



Neutral Citation: [2023] UKFTT 00223 (TC)

Case Number: TC08744

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Decided on the papers

Appeal references: TC/2021/01214
TC/2020/02289

PROCEDURE – Sch 36 information notices and discovery assessments – appellant appealed both the notices and the assessments – appeal against notices stayed behind the onward appeal in Perlman – whether appeal against the assessments should proceed – held, appeal against assessments stayed behind appeal against the Sch 36 notices

Judgment date: 02 March 2023

Before

TRIBUNAL JUDGE REDSTON

Between

DERMOT MCMEEKIN

Appellant

and

**THE COMMISSIONERS FOR
HIS MAJESTY’S REVENUE AND CUSTOMS**

Respondents

Representation:

For the Appellant: Mr Peter Vaines of Counsel, instructed by the Appellant

For the Respondents: Mr Gareth Hilton, Litigator for HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. In 2017, HM Revenue and Customs (“HMRC”) informally requested information from Mr McMeekin relating to his domicile and worldwide income, but Mr McMeekin did not provide that information. On 18 February 2020, HMRC issued Information Notices under Finance Act 2008, Sch 36 (“Sch 36 Notice” or “Notice”) for seven of the eight years 2011-12 through to 2018-19, the exception being 2014-15.

2. Mr McMeekin appealed against the Notices on the grounds that the information was not “reasonably required” because he was not domiciled in the UK (“the Notices Appeal”), and that his domicile should be decided as part of the Notices Appeal.

The stay of the Notices Appeal behind *Perlman*

3. Mr McMeekin’s barrister, Mr Vaines, had put forward essentially identical submissions in another case, that of Mr Robert *Perlman*. A preliminary hearing of Mr Perlman’s case took place before me on 29 April 2021 and 5 May 2021, and the judgment was issued on 22 June 2021, see *Perlman v HMRC* [2021] UKFTT 219 (TC) (“*Perlman*”).

4. In *Perlman*, I decided that the FTT had no jurisdiction to decide Mr Perlman’s domicile as part of a hearing against a Sch 36 Notice, and that if that conclusion was wrong, the FTT should nevertheless decline to exercise the jurisdiction.

5. On 19 August 2021, I gave Mr Perlman permission to appeal that decision to the Upper Tribunal. The Notices Appeal made by Mr McMeekin has been stayed until 28 days after the final resolution of *Perlman*. Mr Vaines, on behalf of Mr McMeekin, has agreed that this stay is appropriate, saying:

“the Information Notices appeals are being stayed behind the case of *Perlman*. As the issues arising on the Information Notices are the same in both cases, the reasoning behind the decision for a stay in Mr McMeekin’s Information Notice appeals behind those of Mr Perlman, is clear.”

The Assessments Appeal

6. Of the seven years for which Notices were issued, the last four are under enquiry and the status of the tax year 2014-15 is disputed: HMRC’s position is that it is also under enquiry and Mr Vaines disagrees.

7. On 30 March 2021, HMRC issued discovery assessments for the three tax years 2011-12 through to 2013-14 because they would otherwise have been out of time to assess those years under the “Requirement to Correct” (“RTC”) provisions in Finance (No 2) Act 2017. HMRC also issued an assessment for 2014-15 on a precautionary basis, in other words in case Mr Vaines was right, and 2014-15 was not under enquiry. On 13 April 2021, Mr McMeekin appealed against those assessments (“the Assessments Appeal”). One of his grounds of appeal was that the quantum was excessive.

8. On 5 July 2021, the Assessments Appeal was stayed pending the outcome of the preliminary hearing in *Perlman*. On 10 September 2021, I directed that the parties provide submissions as to the next steps, and that the stay remain in place pending my consideration of those submissions.

9. Both parties made submissions on whether the Assessments Appeal should be stayed behind *Perlman*, and whether it should be stayed behind the Notices Appeal. In summary, Mr Vaines submitted that the stay be lifted and the Assessments Appeal proceed to a hearing,

and Mr Hilton submitted on behalf of HMRC that the Assessments Appeal should be stayed behind the Notices Appeal.

10. For the reasons set out in the rest of this decision notice, I agree with Mr Hilton, and have directed that the Assessments Appeal be stayed until 28 days after the final resolution of the Notices Appeal.

The issue and the submissions

11. The issue I have to decide is therefore whether:

(1) to stay the Assessments Appeal behind the Notices Appeal, so that the FTT first decides whether or not Mr McMeekin has to comply with the Sch 36 Notices, and subsequently decides his appeal against the Assessments; or

(2) to direct that the Assessments Appeal proceed now, which will have the practical result that it is heard and decided before the Notices Appeal.

12. Mr Vaines submitted that the Assessments Appeal should proceed now, for the following reasons:

(1) Mr McMeekin has been assessed to tax and has appealed on the basis that the quantum is incorrect, and is entitled to have his appeal heard;

(2) the VAT Tribunal in *Thorn Electrical Industries v HMRC* [1974] VATTR 62 held that a stay should only be granted in “exceptional circumstances”, and there were no exceptional circumstances here;

(3) a stay behind the Notices Appeal would delay the hearing of Assessments Appeal until after:

(a) the UT or a higher court had decided *Perlman*; and

(b) the Notices Appeal had been determined. Mr Vaines said that after the FTT had decided that appeal, the FTT’s judgment might be appealed to the UT and beyond;

(4) the Notices Appeal “relates to different years” from the Assessments Appeal, and “it is well-established that each tax year is to be treated separately on its own merits”; and

(5) although Mr McMeekin has appealed both the Notices and the Assessments on the basis that he is not UK domiciled, nevertheless “a determination of a person’s domicile for one year is not determinative of his domicile for a different year”, see *Gulliver v HMRC* [2017] UKFTT 222 (TC).

13. Mr Hilton pointed out that there were two errors in Mr Vaines’ submissions:

(1) as a matter of fact, the Assessments Appeal and the Notices Appeal do not relate to different years. Instead, the Notices Appeal includes tax years 2011-12 through to 2013-14, which are three of the four years covered by the Assessments Appeal; and

(2) as a matter of law, there is no right of appeal against the FTT’s decision on an appeal against a Sch 36 Notice, see FA 2008, Sch 36, para 6(4), and as a result the maximum period of delay is less than that postulated by Mr Vaines.

14. Mr Hilton also said that Mr Vaines was wrong to submit that the Tribunal could only stay an appeal in “exceptional circumstances” in reliance on “a 50-year-old first instance VAT Tribunal decision”. Instead, the correct test to be adopted in relation to an application for a stay in the absence of agreement between the parties was set out by the Court of Session

in *RBS Deutschland Holdings GmbH v HMRC* [2007] STC 814 (“*RBS Deutschland*”) at [22], which reads:

“a tribunal or court might sist [stay] proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so.”

15. Mr Hilton added that weight must therefore be attached to the principles of “material assistance” and “expediency”, and that the Tribunal’s key task is to ensure that the case is dealt with in accordance with the overriding objective. He added that although Rule 2 (2)(e) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”) says that compliance with the overriding objective includes avoiding delay, this is subject to the rider that delay is to be avoided only “so far as compatible with proper consideration of the issues”. On the facts of this case, proper consideration of the issues requires that the Notices Appeal be decided before the Assessments Appeal.

16. Mr Hilton set out the following reasons why this was the case:

(1) HMRC had first requested the information and documents relating to Mr McMeekin’s worldwide income and gains in 2017; that informal request was repeated on 24 January 2018; 13 August 2018; 29 May 2019 and 29 August 2019, but Mr McMeekin did not comply with these requests. HMRC issued the Notices on 18 February 2020. Mr McMeekin then appealed the Notices on the same basis as Mr Perlman, and the resulting litigation was in the end stayed behind *Perlman*.

(2) The Notices Appeal could not therefore be resolved before the expiry of the statutory time limit for the RTC years. As a result HMRC were forced to issue discovery assessments, without the benefit of the information they had sought from Mr McMeekin. This was despite the fact that the FTT has repeatedly held that “HMRC is entitled to know the full facts related to a person’s tax position so that they can make an informed decision whether and what to assess”, see *Stephen Price v HMRC* [2011] UKFTT 624 (TC) (“*Stephen Price*”) at [10], to which I refer again later in this judgement.

(3) Lifting the stay in Mr McMeekin’s case would incentivise other taxpayers to delay compliance with information requests for as long as they possible, with the object of forcing HMRC to issue assessments, and then applying for the appeals against those assessments to proceed, before HMRC were in possession of the full facts.

(4) It was neither fair nor just to require HMRC to litigate a domicile dispute in a vacuum without knowing whether the actual (as opposed to estimated) domicile-dependent liabilities justified the cost of the litigation, in circumstances where (as here) one of the party’s grounds of appeal is that the assessments are excessive.

(5) Mr McMeekin could eliminate any delay by simply providing the information and documents sought by the Notices.

DISCUSSION AND DECISION

17. I begin by considering Mr Vaines’s submission that each tax year should be treated separately, and then consider and apply the principles relating to the granting or refusing of a stay.

Separate tax years

18. Mr Hilton is clearly correct that three of the four years are covered by the Assessments Appeal. Years 2011-12, 2012-13 and 2013-14 are also the subject of the Notices Appeal.

The only year for which HMRC have issued a discovery assessment, but for which there is no Sch 36 Notice is 2014-15.

19. As Mr Vaines says, income tax and capital gains tax are charged by reference to separate tax years. As a result, any factual determination made in relation to one tax year is not binding in relation to a later tax year. Whether a person is UK domiciled is a question of fact, and thus Mr Vaines is also correct that the position could be different as between one year and another.

20. However, neither party sought to argue that Mr McMeekin's domicile was different for any of the years in issue. Mr McMeekin's case is that he was non-domiciled for all the years, whereas HMRC have issued the assessments on the basis that he was domiciled in each of those years. On the basis of the facts as both parties understand them to be, either Mr McMeekin is domiciled for all of the years, or he is not. It follows that there is no basis for distinguishing one year from another.

21. For the same reason, the fact that there is a single year (2014-15) for which HMRC have not issued a Sch 36 Notice does not change the position. The relevant period runs from 2011 through to 2019, and the 2014-15 year sits in the middle of that period. Neither party has sought to argue that Mr McMeekin's domicile was different for that year.

The approach to granting or refusing a stay

22. The Tribunal's power to stay appeals is given by Rule 5(3)(j) of the Tribunal Rules. Rule 2(3) reads:

“The Tribunal must seek to give effect to the overriding objective when it—

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.”

23. It is therefore clear that a decision by a tribunal to stay a case must give effect to the overriding objective. I also agree with Mr Hilton that the relevant case law authority is *RBS Deutschland*, and that I must therefore decide whether the outcome of the Notices Appeal will be of material assistance in determining the Assessments Appeal, and whether it is expedient to direct the stay.

Material assistance?

24. There are the following possible outcomes for the Notices Appeal:

(1) The UT (or higher court) confirms *Perlman* and thus Mr McMeekin's domicile cannot (or should not) be decided as part of the Notices Appeal. The Notices Appeal is then likely to fall away, because Mr McMeekin's only ground of appeal against the Sch 36 Notices is that the information and documents are not reasonably required because he has an overseas domicile. He would therefore be required to provide the information and documents sought by HMRC.

(2) The UT (or a higher court) overturns *Perlman*, so Mr McMeekin's domicile will be determined in the course of the Notices Appeal; in the light of that finding, the FTT will go on to decide whether the information and documents set out in the Sch 36 Notices are reasonably required.

25. Either outcome will put the FTT in a better position to determine the Assessments Appeal, because it will have been provided with:

- (1) the information and documents reasonably required to establish Mr McMeekin's liability, if *Perlman* is upheld;

- (2) a decision on domicile made by the FTT hearing the Notices Appeal if *Perlman* is overturned; or
- (3) both of the above, if:
 - (a) *Perlman* is overturned, so that the FTT heard and decided Mr McMeekin's domicile; and
 - (b) the FTT went on to decide that Mr McMeekin had a UK domicile and must comply with the Notices.

26. If, on the other hand, the Assessments Appeal proceeds without the assistance provided by the Notices Appeal, the FTT would decide Mr McMeekin's domicile and the quantum of the assessments on the basis of information he had chosen to provide, even though there is a live and open question as to whether further information was reasonably required to determine his liability for three of the four years.

27. There is thus no doubt that the outcome of the Notices Appeal will be of material assistance in deciding three of the four years which form part of the Assessments Appeal.

Expedient?

28. In *R (oao McCormack) v St Edmund Campion Catholic School* [2012] EWHC 3928 (Admin), Beatson J considered the meaning of the word "expedient". He first agreed with counsel that it was to be characterised as "subjective and not hard edged" and continued:

"A quick examination of dictionary definitions gives the following meanings: 'convenient and practical', 'suitable or appropriate'. The Oxford English Dictionary states: 'conducive to advantage in general or to a general purpose, suitable to the circumstances of the case.' There is also a more deprecative sense of 'useful or politic as opposed to just or right' and also 'something that helps forward or that conduces to an object'."

29. I respectfully agree with that definition. In *RBS Deutschland* the word "expedient" is clearly not used in the deprecative sense, but instead means "convenient and practical", "suitable or appropriate" and "conducive to advantage in general or to a general purpose, suitable to the circumstances of the case".

30. In considering whether granting the stay is suitable to the circumstances of Mr McMeekin's case, I take into account *Stephen Price* at [10], where Judge Mosedale said, in a passage later approved by Judge Sinfeld in *Andreas Michael* [2015] UKFTT 0577 (TC) at [29], as well as by other Tribunal judges:

"HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008)."

31. Thus, the normal position is that Sch 36 Notices operate at a preliminary investigative stage, which may be followed by the closure of enquiries, the issuance of assessments and taxpayer appeals. However, in Mr McMeekin's case, the events relating to years 2011-12 to 2013-14 have not followed that normal course. Although HMRC issued the Notices on 18 February 2020, after repeated attempts to obtain the information and documents on a voluntary basis and well over a year before the relevant assessment time limits, Mr

McMeekin then appealed the Notices and his appeal was delayed by the same procedural challenges as were later decided in *Perlman*, and that in turn has been appealed to the UT..

32. If the Assessments Appeal is stayed behind the Notices Appeal, the Sch 36 process will precede the FTT's determination of Mr McMeekin's appeal against HMRC's assessments, so putting him as far as possible in the normal position. In my judgment, that outcome is expedient – in other words, “suitable and appropriate” and “suitable to the circumstances of the case”.

33. Mr Vaines did not suggest that the appeal for 2014-15 should be separated from the rest of the assessments, on the basis that it was the only one for which HMRC had not issued a Sch 36 Notice. As the key point in issue is the same, namely whether Mr McMeekin was domiciled in the UK, I find that it is expedient to hear the appeals against all four assessments at the same time, and thus that Mr McMeekin's appeal against the 2014-15 assessment should be stayed behind the Notices Appeal.

The overriding objective

34. Rule 2(1) of the Tribunal Rules provides that the purpose of the overriding objective is “to enable the Tribunal to deal with cases fairly and justly”. Rule 2(2) says:

“Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.”

35. The parties' submissions under this heading focused on subparagraph (e), namely delay. Staying the Assessments Appeal will of course cause delay. However, the period of delay will be significantly less than that submitted by Mr Vaines, because as Mr Hilton pointed out, there is no right of onward appeal against the FTT's judgment in relation to a Sch 36 Notice. In addition, if *Perlman* is upheld, the Notices Appeal will fall away, given Mr McMeekin's current grounds of appeal.

36. In my judgment, staying the Assessments Appeal will allow for “proper consideration of the issues”, whereas lifting the stay would not be in the interests of justice. That is because, for the reasons set out at §30-33 above, staying the Assessments Appeal allows the question as to whether Mr McMeekin has to provide further information and documents to be decided before the substantive appeal. Moreover, one of Mr McMeekin's grounds of appeal against the assessments is that the quantum is too high. If Mr McMeekin is required to comply with the Sch 36 Notices, he will be required to provide the information and documents relating to that quantum.

CONCLUSION, DIRECTIONS AND APPEAL RIGHTS

37. For the reasons set out above, I direct that the Assessments Appeal is stayed until 28 days after the determination of the Notices Appeal.

38. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to

appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE REDSTON
TRIBUNAL JUDGE**

Release Date: 02 MARCH 2023

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 27 February 2023.