to formally reach a conclusion on the question of Lundberg's residency and if the information allows them to reach a decision, they would then at the same time issue their decision on his liability. Both decisions are made at the same time to assess his liability to tax in Sweden.
>
> 22. On the basis of that verbal explanation, the First Tier Tribunal approved HMRC's third-party information notice at the hearing…"

32 The key point was that the final decision had not been made, that the investigation by the STA was ongoing and that it included consideration of whether the claimant had been resident in Sweden. There was no issue as to the relevance of the disputed information to that question and, as I have said, it was needed to enable the STA to make a final decision on the tax residence of the claimant.

33 Mr Grodzinski submitted, in relation to para.21 of the witness statement of Mr Gardiner, that one should read it as saying that the Judge took the view that the question or concern which he had raised, and in respect of which he had adjourned the hearing so that an answer could be provided, was not in the event answered. He relies, in particular, on the statement that "Judge Poole said that the email did not actually answer the view of Lindahls that the case was at an end".

34 The effect of Mr Grodzinski's argument, he accepts, is that the Judge therefore approved the issuing of the Notice, despite the fact that the question, which the Judge regarded as important, if not pivotal, had not been answered. With respect to Mr Grodzinski, that is not a tenable reading of what happened on the basis of para.21, in the context of the evidence as a whole, including the documents to which I have referred to in this judgment. As I read para.21, the Judge was satisfied - having made the point which he made about whether the

email directly addressed Lindahl's point - with the answer that was provided by Mr Gardiner. That answer was to the effect that a final decision had not been made, that there was an ongoing investigation, that the investigation included consideration of the issue of residence and that the information was sought as being relevant to that issue.

35 Mr Grodzinski submits that the Judge should have insisted on receiving evidence from the STA that that was the position, rather than accepting an assurance from Mr Gardiner. But, with respect to him, that mischaracterises the nature of the answer that Mr Gardiner gave. Experience shows - and indeed this was the experience of Mr Grodzinski at the hearing before me – that there are sometimes answers to points which are raised by the judge during a hearing and before they come to their decision. In this case Mr Gardiner, in effect, drew attention to the evidence that the FtT had received. This included the correspondence which I have summarised as well as the email of 3 August 2021, which demonstrated that there was an ongoing enquiry to which the disputed information was relevant. A final decision had not been made and the issue of the claimant's tax liability had not been finally resolved. In my judgment, for that reason the Judge then approved the Notice. He was satisfied that the disputed information was reasonably required by the STA.

The relevant legal framework

36 The relevant context for the statutory provisions which apply in this case includes the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which is given effect by the International Mutual Administrative Assistance on Tax Matters Order 2007 No. 2126. Article 1 of the Multilateral Convention provides, so far as material:

"Article 1 – Object of the Convention and persons covered

1 The Parties shall, subject to the provisions of Chapter IV, provide administrative assistance to each other in tax matters. Such assistance may involve, where appropriate, measures taken by judicial bodies.

2 Such administrative assistance shall comprise:

a exchange of information, including simultaneous tax examinations and participation in tax examinations abroad;

b assistance in recovery, including measures of conservancy; and

c service of documents.

3 A Party shall provide administrative assistance whether the person affected is a resident or national of a Party or of any other State."

…

37. Article 4 provides, so far as material:

"Article 4 – General provision

1. The Parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this Convention…. "

38. Paragraphs 2 and 3 of Schedule 36 to the Finance Act 2008 provide as follows,

"2 Power to obtain information and documents from third party

(1) An officer of Revenue and Customs may by notice in writing require a person–

(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 tax position of another person whose identity is known to the officer ("the taxpayer") or for the purpose of collecting a tax debt of the taxpayer ……

(3) In this Schedule, *"third party notice"* means a notice under this paragraph.

3 Approval etc of taxpayer notices and third-party notices

(1) An officer of Revenue and Customs may not give a third-party notice without–

(a) the agreement of the taxpayer, or

(b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third-party notice….

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third-party notice unless–

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third-party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

(4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax…."

39. In the present case, para.2 therefore required HMRC to be satisfied that the information required by the Notice was "reasonably required … for the purpose of checking the tax position" of the claimant. By para.58 of the Schedule, "checking" is said to include "carrying out an investigation or enquiry of any kind" and, by para.63(1)(m) this includes checking any relevant foreign tax position. These provisions are also to be construed on the basis that the Multilateral Convention contemplates that a notice of the sort which is at issue in this case may require information to be provided if it is "foreseeably relevant" to the investigation or enquiry.

40. Paragraph 3 of Schedule 36 required, in the context of the present case, that the FtT be satisfied that the officer giving the Notice was justified in doing so in the circumstances. In *Kotton v. First-tier Tribunal (Tax Chamber) and HMRC* {2019] EWHC 1327 (Admin.), Simler J, as she then was, explained these provisions in a characteristically lucid way as follows at [59]-[62]:

> "59. First, it is important to recognise the purpose of the statutory scheme in Schedule 36. This represents a balance between the interests of individual taxpayers and the interests of the wider community by enabling HMRC to investigate tax avoidance and tax evasion in a proportionate but efficient manner. As was explained in Derrin Brothers, this is achieved through the means of a judicial monitoring scheme rather than a system of adversarial appeals from third party notices which could allow taxpayers and others to delay or frustrate an investigation and could take years to resolve. The Schedule 36 scheme differentiates between the recipient of a third-party notice and the taxpayer whose tax position is being checked but common to the treatment of each of them is the limited scope for objecting to a third-party notice. There is no appeal on the merits, and it is not open to the taxpayer or third-party recipient to challenge a notice on its merits.
>
> 60. Secondly, the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are 'reasonably required' for the purpose of 'checking' the tax position of the taxpayer. It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. That is unsurprising given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued. As the Court of Appeal observed in Derrin Brothers,
>
> > '68. …it is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax

liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them.'

Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax.

61. Nor is it necessary ...as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.

62. Thirdly and for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required."

These passages were recently approved by the Court of Appeal in *Kandore & Otrs v HMRC* [2021] EWCA Civ 1082 [73].

41. Mr Grozinski also helpfully took me to para.54 of the judgment in the *Kotton* case which deals with the issue of the presumption of irregularity and he referred me to paras.11 to 14 of the judgment of Sir Terence Etherton in *R (Derrin Brothers Properties Ltd) v. First-tier Tribunal* [2016] 1 WLR 2423 and submitted that the FtT has a duty to supervise what is an intrusive power and the HMRC, for its part, has a duty to disclose information which could properly undermine its application. I accept both propositions.

The grounds of challenge

42. The claimant advances the following main grounds of challenge.

43. First, failure on the part of HMRC and then the FtT to conduct a proper investigation of whether the Notice was appropriate. Under this heading the claimant argues that HMRC had a *Tameside* duty to make reasonable enquiries to satisfy itself that the information sought by the STA was reasonably required. It failed to discharge this duty before applying to the FtT for approval by failing to find out how the information could be reasonably required when the STA had already made a decision that the claimant had unlimited tax liability. As against the FtT and HMRC, the claimant also argues that the FtT had a duty to act fairly in carrying out its monitoring role and that this required enquiries to be made in relation to the question why the information was required. Although the FtT did make enquiries, it allowed HMRC to do so by putting leading questions to the STA rather than asking an open question. This was a breach of duty by both the FtT and HMRC.

44. Second, the claimant alleges failure to take into account relevant considerations and/or irrationality on the part of HMRC and the FtT. Under this heading, the claimant argues, as against HMRC, that the email sent to the STA on 3 August 2021 and the response provided did not actually address directly the point that a decision as to the claimant's unlimited liability was said to have been made already. The STA's response focused on the point that it was building a case in relation to the claimant's place of residence but was vague as to what case was being built and why. As against the FtT, these points are reiterated by the claimant and it is said that the Judge approved the Notice despite the fact that his concern had not been addressed. Mr Grodzinski argues that, according to para.21 of Mr Gardiner's witness statement, the Judge himself recognised this, but, nevertheless, approved the Notice. I have dealt with this submission earlier in my judgment.

45. Third, it is argued by the claimant that the notice breached Article 8 of the European Convention on Human Rights. It is said that the Notice was intrusive, and infringed Article 8, as it required the provision of private information about the claimant. It was not in accordance with law because it was not in accordance with the requirements of paras.2 and 3 of Schedule 36, and it was disproportionate because it was not rationally connected to the aim of assisting the STA to carry out any investigation or enquiry, given that it had already decided that the claimant had unlimited tax liability. The complaints about the acts and omissions of HMRC and the FtT to which I have referred are repeated by the claimant under this heading.

Conclusion

46. As will be apparent, the claimant's central point is that since the STA decided in June and/or September 2020 that he has unlimited tax liability, and did so on the basis of the sufficient connection test, it must follow that it does not need the information sought by the Notice. The information goes to the residence criterion and is therefore irrelevant. Neither HMRC nor the FtT took sufficient steps, or any, to investigate, consider or address this point. Nor did they take it into account when it was a relevant consideration. Their decisions were also irrational, given that no answer to the point was provided by the STA.

47. In my judgment, the answer to the claimant's central point is as follows. On the evidence from the STA, there clearly was at all material times an ongoing investigation into the claimant's tax position. It was not the case that that investigation had concluded, still less that any issues which the claimant may have had in relation to the STA's views on unlimited liability had been resolved. Nor was it the case that the STA's view on the substantial connection ground was accepted by the claimant or that his obligations to the STA had been finally determined or agreed.

48. The particular issue which was being investigated, and to which the disputed information is relevant, was indeed the question whether the claimant was resident in Sweden during the relevant period, although, of course, it may also have been relevant to his connections with Sweden for the purposes of the third potential criterion for tax residency which I have referred to above. The STA clearly did not accept the claimant's position on this issue, so it remained live. I also note that there is no real dispute that the information sought is rationally connected to the question of the claimant's residence during the relevant period.

49. On analysis, the true nature of the claimant's complaint is therefore not that there is no investigation or enquiry or that the investigation has come to an end. It is that the investigation which, on the evidence, is being carried out is not reasonably required and is unjustified because the STA has already decided that the claimant has unlimited liability. It therefore need not investigate further, still less investigate other bases on which the claimant may be liable or seek other information which may lend support its view that he is liable. However, on the authorities including *Kotton*, such a complaint is not open to him given that the question whether the STA should still be investigating or should be investigating where he was resident at the relevant time is not a matter for the HMRC or the FtT. He does not suggest that such an enquiry would be in bad faith and nor is there any evidence in this case to support a contention that the STA's enquiries are anything other than genuine and legitimate in the relevant sense.

50. But, even if this is not the true nature of the claimant's complaint, the STA's email of 3 August 2021 and the other evidence to which I have referred make plain that there were rational reasons for continuing to investigate the issue of the claimant's tax residency. It was not irrational to take the view that, even if one basis for liability was thought to be established, the STA could reasonably seek to be as well informed as possible, in the best possible position to defend its view and in a position to rely on other grounds should the need arise. I agree with Mr Edwards that the STA could permissibly wish to carry out

additional checks on the position which it had taken. This was particularly so where the basis on which liability was thought to exist was disputed by the claimant, nothing had finally been determined or resolved, and further decisions would need to be taken in the course of resolving the question of his liability, if any.

51. In my view, the concern raised by the Judge was addressed by HMRC and the STA for the reasons I have given. The substance of the point on which the Judge sought an assurance was that there was an ongoing enquiry and that the disputed information was still required by the STA for the purpose of that enquiry, given that there appeared to have been a decision that the claimant had unlimited liability, in any event. It was not for the Judge to investigate whether any continuing enquiry was reasonable or justified. He received the assurance which he sought. He may have suggested that the email did not actually answer the view of Lindhal that the case was at an end, but it was clear from the STA's email - and I am bound to say the correspondence to which I have referred - that the enquiry was ongoing and that the disputed information was required for the purposes of that enquiry. Consistently with this evidence, the Judge was also told by Mr Gardiner, who had spoken to the STA, that there were further stages in the process in Sweden to which the information was relevant and that a formal decision was yet to be taken.

52. On the leading question point, I cannot see that the contents of HMRC's email of 3 August 2021 rendered its conduct or the decision of the FtT unlawful. I agree that it was open to HMRC to be clear about what the FtT needed if it was to approve the Notice. There was no procedural unfairness or irrationality in this, given that the duty on HMRC was to assist the STA and given that it was open to the STA to put things in its own way, as it did, or not to provide the assurance which had been sought by the Judge.

53. In my view, the allegation of breach of Article 8 ECHR is bound to fail once the true nature of the claimant's argument on proportionality is analysed. On the evidence it fails in any

event, for the reasons which I have given. There plainly was a rational connection between the information sought in the Notice and the investigation which the STA was carrying out. The claimant's criticisms of the process are also unfounded.

54. It follows that I agree with Thornton J and, essentially for the reasons which she gave, permission is refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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