Neutral Citation: [2023] UKFTT 00943 (TC)

Case Number: TC08980

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2023/00987

PROCEDURE – application to stay – whether validity of trust affects HMRC's request for documentation and information under Schedule 36 Finance Act 2008 – no – stay refused

Judgment date: 03 October 2023

Decided by:

TRIBUNAL JUDGE AMANDA BRONW KC

Between

RK HOSKING

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined this application appeal on 26 October 2023 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 1 February 2023 (with enclosures), Robert Hoskins (**Appellant**) application to stay dated 5 May 2023 and the various subsequent submissions by the parties dated 22 June 2023, 25 July 2023 and 13 September 2023 (from the Appellant) and 6 July 2023 and 21 August 2023 (from HM Revenue & Customs (**HMRC**)).

DECISION

INTRODUCTION

1. The appeal in respect of which this application is made concerns the imposition of a £300 penalty (**Penalty**) issued to the Appellant by HMRC pursuant to paragraphs 39 and 46 Schedule 36 Finance Act 2008 (**Sch 36**) for failure to produce information and documents requested by HMRC in respect of the Appellant's tax return for the tax year ended 5 April 2019 and in particular the Appellants use of a disguised remuneration trust.

PROCEDURAL BACKGROUND

2. The appeal was lodged on 2 February 2023. The Tribunal indicated that the appeal should be determined by video hearing as a basic case.

3. On 13 April the Appellant notified the Tribunal that:

> "We wish to inform the Tribunal that the Trust to which the appeal relates is void and that arbitral proceedings in the British Virgin Islands are under issue, to obtain a order determining the beneficial ownership of the property hitherto supposed to be subject to the trusts of the void trust. There will then follow relevant court orders in that jurisdiction and (in the High Court) in this jurisdiction.
>
> We, therefore, respectively submit that because of the above on-going matters, a request for video participants at this stage is premature."

4. Following an indication from HMRC that the status of the trust was not pertinent to the determination of the appeal against Sch 36 penalties, on 5 May 2023 the Appellant made a formal application for stay. The grounds of the application were stated, in summary, to be:

(1) The trust to which the penalty notice relates was void ab initio;

(2) Arbitral proceedings in the British Virgin Islands (**BVI**) continue so as to determine the beneficial ownership of the property held within the void trust;

(3) The arbitral proceedings would result in relevant court orders in BVI and the England and Wales High Court;

(4) As the penalties are based on a premise that contributions were made to a trust and that the loan charge provisions of Part 7A Income Tax (Earnings and Pensions) Act 2003 apply the notices to which the penalties relate were necessarily founded on a premises which is incorrect in law which will be confirmed by the High Court order in due course;

(5) As the trust is void all requested information and documents are similarly void;

(6) The determination of a liability to penalties for failure to provide the requested information and documentation regarding the void trust should properly be stayed pending confirmation as to the status of the trust.

5. The Tribunal directed the parties to provide submissions on the question of the appropriateness of a stay. A summary of these submission is set out below.

BACKGROUND TO THE ISSUE OF THE PENALTY

6. The Appellant is a director of Ortho Solutions Limited (**Company**).

7. Between 9 December 2010 to 5 April 2017 the Company made contributions to Ortho Solutions Limited Remuneration Trust (**OSLRT**) totalling £1,983200 which then made loans to the Appellant. Further amounts totalling £1,433,250 were contributed and loaned in periods prior to 9 December 2010.

8. Sometime before 25 February 2019 the Appellant was approached by Buckingham Wealth Ltd with a solution which met the concerns of some individuals who had established remuneration trusts, regarding the introduction of a tax charge on outstanding loans made by such trusts. The solution was known as "the Sunrise solution". The arrangement involved a "Finco" which had been "established under a joint business venture between Minerva and a 3rd party financier".

9. On 25 February 2019 the Appellant signed a hypothecated loan memorandum (**HLM**) pursuant to which LSC Finance Limited (**LCS**), an entity established in the BVI, as lender, hypothecated "all such sums as may be claimed by HMRC … as falling subject to the provisions of [the loan charge], in respect of [the Appellant]". The Appellant borrowed £2,946,000 pursuant to the agreement, apparently for repayment of sums originally loaned by OSLRT **(**the trustee for which was Griffin Trustees Limited (**Griffin**)).

10. At or about the same date £2,946,000 was paid by LCS at the Appellant's order, to Costa who subsequently confirmed receipt of the sum.

11. HMRC's understanding of the hypothecated loan arrangements offered under the Sunrise solution by Buckingham Wealth is that Griffin subscribed as a shareholder of LCS for the "subscription amount", a sum equal to the sum advanced to the Appellant under the HLM.

12. The Appellant's self-assessment tax return for tax year ended 5 April 2019 did not bring a loan charge was bought into account in respect of the sums lent to the Appellant by OSLRT.

13. On 21 October 2020 HMRC opened an enquiry pursuant to section 9A Taxes Management Act 1970 (**Enquiry**) into the Appellant's self-assessment tax return for the year ended 5 April 2019. The notification of the Enquiry indicated that HMRC were "checking [the Appellant's return] to see whether it should have included information about outstanding disguised remuneration loans".

14. The letter sets out:

> "Disguised remuneration is a type of tax avoidance. It involves people being paid for work or services in the form of a loan that is unlikely to ever be repaid.
>
> The disguised remuneration loan charge is a charge to tax that's calculated on certain disguised remuneration loans.
>
> You can find information about disguised remuneration and the loan charge online. Go towww.gov.uk and search for:
>
> - 'disguised remuneration tax avoidance schemes'
> - 'report and account for your disguised remuneration loan charge' (to find out how to report a disguised remuneration loan in your tax return)
> - 'disguised remuneration independent loan charge review' (to find out about changes to the loan charge that may affect the information you need to include in your tax return)

15. On 18 June 2021 HMRC sent an informal request for information and documentation to be provided.

16. HMRC received a response dated 19 August 2021 which stated:

> "We refer to your letter of 18 June 2021. We understand that your check is in relation to disguised remuneration loans and the loan charge.
>
> It is confirmed that no loans from Remuneration Trusts are outstanding. Please therefore amend your records."

17. The informal request for information was reissued on 12 October 2021.

18. By letter dated 8 November 2021 the Appellant reiterated that no loan charge was appropriate as there were no outstanding amounts due to OSLET from the Appellant. Reference was made to case law supporting the assertion as to the underlying tax position.

19. On 10 February 2022 HMRC issued a formal notice to produce information and documents as set out in the accompanying schedule (**Notice**). The Appellant was notified that if he did not possess a copy of any particular document that he was expected to try to obtain it from others who might have such a copy and to provide evidence of all attempts to obtain the document if it was not produced. The deadline for production was set as 21 March 2022. The Appellant was notified that a failure to produce the documents by 21 March 2022 may render the Appellant liable to a £300 penalty and subsequent daily penalties. The Appellant was also duly notified of his right to appeal against the requirement to produce information and documentation.

20. In response to the request, on 18 March 2022, the Appellant, via his representative wrote to HMRC demanding a response to the position adopted in the 8 November 2021 letter that no loan charge was applicable by reference to the case law cited. Further case law was referenced. Certain information and documents which had been required by HMRC were provided under cover of the letter. The response stated that the Appellant was unable to provide copies of his own bank statements at that time as one of the accounts was closed and Barclays were unable to locate the account on their system; however he indicated that he was making further enquires and sought and extension of time in which to comply with the Notice regarding the statements to 30 April 2022. The letter also appealed the requirement to produce a number of the requested documents on the grounds that they were not in the Appellant's possession.

21. HMRC provided their view of the matter in respect of the appealed items on 29 March 2022. HMRC stated that the technical points raised in earlier correspondence were a matter for determination by the Tribunal as necessary. HMRC confirmed that all the documents and information requested were reasonably required for the purposes of and relevant to, checking the Appellant's tax position. An extension was granted in respect of the provision of the Barclays bank statements. HMRC stated that they considered that the documents against which an appeal had been made were documents which they considered were in the Appellant's possession or power. The Appellant was offered a review of the decision to maintain the information request and informed of their right to notify the appeal to the Tribunal.

22. The Appellant accepted the offer of a review on 20 April 2022. Various points were raised regarding the technical basis on which it was contended that no loan charge could arise. It was stated that all documents in the Appellant's possession had been produced. A further point was made highlighting that HMRC's view of the matter letter had referenced a taxpayer other than the Appellant; general data protection regulation concerns were raised.

23. On 12 May 2022 the Barclays bank statements were provided together with an email from the Appellant to LCS. The email to LCS enclosed the Notice and "formally request[ed] that [LCS] provide [the Appellant] with copies of the required paperwork in order that [the Appellant could] comply with HMRC's correspondence." LCS was requested to acknowledge receipt of the request and to confirm that assistance would be provided.

24. By letter dated 28 June 2022, HMRC acknowledged the data breach and apologised. HMRC confirmed that there had been no breach of the Appellant's data.

25. The outcome of the review was communicated on 18 July 2022. It confirmed HMRC's view that all the information and documentation requested was reasonably required for the purposes of checking the tax return for the year ended 5 April 2019 and that, in HMRC's view, all documents were within the Appellant's possession or power to obtain. It stated that the documents were required to test the position advanced by the Appellant as to the existence at law or in fact of a disguised remuneration loan and thereby whether the loan charge applied. A response was also provided as to HMRC's position with regard to the substantive tax arguments raised on behalf of the Appellant.

26. The review conclusion letter identified that 1) there was a discrepancy in the information provided as to the amounts said by the Appellant to have been repaid to the Appellant and clarification was sought; and 2) with regard to the documents which the Appellant contended were not in his possession the Appellant was required to obtain them from third parties. HMRC notified the Appellant that compliance with the Notice was required within 30 days of the date of the letter (i.e. 18 August 2022).

27. No appeal was notified to the Tribunal in respect of the review decision.

28. Under cover of a letter dated 15 August 2022 the Appellant provided some further information together with certain additional documents and evidence of a communication sent to LCS together with a copy of the Sunrise solution marketing material received by the Appellant from Buckingham Wealth. The letter was misdirected and was not received by the case officer until 6 September 2022.

29. On 16 September 2022 the Appellant provided a response received from LCS refusing to provide copies of the documents on the grounds of confidentiality but indicating if there was a statutory entitlement or other lawful basis to compel delivery to advance such basis in writing.

30. On 22 September 2022 HMRC issued the Penalty considering that the Appellant had continued to fail to meet the terms of the Notice in full. The documents and information HMRC considered to be outstanding on 18 August 2022 were:

> "2. A list of all transfers of money from that trust or foundation to you, or to persons connected to you, during the period 9 December 2010 to 5 April 2017 inclusive.
>
> For each transfer, tell us:
>
> • the date of the transfer
>
> • the amount of the transfer
>
> • the nature of the transfer, for example, loan, fiduciary receipt, payment of expenses
>
> • whether an obligation exists or existed to repay or return the amount transferred, and if so, the amount that was not repaid or returned as at the end of 5 April 2019
>
> 13. All documents relating to each transfer of money identified in response to point 2 above. This includes, but is not limited to, all written agreements in respect of the transfer and bank or building society statements showing the transfer.
>
> 15. All documents relating to each repayment identified in response to point 4 above. This includes, but is not limited to, documents evidencing

the source or sources of the amount repaid and the means by which repayment was made.

19. If you have used arrangements involving hypothecated loans (arrangements sometimes referred to as Sunrise all documents relating to those arrangements including, but not limited to:

• hypothecated loan memorandums

• loan discharge memorandums

• memorandums of receipt

• share subscription memorandums

• bank statements demonstrating the movements of money referred to in the various memorandums

• all promotional, marketing or explanatory material provided to you

• all correspondence (whether by letter, email or other method) to or from you"

(**Outstanding Information/Documents**).

31. By letter dated 19 October 2022 Lucentum responded appealing the penalty. The appeal contended:

(1) In respect of item 2 of the Outstanding Information/Documents that the information had previously been provided but providing further explanation.

(2) Similarly for item 13 though further supporting documentation for a £50,000 transfer on 15 December 2011 was provided together with further redacted bank statements.

(3) Indicating that item 15 had been complied with previously.

(4) With regard to item 19 indicating that the documents requested were in LCS's possession and no other party. That requests had been made of LCS, but the documents had not been produced and as a consequence the documents were no in the Appellant's possession or power and could not be produced by him.

32. In their view of the matter letter dated 14 November 2022, HMRC accepted, by reference to the information and documents provided on 19 October 2022, that items 2 and 13 the Appellant had complied with the Notice. Certain clarification questions were asked regarding the provision of the bank statements. With regard to Item 19 HMRC stated:

"Your agent states that it is your understanding that the only party involved in the arrangements is LCS Finance Ltd. May I remind you that the signed Loan Discharge Memorandum you provided contains a declaration stating that "The Company [LCS Finance] has made payment in money at the order of the Relevant Person of the Paragraph 3 Sum to the Payee Trustee". A Memorandum of Receipt acknowledges receipt of said sum. This contradicts your statement that LCS Finance are the only party involved in the arrangements. The Trustees are clearly in possession of the relevant documents, copies of which would enable you to comply with the Information Notice.

You are asking me to accept you have undertaken genuine commercial transactions which involved you borrowing a significant sum of money incurring fees/interest and from which you continue to have an outstanding debt. Yet at the same time, you suggest that you are unable to obtain the legal and other supporting documents which set out the process and the

> terms of such finance. I don't accept that the documents are not within your power to produce or that the required information cannot be provided. It is not for HMRC to suggest what influence you may exert over LCS or any other party to provide the documents to enable you to comply with my request or which other parties may be able to assist you in the matter. I do not at this point however accept that you have made every attempt to provide the documents and information requested. The onus is on you to provide the evidence to show how the arrangements are intended to work, that they were implemented as intended and to explain how they work for the purpose of avoiding the Loan Charge."

33. Lucentum responded on 7 December 2022 by way of appeal and providing the clarification as to the bank statements. They questioned why HMRC considered there was a share subscription agreement as the Appellant understood that the only parties to the arrangements were himself and LCM. On that basis it was asserted that no other party would have the documents, nevertheless the Appellant enclosed an email (also dated 7 December 2022) in similar form to that sent to LCS but addressed to Griffin.

34. It was contended that the Appellant had no influence over LCS so as to compel production of any documents with all efforts having been made and exhausted without successfully obtaining the documents. It was stated that that the Appellant was not aware of any bank statements which would show the transfer of funds associated with the HLM as it was only a transfer of the liability and not the funds themselves. It was also confirmed that not promotional or marketing material or correspondence had been produced.

35. By the same letter the Appellant notified HMRC that OSLRT (to which the Company made the payments, and which lay at the heart of HMRC's enquiry) was not a trust as it did not meet one or more of what are described as "the 3 certainties required for valid formation of an express trust" such that the Enquiry was redundant thus invalidating the Notice.

36. On 20 December 2022 Lucentum provided a copy of the response received from Griffin enclosing various documents complying with item 15 but item 19 of the Outstanding Information/Documents.

37. HMRC's review conclusion letter dated 20 January 2023 acknowledges that certain of the Outstanding Information/Documents had been provided under cover of the letter of 15 August 2022 but were not received until after 18 August 2022. The letter confirmed the Penalty on the basis that absent a notification to the Tribunal of the appeal against the Notice the terms of the Notice had become final, and the Appellant was bound to comply with its terms. Its terms had not been complied with, with the consequence that he had rendered himself liable to a penalty. As the assessment to the Penalty had been raised within the relevant statutory time limits it had been validly issued. HMRC identify that OSLRT through Griffin was party to the arrangements and who might reasonably be expected to also have copies of the remaining Outstanding Information/Documents and conclude that as no attempt had been made to obtain the documents from these parties no reasonable excuse was made out. In particular HMRC reference the terms of the HLM which provides that Griffin subscribed to a share in LCS in exchange for the subscription amount which countermands the Appellant's position that Griffin was a party to the arrangements. HMRC also reject any contention that the voiding of the trust rendered the information request redundant as their powers to require provision of information and production of documents, in the present case, are founded in the Enquiry.

LEGISLATION

38. Pursuant to paragraph 1 Sch 36 HMRC may require a taxpayer to provide information or produce documents "if the information or document[s] [are] reasonably required for the

purposes of checking the taxpayer tax position". Where a person is required by a paragraph 1 notice to provide information or produce documents they must do so within the period reasonably specified in the notice. Paragraph 18 provides that a notice under paragraph 1 "only requires a person to produce a document if it is in the person's possession or power".

39. Section 49F Taxes Management Act 1970 (**TMA**) provides that where HMRC give notice of the conclusions of a review, then, absent notification of the appeal to the Tribunal, those conclusions are treated as the basis of a formal settlement under section 54(1) of the appeal formerly notified to HMRC.

40. Rule 5 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 grant the Tribunal wide powers of case management. Including the power to stay proceedings. In exercising its case management powers the Tribunal must act in accordance with the overriding objective to deal with matters justly and fairly.

PARTIES SUBMISSIONS

Appellant's submissions

41. The principal grounds for the application are set out in paragraph 4. above. It is the Appellants case that once the status of OSLRT has been confirmed by the relevant BVI and English and Welsh High Court orders the matter of the which Tribunal is currently seized (i.e. the Appellant's liability to the Penalty) will "fall away by definition".

42. The Appellant contends that as OSLRT was void ab initio the Appellant cannot have received sums by way of disguised remuneration as he never had legal title to the sums. In consequence of the legal status of OSLRT, HMRC's attempts to tax the payments received are wrong in law. He contends that the arbitral proceedings will determine the beneficial ownership of the property previously considered to have been trust property and the position ultimately then confirmed with binding effect by the High Court, in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and section 36 of the Arbitration Act 1950. The consequence, so it is contended, will be that there can be no sound basis on which the documents and information could have been requested. By inference, I conclude that the Appellant contends that the information and documentation is not relevant to the tax position of the Appellant with the consequence that the information and documentation does not come within the relevant provisions of Sch 36.

43. The Appellant also appears to contend that there was no Outstanding Information and Documentation because the request must also be void.

44. In the Appellant's submission a stay is necessary in order that the High Court order confirming the invalidity of OSLRT can be obtained at which point HMRC will be forced to concede that no Penalty was due and there will be no issue for the Tribunal to determine.

45. In their submission of 13 September 2023 the Appellant states:

> "… were the Tribunal not to grant the Application for a stay, then the Tribunal would be placed in an injurious position. The Tribunal would be called upon to adjudicate matters concerning a trust which never had legal existence. Upon the issue of the said High Court Order, the Tribunal would be bound to reconsider the matter, at the waste of public time and money."

HMRC's submissions

46. HMRC oppose the Appellant's application for a stay.

47. HMRC contend that they opened an enquiry in respect of the Appellant's tax return for the tax year ended 5 April 2019 in order to establish whether the Appellant had received

disguised remuneration through OSLRT and in respect of which the Appellant was liable to the loan charge. HMRC were aware that the Appellant was a user of the Sunrise arrangements.

48. HMRC were concerned that the Appellant had received monies which were not subject to any income tax charge and, it is contended, issued the Sch 36 notice with a view to establishing whether or not the Appellant's self-assessment tax return for the year to 5 April 2019 was accurate. HMRC contend that the legality of the information notice has been determined as it was appealed by the Appellant and subject to a review by HMRC but there was no notification of an appeal to the Tribunal with the statutory consequence (pursuant to section 49F(2) TMA that the appeal was treated as settled in accordance with the provisions of section 54 TMA. In this regard they refer to the judgment of *PML Accounting Ltd v HMRC* [2018] EWCA Civ 2231 (at [45], [47] and [113 – 115]). HMRC submit that, as a consequence, the Appellant is not entitled to assert that there is no basis on which the information and documentation could be requested and the sole issue for determination is whether the Appellant complied with the terms of the notice or had a reasonable excuse for failing to do so.

49. In substance HMRC contend that the relevant issues to be determined by the Tribunal in respect of the present appeal are limited to answering the following three questions:

(1) Did the Appellant fail to comply with the terms of the Notice?

(2) If so, has the Penalty been validly issued?

(3) If so, does the Appellant had a reasonable excuse for non-compliance?

50. The question of the validity or otherwise of OSLRT is not relevant to any one of those questions.

51. HMRC make various arguments as to the effect and nature of any English and Welsh court order that may be obtained (with which the Appellant takes issue – see paragraph 42. above) but ultimately contends only that the validity of OSLRT is an irrelevant issue in the context of the points to be decided on the Penalty appeal.

DISCUSSION

52. I have no hesitation in concluding that the Appellant's application for a stay should be refused. Substantially for the reasons advanced by HMRC.

53. As indicated above, it does not appear to be contested by the Appellant (nor can it be) that the Company made payments to what purported to be a trust, namely, OSLRT; and that payments were subsequently received by the Appellant from OSLRT, whatever its status. Those payments were not returned as taxable income by the Appellant when paid. It also appears to have been accepted in correspondence, and by reference to documents and information which have been disclosed that the Appellant entered into the hypothecated loan agreement referred to at paragraph 9. above and that the payment referred to at paragraph 10. above was subsequently made. It has been claimed that no loans were outstanding as of 5 April 2019, at least indicating that the Appellant considered that any loans made to him were repaid by him. Bank statements have been produced showing movement of money in line with the agreements entered.

54. HMRC stated when opening their Enquiry that they were (and are) concerned that the various payments (which the Appellant cannot contest were made) represent disguised remuneration. It is open to the Appellant, in due course and consequent upon HMRC closing the enquiry in a manner adverse to the Appellant, to challenge HMRC's conclusion and the consequences which follow.

55. Similarly, the Appellant could have (and initially did) challenge the Notice on the basis that the information and documents were not reasonably required by HMRC for the purposes of checking the Appellant's return. Such a challenge could have been by reference to the validity of OSLRT. However, the question of validity of OSLRT was not, it would appear, something which had occurred to the Appellant or his advisors at the time that he did, in fact initiate a challenge to the Notice. HMRC had no reason to consider, at the time they issued their review conclusion letter in respect of the appeal against the Notice, that the validity of OLSRT was in question. The Notice was affirmed and there was no notification of an appeal to the Tribunal.

56. As no appeal was notified to the Tribunal in respect of the review the statutory consequence (as per sections 49F(2) and 54 TMA) is that the conclusions stated in the review represent a formal settlement between the Appellant and HMRC as if the Tribunal had determined the appeal on the basis agreed.

57. As such it is settled that:

(1) the Notice was issued in order to check the Appellant's tax position

(2) the information and documents requested were reasonably required

(3) the Notice was validly issued.

58. Whether the Appellant should be entitled to seek to relitigate the validity of the Notice by reference to an assertion that OSLRT has been voided and the Enquiry thereby rendered irrelevant or whether it is an abuse of process would be a matter to be determined on a broad merits basis (see [20 – 27] *HMRC v Dhalomal Kishore* [2021] EWCA Civ 1565) were the Tribunal to have jurisdiction to consider the validity of the Notice at all when determining whether there was a failure to comply for the purposes of an appeal against the Penalty.

59. However, I have no such jurisdiction. In in *PML Accounting Ltd v HMRC* [2017] EWHC 733 (Admin) (at [63 – 67]) it was determined:

> 63. There is another reason that in my judgment the Tribunal had no jurisdiction to consider the validity of the information notice in the penalties appeal. That is the narrow scope of the issues in a penalties appeal as a result of the relevant statutory provisions. That narrow scope was correctly identified, in my view, in *Birkett v. Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 89 (TCC).
>
> 64. The claimant contended that in this case the issue was whether the claimant was liable for a penalty under paragraphs 39 … of Schedule 36 of the 2008 Act. That included whether [HMRC's] decision was correct that the pre-conditions for imposing [the penalty] been met. The pre-conditions in this case included whether there was a valid information notice which had not been complied with. In the [taxpayer's] submission the Tribunal was correct to conclude that the validity of the information notice was "fundamental to the question of the lawfulness of the penalties under appeal".
>
> …
>
> 66. … The Tribunal's jurisdiction is statutory. Section 49D TMA 1970 provides that the Tribunal's overall jurisdiction is to decide "the matter in question". The right to appeal a penalty set out in paragraph 47 of Schedule 36 of the 2008 Act is against "(a) a decision that a penalty is payable by that person under paragraph 39, …" or against the amount (not relevant in this case). Under paragraph 48(3) the Tribunal is limited to confirming or cancelling the decision. In a penalties appeal paragraph 39(1)

> of Schedule 36 applies "to a person who (a) fails to comply with an information notice" where there is liability to a penalty of £300. …
>
> 67. Thus the issue on appeal whether a penalty is payable under both paragraph 39(1) … is the narrow one of whether, … the person has failed to comply with the notice … The validity of the information notice which gives rise to the imposition of a penalty simply does not arise. …"

60. On the basis that there is no jurisdiction of the Tribunal to consider the validity of the notice, whether AILRT is or is not void ab initio and the status of the arbitral proceedings in the BVI, and court order from the BVI or indeed from the High Court are all irrelevant in these proceedings. The Tribunal determining this appeal against the Penalty must proceed on the basis that the Notice was valid.

61. I agree with HMRC that the only questions to be answered by the Tribunal in this appeal are those identified in paragraph 49..

62. In the context of a stay application it is not necessary for me to determine the answer to those questions as that is the role of the Tribunal appointed to hear the appeal. However, in the context of the application for a stay I must determine whether the status of OSLRT is relevant to any of the questions.

63. I note that the first and second questions are matters of fact to be determined by reference to the terms of the Notice and the validity of AILRT will be irrelevant to them both.

64. The Appellant contends that the validity of OSLRT is a relevant issued in determining whether he had a reasonable excuse.

65. I do not consider that the validity of OSLRT is relevant to the reasonable excuse defence. I note that the test which the Tribunal hearing the appeal against the Penalty is required to apply is as set out in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) as recently endorsed by the Court of Appeal in *William Archer v HMRC* [2023] EWCA CIV 626. That test requires the tribunal to:

(1) Establish the facts that the Appellant asserts give rise to the reasonable excuse;

(2) Decide whether the facts are proven;

(3) Determine whether, viewed objectively, the proven facts provide a reasonable excuse for default;

(4) If the reasonable excuse ceased determine if there was a reasonable delay between the excuse ending and compliance.

66. Where the excuse advanced is that the Appellant reasonably believed that there was no obligation to comply the Tribunal must determine as a fact whether that belief was held and if so whether the belief was reasonable.

67. The Appellant's appeal against the Penalty states that OSLRT was void but notably it does not contend that the Appellant believed or had been advised that OSLRT was void when he failed to comply with the Notice (some months previously). That it does not do so is entirely understandable in the context of the extensive correspondence between the Appellant's representatives and HMRC throughout the period between the issue of the Notice and the imposition of the Penalty which centred entirely on whether the documents were within the Appellant's possession or power.

68. On the case as pleaded the status of OSLRT at the point at which payments were made to or by it and in February 2019 when it is claimed that any outstanding loans were repaid has

no bearing on whether the Appellant has complied with the Notice or had a reasonable excuse for not doing so and therefore does not justify a stay of this appeal against the Sch 36 Penalty

DISPOSAL

69. For the reasons stated above I refuse the application the appeal should not proceed to be determined.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 03rd OCTOBER 2023