Judgments

Ex parte PQ and another

[2019] UKFTT 371 (TC)

UK First-tier Tribunal (Tax)

Judge Barbara Mosedale

12 June 2019

Judgment

Mrs Rhonda Bigwood, HMRC officer, for the Respondents

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

JUDGE BARBARA MOSEDALE:

INTRODUCTION

1. Earlier this year, the Court of Appeal ruled in *R (oao Jimenez) v First Tier Tribunal and HMRC* [2019] EWCA Civ 51 that this tribunal had jurisdiction to approve the issue by HMRC of an information notice to a non-resident taxpayer requiring him or her to provide the requested information about his or her tax affairs.

2. In April 2019, HMRC applied to this Tribunal for approval for an information notice to be issued to two non-residents in respect of information relating to the tax affairs of UK resident company. As is normal in such cases, for reasons as explained in the Court of Appeal decision in *R (oao Derrin) v First Tier Tribunal and HMRC* [2016] EWCA Civ 15 at [67-68], [114] and [118] (and as applied in *Mr E and others* [2018] UKFTT 590 (TC) at [21-57]), and in particular to help ensure the effectiveness of the HMRC investigation, the hearing of this application was ex parte. That meant that neither the intended recipients, nor the taxpayer the focus of the investigation, were entitled to attend the hearing.

3. After hearing HMRC's case, I indicated that, had the intended recipients of the notice been UK-resident, I was satisfied that the notice should be approved. I was concerned, however, that I had no jurisdiction to do so as the two intended recipients were, so far as HMRC were aware, not UK residents.

4. While the intended recipients had no right to attend the hearing, they were given the opportunity to make representations and HMRC presented to the Tribunal their representations. It was their position that their non-resident status meant that they could not be served with a third party information notice; they pointed out that *Jimenez* did not apply to third party information notices. HMRC, on the other hand, had come to the hearing assuming that the Court of Appeal's ruling in *Jimenez* covered third party as well as first party information notices and had not come prepared to explain to me why that was so. So I reserved my decision on this point.

5. This decision records my reasoning on that one point of jurisdiction. Ordinarily it would not be appropriate to publish any part of my reasons for a decision arising out of an ex parte hearing. As I have said, the proceedings are necessarily ex parte and in private to protect HMRC's investigation. Moreover, as neither the taxpayer nor third parties have any right to attend, it is also correct that their private affairs, as discussed in the hearing, should not be made public.

6. However, my decision on whether there is jurisdiction to issue a third party information to non-residents is (so far as I am aware) on a novel point of law and of some public interest; moreover, there is nothing in this decision notice which identifies the taxpayer nor intended recipients, nor reveals to them anything about the state of HMRC's investigation. Lastly, while there is no right of appeal against my decision, it is possible for the intended recipients or the taxpayer to seek permission from the Administrative Division of the High Court to judicially review my decision. It is therefore helpful to them, if they were to consider such action, and for the Court if such action goes ahead, for me to set out my reasoning on this one point, as I have, for reasons given below, decided to grant the approval of the notice requested.

THE RELEVANCE OF THE COURT OF APPEAL'S DECISION IN JIMENEZ

7. My starting point was the decision in *Jimenez* and the reasons why the Court of Appeal ruled that the FTT had jurisdiction to approve the issue of, and HMRC had power to issue, an information to a non-resident in respect of an investigation into his tax liability in the UK. The notice in *Jimenez* was therefore of the type referred to as a '*taxpayer* notice' which is issued under paragraph 1 of Schedule 36 Finance Act 2008 ('Sch 36'). This case concerns the issue of what is referred to as a *third party* notice, as it is a notice to a person to produce information and documents relevant to a tax investigation into another person's tax liability. Such a notice can be issued under paragraph 2 of Sch 36 and the ruling of the Court of Appeal did not apply to such notices as the Court was careful throughout its decision to specifically limit its comments to paragraph 1. See, for an example of this, the final paragraph of Leggatt LJ's decision:

> [57] I would therefore reject the contention that giving a taxpayer notice to a person who is abroad offends the sovereignty of the state in which that person is located. In these circumstances, for the reasons given by Patten LJ, *paragraph 1* of Schedule 36 is not in my view properly interpreted as subject to any territorial limit….
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> (my emphasis)

8. Having said that, some of what the Court of Appeal said in relation to a paragraph 1 (taxpayer) notice would clearly also apply to a paragraph 2 (third party) notice. But there is a fundamental difference between the two types of notice which means it cannot be assumed, as it appears HMRC have done, that paragraph 2 notices can be issued to any non-resident person. And that fundamental difference is that, where a paragraph 2 rather than paragraph 1 notice is sought, the tax investigation being undertaken by HMRC does not relate to any (alleged) UK tax liability of the person on whom HMRC wish to serve the notice. But I will start with consideration of the similarities.

INTENDED TERRITORIAL SCOPE OF SCH 36

9. Sch 36 contains no express territorial limit. The question is what Parliament intended to be its scope. What the Court of Appeal said about this in respect of paragraph 1 appears to me to apply equally to paragraph 2 and that was that the territorial scope of Sch 36 would have been intended by Parliament to have no restriction on it other than would be strictly required to comply with international law:

> [37] It seems to me unlikely that investigatory powers designed to verify a taxpayer's self-assessment in relation to the taxes listed under paragraph 63(1) would have been limited to operating within the UK except insofar as to give them extra-territorial effect would involve an obvious incursion upon the sovereignty of a foreign state which would be contrary to international law. Paragraph 10 is a good example of this. But the more nuanced approach advocated in decisions such as *Masri* and *KBR* suggests that the evident purpose of Schedule 36 and the public interest which underlies it will dictate a construction of the provisions of Schedule 36 which renders them effective in most foreseeable circumstances unless that would involve a breach of international law of the kind I have just described.
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> Per Patten LJ with whom Leggatt and Davies LJJ agreed.

10. So the question for the territorial scope of paragraph 2 is what are the limits required by international law on the territorial scope of information notices seeking information from non- resident third parties about the UK tax liability of other persons?

CRIMINAL LIABILITY NOT IMPOSED

11. International law would normally not permit the imposition of criminal liability on persons not within the jurisdiction of the national courts. However, as the Court of Appeal pointed out in respect of paragraph 1, serving an information notice does not impose criminal liability; non-compliance with an information notice at most may give rise to civil sanctions. And while it might be against international law to seek to enforce outside the jurisdiction civil sanctions for breach of an information notice served outside the jurisdiction, it would not be a breach of international law to enforce it against assets held in the UK by the defaulter.

> [44]…..Non-compliance with the notice is not made a criminal offence and so the presumption that a statute should not be construed as making conduct abroad a criminal offence (which was so decisive in *Perry*) has no application.
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> …
>
> Per Patten LJ

12. This point applies equally to a paragraph 2 as paragraph 1 notice. So the question comes down to whether there is sufficient national interest such that the issue of the proposed notice to a non-resident person is not a breach of international law.

SUFFICIENT NATIONAL INTEREST

13. The decision of the Court of Appeal in *Jimenez* appeared to be that whether HMRC were permitted to issue a notice to a non-resident taxpayer depended on a consideration of the public interest served by the notice compared to the extent to which the notice might offend the sovereignty of another nation (see [49]). While the Court of Appeal did not state precisely where the border was between what was permitted and what was not permitted, they did conclude that the extent of the public interest in the collection of taxes (bearing in mind that liability to UK tax arose from having either a UK residence or UK source of income) was such that it did not offend international law for HMRC to serve an information notice on a non- resident taxpayer for the purpose of checking his liability to tax in the UK.

APPLICATION TO PARAGRAPH 2 SCH 36

14. I have to decide what the principles applied by the Court of Appeal for paragraph 1 (taxpayer) notices mean for paragraph 2 (third party) notices. The difficulty for me is that the reason that the Court of Appeal considered the territorial scope of taxpayer notices extended to non-residents was clearly because the notice was to obtain information relating to the recipient's UK tax liability. That connection between the recipient and the information sought by the notice does not exist with a third party notice.

15. So I have also found it helpful to consider the case of *R (on the application of KBR Inc) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) which was cited with approval by the Court of Appeal in *Jimenez.*

16. In that case, it was decided that the Serious Fraud Office, to assist its fraud investigation, could have the benefit of a disclosure order made against a foreign company, because there was public interest in preventing fraud and 'sufficient connection' on the facts of that case between the information sought and the intended recipient of the notice. In particular, the recipient of the notice was a shareholder in the UK resident company being investigated, one of its directors was based in the UK and there was evidence it had controlled the decision by the subsidiary to make the payments the subject of the investigation.

17. Applying *Jimenez* and *KBR* it seems to me that the territorial scope of paragraph 2 is not the same as that of paragraph 1: while *Jimenez* indicated that that a paragraph 1 information notice may be served on a UK taxpayer where ever resident, it is not the case that any non- resident person may be served with an information notice relating to some other entity or person. On the contrary, HMRC must show a sufficient connection between the intended recipient and the information sought to be obtained before a non-resident may be served with a paragraph 2 information notice.

SUFFICIENT CONNECTION?

18. What is a sufficient connection? I wondered whether it was sufficient for the intended recipient to be a British national. This is relevant in this case as I accept (for the purpose of this hearing) HMRC's evidence that the two intended recipients both hold British nationality and use British passports.

19. The Court of Appeal case of *Ex parte Blain* (1879) 12 Ch.D. 522 (cited in *Jimenez* at [13] as the cornerstone of the cases on jurisdiction) stated the:

> broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied …, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction …

20. However, while Mr Jimenez was a UK national (see [1] of *Jimenez*), his nationality was not the basis of the Court's decision: the basis was that Mr Jimenez was liable to UK tax. Therefore, the Court's decision was not limited to persons who were British nationals; but that leaves me in the position that it is not possible to tell whether the Court of Appeal considered British nationality by itself could be sufficient connection. The case of *Blain* would suggest, however, that HMRC ought to be entitled to issue the notice in this case simply because the intended recipients are both British nationals, albeit no longer resident in the UK.

21. However, in case that is wrong, I have considered whether there are other facts which mean that there would be sufficient connection in this case even if the intended recipients were not British nationals. And I consider that there is.

22. The facts I have found established for the purpose of the hearing in front of me was that the recipients were, at the time at which the decisions were made which gave rise to the alleged UK tax liability, in effect (via a holding company) the sole owners of the taxpayer and (with one other person) the directors of it; moreover, they were the persons who made the decisions which gave rise to the alleged tax liability and it is information in respect of those decisions which is sought by HMRC. Applying *KPR,* I find that is sufficient connection and would be sufficient connection even if they were not British nationals.

23. I consider, therefore, that on the particular facts of this third party application, it is within the jurisdiction of this Tribunal to approve the issue of the information notice to the two intended recipients albeit that they are not now resident in the UK.