TC04004

Appeal number: TC/2013/05005

Income Tax - Residence - Application for a hearing to deal with a preliminary issue - Application Dismissed - Arrangements in relation to Directions

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARRELL HEALEY **Appellant**

- and -

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN

Sitting in public at 45 Bedford Square in London on 28 August 2014

Conrad McDonnell, counsel, instructed by KPMG on behalf of the Appellant

Christopher Stone, counsel, on behalf of the Respondents

DECISION

1. This was an Application requesting me to direct that a preliminary matter be determined by the Tribunal, prior to the main hearing in this Appeal. The substantive appeal in question is a significant Appeal where the Appellant disputes HMRC's closure notice to the effect that having been non-UK resident in the tax year 2006/2007, he was resident in the UK in the following year, 2007/2008.

2. In one scenario it was suggested that a decision in favour of the Appellant might even dispense with the need for the full hearing. The Respondents, however, opposed the application on the ground that the suggested preliminary hearing was bound to be far from simple; that for the preliminary point to be fully addressed on their analysis, the Appellant would still have to produce considerable evidence that would duplicate evidence that would have to be produced in the substantive hearing; that even if the point in issue was resolved in favour of the Appellant, the point would still not conclude the outcome on the substantive matter, and that this was a case where I should follow the general trend of the authorities and refuse the Application, or certainly exercise extreme caution in considering the Application.

3. The facts that were revealed to me were relatively simple.

4. On 2 April 2006, the Appellant left the UK. He had available rented accommodation in Monaco, and he indicated to HMRC that he was going to be working full-time abroad. He apparently indicated in a form, form P85, that he did not intend to live outside the UK permanently. In the event, in the tax year 2006/2007, he did not set foot in the UK, and because HMRC accepted his contention that he was working full-time abroad, it was accepted by HMRC that he was non-UK resident for the tax year 2006/2007.

5. In the following tax year, 2007/2008, it is apparently conceded that the Appellant undertook substantive, i.e. non-incidental, duties in the UK on 71 days, and it appears that as a result HMRC has indicated that he will not be treated as remaining non-UK resident for the tax year 2007/2008, at least if his residential status for that year is to be tested in relation to whether he continued to be working "full-time abroad" in the later year.

6. The question to be answered by the Tribunal, at least if the matter is eventually to be heard by the Tribunal, will be whether the Appellant was UK resident in the year 2007/2008.

7. The basis on which it is now asserted that the Appellant will seek to establish that proposition is that although the Appellant was initially treated as having been non-UK resident in the earlier year 2006/2007 by demonstrating that he was absent for a full tax year and was working full-time abroad, he could equally be said to have been non-UK resident because he effected a "distinct break" when he left the UK on 2 April 2006. If that could be established, as it was suggested that it could be established in a ½ day preliminary hearing, the Appellant would apparently then suggest that his residence status for the later year 2007/2008 should be governed by whether he then ranked as an "arriver" in the UK, and that should be tested, it was claimed, in accordance with the decision of the Supreme Court in *Gaines-Cooper* and *Davies* entirely by reference to the tests contained at the time in HMRC's publication IR20.

8. It was thus suggested that if the Tribunal heard the preliminary point, as requested, and decided in favour of the Appellant that he had effected a distinct break when leaving the UK

prior to the beginning of the tax year 2006/2007, it might follow, it was claimed, that HMRC would then adhere to the guidance of IR 20 and drop their claim that the Appellant was resident in 2007/2008. If they failed to do that, then once the Tribunal had established that the Appellant had made the relevant "distinct break" prior to the beginning of the tax year 2006/2007, the Appellant might conclude that it would be more promising to pursue his claim for breach of legitimate expectations as a judicial review matter before the appropriate court, rather than pursue his Appeal before the First-tier Tribunal.

9. I was told that, to date HMRC has not reached a decision on the issue of whether the Appellant had effected a distinct break on 2 April 2006. That at least suggests that HMRC is not saying that the Appellant is precluded from contending that he effected a distinct break by virtue of having conceded in the form P85 that he did not intend to live outside the UK permanently or indefinitely. What HMRC has indicated is that they want the Appellant to answer numerous questions so that, to use the familiar terminology, they can pursue the multi-factorial enquiry as to whether in the requisite sense the Appellant had effected a distinct break. To date the Appellant has indicated that answering those questions would involve an enormous amount of work, and that if the Appellant is right to suggest that the authority of *Reed v. Clark* conclusively determines that a person has effected a distinct break by being absent from the UK for a complete tax year, then HMRC should accept that proposition and cease to ask the numerous questions, relevant to their intended multi-factorial enquiry.

10. I was of course given no evidence when hearing the Application to order that there be a preliminary hearing. There were, however, tentative references to the fact that the Appellant still had a wife and two children living at the house in Kent, either owned by him or perhaps by him and his wife jointly. There was a suggestion that at some time he may have separated from his wife, but naturally I was not told the remotest detail in relation to that. There was a tentative suggestion that he may not have spent much time in Monaco, where it was suggested that he had settled. Reference was made to his having visited countless countries during the year 2006/2007, though I was not told whether this was for work reasons of for holidays. I was given no detail about the periods of time that he actually spent in Monaco.

11. Although the following point has no bearing on whether the Appellant effected a distinct break on 2 April 2006, it was also indicated that, while he had worked in the UK in performing substantive duties in the year 2007/2008 for 71 days, he may have been present in the UK on more than 140 days in that tax year. I was not clear whether he was present for full days on more than 71 days, and no issue was raised before me as to whether IR 20 was conclusive in relation to the exercise of counting days for the purposes of the 90-day test.

My decision

12. My decision is that I cannot grant this application unless I first conclude that there is a sensible chance that the Appellant can sustain his claim that he effected a distinct break simply by relying on *Reed v. Clark*, and in other words by asserting that total non-presence in the UK for the whole of a tax year conclusively establishes a distinct break. I am not saying that I would grant the application if I was convinced that *Reed v. Clark* does conclusively establish that point because I would still have to assess whether the conclusion in relation to the distinct break might be decisive, or at least extremely important in relation to the conclusion as regards residence status for the later year 2007/2008. Until, however, I

conclude that *Reed v. Clark* establishes the distinct break without any reference to the facts of the present case, beyond the simple assertion that the Appellant did not set foot in the UK in the tax year 2006/2007, it seems to me that I would, by granting the present Application, be setting the scene for a pointless hearing. For as soon as the total absence for the year ceased to be conclusive, the Tribunal would be faced with HMRC contending that they needed numerous questions to be addressed before they could even reach their own conclusion on the "distinct break" issue. Presumably in the suggested ½ day hearing, and not least because the whole point of this suggested preliminary hearing is to eliminate the need to provide all this information, there would be no intention on the part of the Appellant to produce such evidence. In any event, once one reached the conclusion that some, or then more obviously, all, of the evidence had to be considered, the preliminary hearing would become a very significant hearing, that would take very much more than ½ day.

13. It is not for me actually to decide the issue of whether *Reed v. Clark*, or for that matter any other authority, does demonstrate conclusively that absence for a complete year, of itself, establishes a complete break. Needless to say the point was not actually fully debated before me, and the only question for me to decide is whether there is a sensible prospect that the total absence from the UK for a complete tax year does, ignoring all other facts, establish the required distinct break. My decision on that point is that I do not consider that there is a sensible chance of this point being established.

14. It is firstly clear that while in the case of *Reed v. Clark*, the decision in that case was that on living in Los Angeles for 13 months and doing a considerable amount of work there, Dave Clark duly established non-UK residence, it was always acknowledged that this conclusion was one that depended on the individual facts. Dave Clark had no wife, I get the impression that he was relatively firmly based in Los Angeles, and while he may not have been asserting that he worked full-time abroad, he did a considerable amount of work in America. Had the facts been that Dave Clark had retained countless connections with the UK; that he was constantly communicating with his wife and family who remained in the UK; had it been the case that he only had a pied-à-terre in Los Angeles that he rarely stayed at because he spent much time in 10 other countries, with no intention to settle in any sense in Los Angeles, the decision in *Reed v. Clark* might well have been different. And the resultant key point is that until the Tribunal is given the facts and the evidence in this case, I rate the chance of any Tribunal concluding that the present Appellant became non-UK resident by virtue of having effected a distinct break, simply because he never set foot in the UK, to be very slim.

15. I also consider that the later authorities, following *Reed v. Clark*, have heightened the emphasis on the "multi-factorial enquiry", in relation to the "distinct break" issue. I accept that it is definitely accepted that a year's total absence, coupled with full-time work abroad does conclusively establish non-residence. But where the present question for me, and for the Tribunal, is, and would be, whether the year's absence would establish the distinct break and perhaps also be said to establish a decision "permanently or indefinitely" to leave the UK, the later authorities have rather increased the emphasis on considering family and social ties, the feature of settling in a realistic sense in some other place and the countless factors that HMRC's questions that currently remain unanswered are seeking to explore.

16. While I consider that my severe doubt that the "distinct break" point could be established, solely on the basis of the year's total absence, I am inclined to support my decision that this Application must be dismissed by referring to two other points.

17. Firstly the Respondents contend that the test of residence in 2007/2008 would in any event not be governed, or indeed all that influenced, by the decision on the distinct break issue. They contend that the rules in relation to "arrivers" and "leavers" were not that dissimilar. Having regard to the remark made to the effect that the Appellant was present in the UK for in excess of 140 days, albeit not present for the totality of days to that extent, this might also be relevant in considering the residence status for 2007/2008, even indeed if close regard was being paid to HMRC's publication IR20.

18. A final point is that, while I imagine that the Appellant will recognise, having the burden of proof in the substantive matter in this Appeal, that it might well be prudent to advance as much evidence as possible in support of the complete break point, it nevertheless remains the case that if the total absence for the year is itself conclusive in establishing the complete break, this could still be addressed in the substantive hearing. I appreciate that the Tribunal is not then a tribunal that can properly address judicial review questions, but I am not clear that the Tribunal would be precluded from paying regard to the then terms of IR20 in deciding the residence issue for 2007/2008. For once the Supreme Court has itself decided, as a matter of binding case law, that taxpayers should be entitled in the given circumstances to rely on the content of IR20, it seems to me that that guidance is thereby incorporated into the common law tests by the decision of the Supreme Court and that this is a matter that the Tribunal can then pay regard to. Accordingly, should the Appellant be right, and should I be wrong, in relation to the decisive significance of the total year's absence, coupled with the Appellant's contentions as to how HMRC ought then to decide the residence issue for 2007/2008 in accordance with the guidance given in IR20, it seems to me that this is something that could still be advanced in the substantive hearing.

19. My present decision, however, is that, absent any of the relevant evidence other than the single fact that the Appellant did not set foot in the UK for the complete tax year 2006/2007, I consider that a preliminary hearing to hear the requested issue would be futile and should not be granted.

20. The Appellant may seek leave to appeal against this decision, and if he does so, it would be premature to issue Directions, albeit the Respondents produced some draft Directions that had presumably been seen but not commented on by the Appellant. I volunteered that if the conclusion is that the Appellant accepts this decision, rejecting its Application and if the Appellant and the Respondents then agree terms of Directions for the conduct of the substantive hearing, they can send those jointly agreed Directions to the Tribunal, with a direct copy to me on howard.nowlan@btinternet.com, and assuming that they seem acceptable to me, I will issue the relevant directions.

Right of Appeal

21. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASED: 11 September 2014