TC02540

Appeal number: TC/2010/05514

APPLICATION TO STRIKE OUT – Tribunal Procedure - First-tier Tribunal) (Tax Chamber) Rules 2009 rule 8(3)(c) — whether decision of Court of Appeal was* per incuriam *- no– whether taxpayer had an arguable case under the European Convention – no — application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK ALLAN **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
MICHAEL BELL

Sitting in public at 45 Bedford Square on 13 September 2012

Michael Sherry, counsel, instructed by Charterhouse (Accountants) LLP, for the Appellant

James Rivett, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. HMRC apply to strike out the appeal of the Appellant, Mr Mark Allan under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the basis that it has no reasonable prospect of success.

2. The appeal is made against a discovery assessment issued to Mr Allan in the sum of £139,726.80 on 26 October 2009. The assessment was raised in respect of contributions of assets (not being money) made by Mr Allan's employer to a retirement benefits scheme which were taxable as employment income under s. 386 of the Income Tax (Earnings and Pensions) Act 2003 during the tax year 2004/2005, and which had not been included within Mr Allan's self-assessment tax return for that year.

3. Before us, Mr Sherry represented Mr Allan, and Mr Rivett represented HMRC.

Decision in *Irving* and the application of the European Convention

4. It is common ground between the parties that, given the judgment of the Court of Appeal in *Irving v HMRC* [2008] EWCA Civ 6, Mr Allan's appeal cannot succeed before this Tribunal.

5. In *Irving*, the Court had to construe the phrase "payment of a sum" in section 595, Taxes Act 1988 (replaced following the tax law re-write by section 396 of the Income Tax (Earnings & Pensions) Act 2003). The question was whether the transfer of assets to a funded unapproved retirement benefit scheme ("FURBS") was a "payment of a sum". The Court of Appeal reached the conclusion that the words should be interpreted as applying not only to payments of sums of money, but also to transfers of assets not being money. We were told by Mr Sherry (who had represented Mr Irving before the Court of Appeal) that he had sought leave to appeal to the House of Lords, but leave was not given.

6. HMRC submit that therefore this appeal should be struck out under Rule 8(3)(c), Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 on the grounds that there is "no reasonable prospect of the appellant's case, or part of it, succeeding".

7. Mr Allan's argument is that in reaching its decision in the *Irving* case, the Court of Appeal did not take account of the rights of the taxpayer under the European Convention of Human Rights ("the Convention"), and its decision is therefore *per incuriam*. While it may be that this Tribunal (and the Upper Tribunal) is bound by the *Irving* decision, Mr Sherry's submission is that there is a reasonable prospect of success on this issue either before the Court of Appeal or the Supreme Court.

8. The Convention has effect as a matter of English law by virtue of the Human Rights Act 1998 ("HRA 1998"). Article 1 of the First Protocol ("Article 1/1") to the Convention provides as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

9. Section 1(1) HRA 1998 defines "Convention rights" for the purposes of the Act to include Article 1/1 of the Convention.

10. Section 3 HRA 1998 provides that UK primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section--
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

11. It is common ground that Mr Allan's rights under Article 1/1 are in point. The issue is the extent of the rights of States to impose taxes under the second paragraph of Article1/1, and whether s396 ITEPA (as interpreted by the Court of Appeal in *Irving*) goes beyond the "margin of appreciation" afforded to States under the Convention.

Per Incuriam

12. Mr Sherry submits that the Court of Appeal's decision in *Irving* is *per incuriam*. Although the decision binds both this Tribunal and the Upper Tribunal, the Court of Appeal is therefore not itself bound by its decision. It is therefore open to the Court of Appeal to allow Mr Allan's appeal by restricting the application of s396 to money payments only notwithstanding its decision in *Irving*. Mr Sherry submits that a decision is *per incuriam* where the relevant court has overlooked a relevant statute or binding authority which would have persuaded the court to adopt a different *ratio descidendi* (*Ashburn Anstaldt* [1989] 1 Ch 1). None of the judgments in *Irving* in the Court of Appeal make reference to Convention rights, and Mr Sherry submits that there is no evidence that the Court had in mind Article 1/1 when reaching its decision.

13. Mr Rivett submits that the decision of the Court of Appeal is not *per incuriam*. The decision in *Irving* therefore not only binds this Tribunal and the Upper Tribunal,

but the Court of Appeal as well. Mr Rivett submits that the fact that the decision could be overturned on an appeal to the Supreme Court should not weigh in our decision, particularly in the light of the fact that the taxpayer in *Irving* had himself sought leave to appeal to the Supreme Court, but that leave had not been given.

14. Mr Rivett submits that there are only limited circumstances in which a decision of the Court of Appeal can be regarded as *per incuriam*, and cited to us paragraph 96(2009) of *Halsbury's Laws* (at page 110):

> A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own, or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or a rule having statutory force, or when, in rare and exceptional cases, it is satisfied that the earlier decision involved a manifest slip or error and there is no real prospect of a further appeal to the House of Lords. A decision should not be regarded as given *per incuriam* simply because of a deficiency of parties, or because the court had not the benefit of best argument, and, as a general rule, the only cases in which decision should be held to be given *per incuriam*, are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.

15. Mr Rivett submits that the Court of Appeal did not give its decision in *Irving* "in ignorance of the terms of a statute or a rule having statutory force" or that it involved a "manifest slip or error". The fact that the Court of Appeal did not refer to the Convention in its judgment does not render it *per incuriam*. Rather, the Court of Appeal did not have the benefit of one particular argument that Mr Allan now wishes to raise, but as the quotation above from *Halsbury* makes clear, this does not render the judgment *per incuriam*.

Article 1/1

16. Mr Sherry on behalf of Mr Allan submits that s396 is confiscatory in nature, and is wider than the margin of appreciation afforded to States. This is because tax is imposed upon Mr Allan in circumstances where the payment does not necessarily inure for his benefit, and he has no control over the timing or the amount of the payment.

17. Mr Sherry notes that the payment is made by the taxpayer's employer, who could be wholly unconnected with the taxpayer (although it is acknowledged that in this case there is a connection). The payment is made to the trustees of a FURBS, and may never benefit the taxpayer – not only is there an investment risk, but if the taxpayer should die before retirement, neither the taxpayer nor his estate would benefit from the payment.

18. Mr Sherry argues that it is confiscatory to impose tax upon an individual in circumstances where the individual has received nothing other than a mere hope or contingent expectation of a payment which he cannot turn to account and when he has not received the means with which to pay the tax. Although Article 1/1 confers a wide margin of appreciation to States, Mr Sherry submits that this wide margin does not extend to a measure which has a confiscatory effect. In support of this argument he cited the decision of the European Court of Human Rights in *Hentrich v France* [1994] ECHR 13616/88, where the European Court held that a right of pre-emption granted to the French *fisc* in connection with sales of land. was incompatible with the Mrs Hentrich's rights under Article 1/1.

19. The effect of applying Article 1/1 in these circumstances is therefore to compel the courts to adopt an interpretation of s396 ITEPA which is consistent with Mr Allan's Convention rights. One such interpretation would be to restrict s396 to the natural meaning of the language used, and limit its impact only to payments of money.

20. Mr Sherry acknowledges that there are provisions in the legislation which avoid or relieve the s396 charge, in particular where the relevant benefits take the form of a lump sum or where the taxpayer can show that he will never receive anything. But, argues Mr Sherry, these provisions only operate in very limited circumstances – and in other cases there is sequential double taxation. Indeed submits Mr Sherry, the existence of the relief in s392 ITEPA shows that Parliament recognised the confiscatory nature of the provisions – but the existence of a limited subsequent relief does not change their confiscatory nature. Mr Sherry also argues (in response to a point made in HMRC's statement of case) that the fact that the employer can foresee that a payment to a FURBS will have the consequence of imposing a tax charge upon its employee, does not made the tax charge any less confiscatory.

21. Mr Rivett submits that the provisions of s396 ITEPA fall within the broad margin of appreciation given to States under the Convention, and that courts respect "the legislature's assessment in such matters unless it is devoid of reasonable foundation" (*National & Provincial Building Society v United Kingdom* (1997) 25 EHRR 127 as summarised by Kenneth Parker J in *R oao Robert Huitson v HMRC* [2010] EWHC 97 (Admin) at [75.]). There is a consistent line of authority in which both the UK and the European courts have rejected challenges brought to different aspects of UK tax legislation. Examples cited to us by Mr Rivett included:

(1) *R v Dimsey* [2001] STC 1520 – relating to economic double taxation under the transfer of assets abroad provisions. The House of Lords rejected the taxpayers argument that these provisions were inconsistent with Convention rights, and Article 1/1 in particular;

(2) *R oao Robert Huitson v HMRC* [2011] EWCA Civ 893 – a taxpayer challenged the introduction of retrospective tax legislation. The Court of Appeal rejected the taxpayer's argument on the basis that the provisions in question were within the margin of appreciation allowed to states; and

(3) *R oao Professional Contractors and others v IRC* [2001] STC 629 - a taxpayer challenged the "IR35" provisions on the basis that they breached Article 1/1 because they interfered with the rights of an individual to enjoy the benefit of ownership of shares in an "IR35" company - on the basis that the ownership of shares was a property right, and that the enjoyment had been rendered more expensive because of the imposition of taxation. This argument was rejected in the decision of the High Court, and was not pursued in the appeal to the Court of Appeal.

22. As regards the decision of the European Court of Human Rights in *Hentrich*, Mr Rivett submits that this is in fact the only case in which a court has found that tax legislation had infringed an individual's rights under Article 1/1. In all other cases, the courts have found that taxing statutes (even if they apply retrospectively or levy economic double taxation) fall within the margin of appreciation allowed to States.

Procedure

23. Mr Sherry acknowledges that both this Tribunal and the Upper Tribunal are bound by the Court of Appeal's decision in *Irving*. However, he submits that there are reasonable prospects of the Appellant succeeding on the Article 1/1 point either before the Court of Appeal or before the Supreme Court, and for those reasons, this appeal should not be struck out. Even if the Tribunal took a restrictive interpretation of Rule 8(3)(c), so that the reference to "success" is a reference to success before this Tribunal, Mr Sherry notes that the Rule gives the Tribunal discretion, and does not compel a strike-out. Given the overriding objective in Rule 2 to deal with cases fairly and justly, Mr Sherry submits that the Tribunal should exercise its discretion not to strike-out, as to strike out the appeal would deny Mr Allan access to justice. The proper course in this case is to hear the case, and if bound by authority to refuse the appeal but give leave to appeal to the Upper Tribunal. Mr Sherry cites *Kleinwort Benson v Lincoln County Council* [1992] 2 AC 349 as being analogous.

Conclusions

24. We agree with Mr Rivett that Mr Allan's rights under Article 1/1 have not been infringed. We cannot identify any basis on which the provision of s386 could seriously be said to fall outside the wide margin of appreciation given to States under the Convention. It is a fact that all taxation is confiscatory in nature (which is why the courts have traditionally adopted a strict approach when interpreting fiscal legislation). There is a consistent line of case law upholding the rights of States to impose taxation, even in circumstances where, for example, the taxation is imposed retrospectively, or where the taxpayer suffers economic double taxation. For a tax law to infringe rights under Article 1/1 it must be utterly egregious. In this context we note that the European Court of Human Rights held that the provisions in the *Hentrich* case infringed the Convention because of the arbitrary and selective way in which the provisions operated, which were scarcely foreseeable and were not attended by basic procedural safeguards. None of these factors are present in relation to the operation of s386. For this reason we consider that Mr Allan's case has no reasonable prospect of success, even if it were to be appealed the Supreme Court.

25. Further, even if there was an arguable case that Mr Allan's Convention rights had been infringed, we find that the decision of the Court of Appeal was not given *per incuriam*, and therefore binds not only this Tribunal, but also the Upper Tribunal and the Court of Appeal itself. The fact that Mr Allan now wishes to raise an argument that was not previously raised before the Court of Appeal does not render the Court of Appeal's judgment *per incuriam*. Further, the possibility that Mr Allan might obtain leave to appeal from the Court of Appeal to the Supreme Court is mere speculation (particularly given our view of the underlying merits of his case, and the fact that leave was refused in the *Irving* case), and cannot be taken into account by this Tribunal in considering the prospects of success of this appeal.

26. For these reasons we consider that this appeal has no reasonable prospects of success, and we therefore strike it out.

27. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 12 February 2013

Cases referred to in submissions but not mentioned in the decision:
A, B, C and D v UK (1981) ECHR App No 8531/79
Sporrong und Lonnroth v Sweden (1982) 5 EHRR 35
AGOSI v UK (1986) 9 EHRR 1
Wasa Liv Omsedsidigt v Sweden (1988) ECHR App No 13013/87
Gausus Dosier und Fordertechnik GmbH v Netherlands (1995) 20 EHRR 403
Cassell & Co Ld v Broome [1972] AC 1027
Lancaster Motor Company (London) Ltd v Bremith Ltd [1941] 1 KB 675
Young v Bristol Airoplane Company Ltd [1944] 1 KB 718
Rakhit v Carty [1990] 2 QB 315
Rob Lewis v HMRC [2012] UKFTT 326 (TC)
Fat Sams Holdings Ltd v HMRC First Tier Tribunal: 24 May 2012