[2020] UKFTT 0081 (TC)

TC07576

PROCEDURE – ex parte application by HMRC for Tribunal approval of information notice to taxpayer – taxpayer applying to attend hearing of that application – whether has right to do so – no – whether Tribunal has power to permit it to attend – no – taxpayer's application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/19/6311

BETWEEN

PERFECTOS PRINTING INKS CO LTD **Applicant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers on the basis of representations on behalf of the applicant

DECISION

INTRODUCTION

1. In September 2019, HMRC applied to the Tribunal for a tribunal-approved notice under paragraph 1 of Schedule 36 Finance Act 2008 to be issued to the appellant company.

2. Oddly, and at variance to most if not all such applications made by HMRC, it did not state that the application was without notice to the taxpayer nor did it expressly ask for the hearing of the application to be in private. The tribunal assumed that this was an error and treated it in the same manner as any Sch 36 application by HMRC for tribunal approval of an information notice which are invariably made without notice to the taxpayer and so, on 30 September 2019, it directed that the application would be heard in private and it did not notify the taxpayer of the application.

3. Another error made by the tribunal was that it processed the application so promptly it allocated the application a hearing date which was before the date notified by HMRC to the taxpayer being the date by which the taxpayer needed to make its representations to HMRC. For that reason, the original hearing had to be cancelled.

4. On 10 October, before a second hearing could be arranged, the appellant applied to the tribunal for an oral hearing of HMRC's application. It wished to have the opportunity to put its case that the information was not reasonably requested and that HMRC was (it said) manifestly abusing its power in the enquiry into the company's tax affairs. It submitted representations by counsel, various witness statements, and other documents.

5. On 18 October, the Tribunal wrote to HMRC to notify it of this application and give them the opportunity to respond; at the same time, HMRC were asked to clarify whether their notice was intended to be made ex parte.

6. On 31 October, HMRC responded to say that they did rely on para 3(2A) in making the application; it was made without notice to the taxpayer and HMRC required the hearing to be in private.

7. On 5 November, the appellant responded to HMRC's response.

DETERMINATION ON THE PAPERS

8. The taxpayer's application was almost entirely focussed on the hearing of HMRC's information notice application: the taxpayer wished to attend and participate in that hearing. It did not expressly ask for a hearing of its application to attend that hearing.

9. Nevertheless, I have considered whether I should resolve this application on the papers or after a full hearing. My conclusion is that I should resolve it on the papers:

(1) The hearing of HMRC's application has already been much delayed and an oral hearing will delay it further;

(2) An oral hearing would only be of real assistance if I was in doubt about the outcome and for reasons given below I am not.

THE ISSUE FOR DETERMINATION IN THIS APPLICATION

10. The evidence and submissions provided by the appellant to support its application was quite voluminous but, with the exception of a few pages of counsel's submissions, related entirely to the question (legal and factual) of whether the Tribunal should exercise its (alleged) discretion in favour of the appellant and call an inter-partes hearing and why, whether the hearing was ex parte or inter partes, the appellant considered HMRC's application should be refused.

11. However, the logically prior question is whether the Tribunal actually has a discretion to order an inter partes hearing. If it does not, there is no need to consider (at this stage) its legal and factual case on why the discretion should be exercised in its favour.

12. On that question, which is the only issue I address in the decision notice, the applicant's submissions were, as I have said, quite short. In summary, the applicant's position was

> (1) The taxpayer had the right both to be present at and to make submissions during the hearing of HMRC's applications and; or in the alternative
>
> (2) the tribunal had a discretion to permit the taxpayer to attend and be heard at the hearing of the application

and previous FTT decisions which had said otherwise (and in particular my decision in *Mr E* [2018] UKFTT 590 (TC)) were wrong in law. Those submissions I will determine in this decision.

WHAT IS MEANT BY NOTICE TO THE TAXPAYER

13. Before doing so, I explain what I understand the appellant to be applying for. It applies for an inter partes hearing. I have set out in previous decisions what I then understood an inter partes hearing to mean: see §§14-20 of *Mr E*. The appellant's counsel did not suggest that what I said at that point in *Mr E* was wrong and therefore I proceed on the same understanding as expressed there in this determination.

14. At §§18-19 in *Mr E,* I dealt with the distinction between an on notice (or inter partes) hearing and an ex parte Sch 36 hearing, where some advance notice of the application (but not the hearing) is often (but not invariably) given to the taxpayer and (where applicable) third parties under the provisions of §3(3) Sch 36. It was the giving of this advance notice of the application that alerted the applicant here to the fact HMRC had made an application to this Tribunal and enabled it to make its application to be heard before the Tribunal had actually determined HMRC's information notice application.

15. As I said in *Mr E,* the notice that is given by HMRC under §3(3) is very different to the right to attend and be heard at an inter partes hearing before the Tribunal and should not be confused. The applicant here has already been given notice by HMRC under §3(3) that HMRC is making the application: it is now seeking an inter partes hearing of that application at which it will have the right to attend the hearing and at which it would have the right to hear what HMRC said and the right to respond.

MUST §3 APPLICATIONS BE INTER PARTES?

16. The taxpayer's first point appeared to be that <u>all</u> applications by HMRC under §3 Sch 36 in respect of first party information notices must be determined at inter partes hearings. The appellant's counsel made this submission relying on §3(2) which provides:

> An officer of revenue and Customs may ask for the approval of tribunal to the giving of any taxpayer notice or third party notice….

He suggested it was in this form to comply with the Human Rights Act and The Tribunals Courts and Enforcement Act 2007 which enabled Rules to be tabled:

> 'with a view to securing….that the tribunal system is accessible'

And the Rules themselves which require the Tribunal to ensure:

> 'so far as practicable that the parties are able to participate fully in the proceedings'

17. I do not agree that the appellant is right about this. Firstly, §3(2) is followed by §3(2A) which provides:

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

As this gives HMRC the power to make an application that is without notice, it clearly implies that the hearing in such cases will be without notice, else there is no point in giving HMRC the power to make an application without notice.

18. The point of §3(2A) seems to be that an application by HMRC does not have to be made without notice: but HMRC have the power to decide whether nor not they wish to make the application without notice. And where they do make the application without notice (which in practice they always, or almost always, do) it implies the Tribunal has no discretion to hear it on notice to the taxpayer.

19. I note that this was the purpose of the amendment, as the explanatory notes to s 95 FA 2009 which enacted Sch 47 which inserted new §3(2A) reads as follows:

> Paragraph 2 inserts new paragraph 3(2A) into Schedule 36 to make clear that applications to the tribunal for approval of taxpayer or third party notices are heard without the taxpayer being present.

Human rights

20. The appellant's counsel did not explain which human rights he considered infringed by an information notice application hearing being in private: I presume he would refer to the right to privacy and the right to a fair hearing. I think that the answer to this is that no rights conferred by the convention are infringed.

21. As I said at §39 of *Mr E*, a taxpayer during the investigation stage has only a qualified right to privacy to protect. His right to privacy is qualified because HMRC have the right – both under the European Convention on Human Rights and under common law – to carry out reasonable checks into whether a taxpayer is paying the correct amount of tax. A taxpayer's right to privacy, in so far as HMRC is concerned, only relates to documents not reasonably required for the purpose of checking his tax position.

22. As to the right to a fair hearing, there is no such right to a fair hearing in respect of HMRC's investigatory powers. This is for similar reasons that persons do not have the right to a hearing of any application by the police for a search warrant. It would stymie an investigation. As I said at §38 of *Mr E*, the right to a fair hearing is a right to a fair hearing as and when HMRC actually make an assessment.

The TCEA and the Rules

23. And as for the TCEA and the Rules quoted at §15 above, these relate to making a tribunal hearing accessible and fair for the parties: they say nothing about who the parties to a hearing are. Sch 36 §3(2A) makes it clear that the taxpayer is <u>not</u> a party to the hearing of an application for an information notice in respect of their tax affairs where HMRC apply for it to be in private. So those parts of the legislation quote by the appellant's counsel are not relevant.

Conclusion

24. I have given previous quite lengthy decisions on the same issue where I have relied heavily on what was said by the Court of Appeal in *Morgan Grenfell* and *Derrin.* Above I have addressed the specific case put by Mr Gordon on behalf of the appellant but I also taken into account, without repeating, what was said by the Court of Appeal in these cases, such as:

> [118] Those submissions, however, are simply an attack on the whole model of a judicial monitoring scheme rather than one based on inter partes adversarial litigation. The judicial monitoring model was approved by the House of Lords in both T.C. Coombs and Morgan Grenfell, and there has been no decision of the ECtHR, including *Ravon*, which has held that such a scheme is inherently inconsistent with the Convention. ….

25. I find that a taxpayer has no right to attend a hearing of an application made under paragraph 3(2A).

26. I note that later in its application, the appellant then said that 'it is not doubted that the tribunal has the power (indeed, the duty) to hear §3 applications in private in appropriate cases' suggesting even the appellant did not advance the position that the tribunal must hear all Sch 36 applications inter partes that strongly. And it was right not to do so, as that is not the position.

MAY §3 HEARINGS BE ON NOTICE?

27. As I have said, the appellant's secondary position was that the Tribunal has an inherent power to permit a hearing of a Sch 36 application to be inter partes whether or not HMRC applied for it to be ex parte.

28. Mr Gordon's first point was based on §3(2) itself which provides, as I have said, that an application 'may' be made without notice. His interpretation was that the use of 'may' gave discretion to the Tribunal, instead of or as well as HMRC, to have an inter partes hearing.

29. However, my understanding that it is only HMRC who has choice whether to make the application ex parte. And if the application is made ex parte, the Tribunal must determine it ex parte. I consider that my analysis in *Mr E* was correct and, as I said at [54], both *Morgan Grenfell* and *Derrin* are very persuasive that Sch 36 must be read as meaning that an ex parte application under §2&3 Sch 36 must be determined ex parte and the Tribunal has no power to order an inter partes hearing.

30. I recognise that *Mr E* dealt with the position where HMRC were applying to issue a third party notice under §2; here HMRC are applying to issue a first party notice under §1 and 3. I do not think that it makes any difference: the concerns expressed in *Derrin* about revealing the state of an investigation and delaying an investigation apply as much to first party as third party notices.

31. Mr Gordon suggested that the tribunal must have power to order an inter partes hearing because HMRC might unreasonably make an application ex parte. However, I do not agree that that is the right conclusion to draw: it seems to me that the tribunal is not given the power to determine whether HMRC have acted reasonably. The Tribunal's power is to refuse to issue approve the application if HMRC do not satisfy the statutory conditions. If the taxpayer considers HMRC have acted unreasonably, then its remedy is judicial review.

32. Mr Gordon also suggested that the existence of the Sch 36 §3(3), which require HMRC to give some notice to the taxpayer and (where relevant) third parties even where the application is ex parte, themselves indicate that Parliament did not intend all hearings to be ex parte. I cannot agree that that is a logical suggestion. If Parliament intended an inter partes procedure, it would not have needed to include those provisions at all. Those provisions would have been unnecessary as, in an inter partes procedure, the Tribunal will direct exchange of evidence. Th inclusion of those provisions, on the contrary, indicated Parliament's intent that the procedure would be ex parte. Because the procedure was intended to be ex parte, Parliament gave a limited right to third parties and taxpayers to provide comments in advance to HMRC (but not to the Tribunal).

33. In conclusion, for the above reasons and those given by me in *Mr E*, which I do not repeat here, I consider that this Tribunal has no power to order an inter partes hearing when HMRC make an ex parte application under §3(2A) Sch 36 FA 2008.

THE APPELLANT'S CASE AGAINST THE APPLICATION FOR AN INFORMATION NOTICE

34. That conclusion is simply a conclusion that the appellant the Tribunal has no power to allow the appellant to attend the hearing of HMRC's application. There is therefore no point in considering whether I would have exercised such a power in the appellant's favour if I had it.

35. However, all the submissions and evidence which the appellant has provided in opposition to the application for the Tribunal to approve a first party information notice will be before the Tribunal when it hears HMRC's application. The Tribunal will shortly set down that hearing but the appellant will not be informed of the hearing date and will have no right to attend.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

Barbara Mosedale
TRIBUNAL JUDGE

Release date: 19 DECEMBER 2019