

MARD

Issues Arising from the Mutual Assistance in the Recovery of Debts Directive

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Introduction

The general principle governing the cross border recovery of tax debts has, generally, been the rule set out in *Government of India v Taylor* [1955] AC 491: one territory will not help in the recovery of a tax debt due to another territory.

European incursions into this principle began in 1976 (76/308/EEC) which dealt with the recovery of claims forming part of the system of financing the European Agricultural Guidance and Guarantee Fund and of agricultural levies and customs duties. The 1976 Directive was extended in 1979 to cover the recovery of VAT (79/1071/EEC).

Directive 76/308/EEC was once again amended in 2001 so that claims relating to taxes on income and capital and insurance premium tax were included within the scope of the directive (2001/44/EEC). The Directive on mutual assistance on recovery of tax debts (“MARD”) as amended was enacted into UK law by Finance Act 2002 (“FA 2002”).

Given the extensive nature of the taxes covered by MARD, as well as the manner in which it has been enacted into UK law, it is increasingly likely that tax

practitioners will come across recovery proceedings under MARD / FA 2002 in practice. The author seeks to draw on the experience gleaned from a recent MARD /FA 2002 recovery case in which the author was involved in order to highlight some of the interesting issues of principle and practice that arise in such proceedings.

Principles of MARD

MARD provides, broadly, that the competent authority in the territory in which the tax debt arises (“the Applicant Authority”) can request the relevant authority in another territory to which a request for assistance is made (“the Requested Authority”) to provide any information which would be useful to the Applicant Authority in the recovery of its claim (Art 4) or to enforce the tax debt (Art 6). The Requested Authority is usually situated in the territory in which the taxpayer is resident or holds assets or where the source of the income is situated.

In complying with the request for assistance under MARD, the Requested Authority makes use of the powers provided under the laws, regulations or administrative provisions in the Requested Authority’s territory which apply to the recovery of similar claims arising in that territory.

Article 7 (as amended) sets out the procedural rules governing the Applicant Authority’s request for enforcement of a claim. Of note is the rule that, except in circumstances falling within the second sub-paragraph

of Art 12(2), an Applicant Authority may not make a request for recovery if the claim and/or instrument permitting recovery are contested in the Applicant Authority's territory.

The second sub-paragraph of Art 12(2) provides that the Applicant Authority may make a request for recovery of a claim that is contested in so far as the relevant laws, regulations and administrative practices in force in the territory in which the Requested Authority is situated allow such action.

UK Enactment

MARD was enacted into UK legislation in FA 2002 s134 and Sch 39. Para 2 Sch 39 FA 2002 provides that the UK authority (e.g. the Inland Revenue or the Commissioners of Customs & Excise) may take such proceedings to enforce the foreign claim by way of legal process, distress, diligence or otherwise, as might be taken to enforce a corresponding UK claim.

A "corresponding UK claim" is a claim in the UK corresponding to the foreign claim. Sub-paras 3(1) and (2) Sch 39 FA 2002 provide that the Treasury may, inter alia, provide by regulations what is a corresponding UK claim in relation to any type of foreign claim.

Para 3(4) Sch 39 FA 2002 empowers the relevant UK authority (i.e. the Inland Revenue or the Commissioners of Customs & Excise) to make provisions by regulations as to the application, non-application or adaptation in relation to foreign claims of

any enactment or rule of law applicable to corresponding UK claims. However, this is without prejudice to the application of any such enactment or rule in relation to foreign claims in circumstances not dealt with by regulations under para 3(4) Sch 39 FA 2002.

Para 4 Sch 39 FA 2002 enacts the requirement set out in Art 7 MARD that no proceedings under Sch 39 FA 2002 shall be taken against a person if he shows that proceedings relevant to his liability on the foreign claim are pending, or are about to be instituted, before a court, tribunal or other competent body in the foreign territory in question.

Proceedings are “pending” so long as an appeal may be brought against any decision in the proceedings. It must be noted that proceedings under Sch 39 FA 2002 may be taken if the proceedings in the foreign territory are not prosecuted or instituted with reasonable expedition.

Para 5 Sch 39 FA 2002 provides that no proceedings can be instituted under Sch 39 FA 2002 if a final decision on a foreign claim has been given in the taxpayer’s favour by a court, tribunal or other body in the foreign territory in question. A final decision is one against which no appeal lies or against which an appeal does lie but the period for making the appeal has expired without an appeal being made.

Para 6 Sch 39 FA 2002 stipulates that for the purposes of proceedings under Sch 39 FA 2002, a request made by an authority of a foreign territory shall

be taken to be duly made in accordance with the MARD unless the contrary is proved and, except as mentioned in para 5 Sch 39 FA 2002, no question may be raised as to the person's liability on the foreign claim.

Issues of Principle Arising from UK Enactment

Sch 39 FA 2002 raises at least three controversial issues: first, it is not possible to contest the foreign claim in proceedings brought under Sch 39 FA 2002; second, Sch 39 FA 2002 is potentially retrospective because it can, in theory, apply to claims which arose before the MARD and Sch 39 FA 2002 were enacted; and, third, the Applicant Authority can request assistance in recovery under MARD even where the foreign claim is contested.

First Issue

There is arguably some sense in limiting the right to contest a foreign claim to the territory in which the claim arose on the basis that the tax laws that give rise to the foreign claim will be better understood in that foreign territory than in the territory in which recovery is sought. For instance if the UK tax authorities institute recovery proceedings under Sch 39 FA 2002, and the taxpayer seeks to contest the claim in the recovery proceedings, the UK tax authorities may not know the relevant foreign tax laws and may well be unable to accurately assess the legitimacy of the foreign claim or the legitimacy of the appeal.

The main exception to the principle that the foreign claim cannot be contested in the recovery proceedings is where the foreign claim has already been decided in the taxpayer's favour. Such an exception is clearly fair in principle. After all, it should not be possible to enforce a foreign claim if it has been decided that that foreign claim does not exist.

Further, the exception in para 5 Sch 39 FA 2002 to the rule that the foreign claim cannot be contested in the recovery proceedings has the additional merit of practical efficacy because it should be fairly easy for the taxpayer to demonstrate that the relevant court in the foreign territory has decided the contested tax claim in the taxpayer's favour.

Second Issue

The potential retrospectivity of the legislation is less defensible. Neither MARD nor Sch 39 FA 2002 limit the application of the recovery proceedings to claims that arose after the coming into effect of MARD or FA 2002.

However, it must be noted that Art 14(b) MARD does state that the Requested Authority (in our case, the UK tax authorities) is not obliged to assist in recovery of a foreign claim if the first request for assistance in recovery is made more than five years after the foreign claim arose. The five year time limit runs from the date that the claim is established under the laws of the foreign territory and ends with the date that the request for assistance is made. If the foreign claim is contested, the

five years run from the time when the foreign claim can no longer be contested.

Consequently, it is possible for recovery proceedings to be instituted in respect of a foreign claim that arose prior to the enactment of MARD and FA 2002.

Third Issue

Art 12(2) MARD permits an Applicant Authority to make a request for assistance even if the foreign claim is being contested provided that the laws, regulations and administrative practices of the territory of the Requested Authority allow such action. This provision is potentially inequitable because recovery is possible in respect of a contested tax claim even before that contested tax claim has been established by an independent court, tribunal or other body.

In the UK, the potential unfairness of Art 12(2) MARD has been reduced by para 4(1) Sch 39 FA 2002. This provides, subject to one exception, that no proceedings can be instituted under Sch 39 FA 2002 in respect of a foreign claim that is contested. The exception is that recovery under Sch 39 FA 2002 is possible in respect of contested foreign claims where regulations under para 3(4) Sch 39 FA 2002 apply an enactment that permits such proceedings in the case of a corresponding UK claim.

At present, no regulations have been made under para 3(4) Sch 39 FA 2002. Consequently, the UK tax

authorities cannot seek to enforce a foreign claim that is contested. Further, and more importantly, it follows that no valid request for assistance can be made by an Applicant Authority to a UK tax authority in respect of a contested foreign claim because the requirements of the second sub-paragraph of Art 12(2) MARD are not satisfied.

Practical Issues Arising from the UK Enactment

It should be safe to assume that, where a taxpayer has a foreign tax claim and is contesting it in the foreign territory, no proceedings for recovery in respect of that foreign claim will be instituted under Sch 39 FA 2002.

Sadly, this is not necessarily true. Experience has shown that, despite the words of the legislation, recovery proceedings may be instituted under Sch 39 FA 2002 even in respect of a contested claim. The situation arises as follows:

- (1) MARD permits an Applicant Authority to request assistance in recovery where the claim is contested provided that recovery of a corresponding claim is possible under the laws etc of the territory of the Requested Authority (Art 7 and 12(2) MARD).
 - The flaw with the proviso in Art 12(2) is that the Applicant Authority is required to be sufficiently conversant with the laws of the territory in which the

Requested Authority is situated in order to determine whether it, i.e. the Applicant Authority, is permitted to rely on the proviso in Art 12(2) and make a request for assistance. In the author's view, this, perhaps, places too great a burden on the tax authorities of our European neighbours. It is by no means certain that these foreign tax authorities enter into an assessment of the laws of the territory in which the Requested Authority is situated in order to determine whether the foreign tax authorities can rely on the second sub-paragraph of Art 12(2) MARD. It is, therefore, possible, as happened in a recent matter in which I was involved, that the Applicant Authority will make the request for assistance in any event.

- (2) The Applicant Authority makes the request for assistance to the Requested Authority.
 - Given the fact that the UK laws do not permit UK tax authorities to enforce contested foreign claims, such a request is invalid under Art 12(2) MARD;

(3) In accordance with para 6(a) Sch 39 FA 2002 the UK tax authorities treat the request for assistance a being validly made under the provisions of MARD *unless the contrary is proved*.

- In other words, the UK tax authorities must comply with the request for assistance in recovery if such a request is made. It is not clear who is required to prove that the request made by the Applicant Authority has not been made in accordance with MARD. It is unlikely, given the paucity of government resources, to be the UK tax authorities. In fact, the words of para 6(a) Sch 39 FA 2002 appear to prevent the UK authorities from checking the validity of the request for assistance. It seems probable, therefore, that the first point at which the validity of the request will be impugned will be when the taxpayer, against whom enforcement is sought, raises the point. This seems to place an unnecessary burden on the taxpayer who is already contesting the foreign claim in the territory in which the Applicant Authority is situated. The taxpayer, therefore,

has to bear the time and expense of two separate actions in two different territories relating to the same contested claim. This seems somewhat iniquitous.

- (4) The taxpayer against whom recovery of the foreign claim is sought is not permitted to contest his liability except where he can show that the foreign claim has already been determined in his favour by the courts of the foreign territory.

In the light of the foregoing, and entirely inconsistent with the words of the Sch 39 FA 2002, it is possible for recovery proceedings to be instituted under FA 2002 in circumstances where the foreign claim is contested.

Quite apart from seeking recovery in respect of contested foreign claims is the situation where the foreign claim in respect of which assistance is sought by the Applicant Authority is not the tax liability itself (contested or otherwise) but, as happened in the case with which I was involved, is security for a contested tax liability.

It is not clear whether a claim for security in relation to a contested tax liability is the type of foreign claim that is meant to be covered by MARD. The opening words of Art 2 MARD speaks of “all claims relating to”. This phrase is arguably broad enough to cover established tax debts, contested tax debts as well

as interlocutory measures such as security for the tax debts (contested or otherwise). That contested tax debts are not meant to be recoverable (except in certain circumstances) under MARD is evidenced by Art 7 and 12 MARD.

However, the matter of interlocutory measures is not expressly dealt with by MARD. Arguably, the aim of MARD, as gleaned from the words of the Directive, is to enforce established tax debts i.e. tax liabilities that are final and conclusive and not subject to further appeal (see Arts 7 and 12 MARD). Other language versions of the Directive (French, Finnish and Swedish) seem to support this view: the opening words of Art 2 MARD in these foreign language versions use words that mean “claims *or debts* relating to”. The implication of the reference to “debts” suggests that there should be an established final tax liability. As a result, it is arguable that MARD should not be used to enforce interlocutory measures, such as security, for an unestablished tax liability.

Issues Arising From the Mechanics of Recovery Proceedings

The UK tax authorities, when complying with a request under MARD, rely on the Civil Procedure Rules (“CPR”) mechanisms to enforce the tax debt i.e. they seek third party debt orders and charging orders (CPR Parts 72 and 73).

The applications for such orders are made either in the County Court or in the High Court. Initially, interim

orders are sought without notice to the taxpayer / debtor and are granted without a hearing. These interim orders are made final after a hearing at which both the Revenue and the taxpayer/debtor are present.

The procedure for obtaining these orders appears to place the taxpayer/debtor at a disadvantage: he is not told about the UK tax authority's application for an interim third party order or charging order, and has an order made against his assets as a result of which he is no longer free to deal with those assets.

Further, although the Court has discretion whether to grant the interim orders, it does so on the basis of the papers. The Court may refuse to make an interim charging order if the result would be oppressive – perhaps because the amount of the debt is too small to warrant a charge on the assets. Of importance is the fact that this procedure does not permit the Court, when exercising its discretion to grant the interim order, to determine whether the application by the UK tax authorities is validly made i.e. effectively, whether the request under MARD was validly made by the Applicant Authority. It is, therefore, possible for the taxpayer /debtor to be subject to an interim order even though the request for assistance under MARD was invalidly made by the Applicant Authority.

Interim orders, once granted, continue until they are made final. The Court has discretion in deciding whether to make the interim orders final. The burden of showing why an interim order should not be made final is on the taxpayer/ debtor. This is the taxpayer/ debtor's

first opportunity to object to the UK tax authorities' enforcement actions, for instance, on the grounds that the Applicant Authority has no right to make a request for assistance under MARD because the foreign claim is being contested.

It is the author's view that the opportunity to impugn the validity of the Applicant Authority's request under MARD comes too late – the taxpayer/ debtor has already been prejudiced by the grant of the interim third party and / or charging orders.

An added concern relating to the CPR recovery procedures is that the proceedings are generally heard in the County Court by a District Judge. It is the author's view that this forum may be inappropriate to deal with the important issue of the UK tax authorities' jurisdiction to bring recovery proceedings. This is based on two factors: first, the time allotted to such hearings tends to be wholly inadequate- matters are initially set down for 5 minutes unless representations are made to the court clerk that important issues and significant sums are involved, in which case the time allocated to the hearing may be slightly extended.

Secondly, there is some concern that the subject matter of MARD / FA 2002 hearings, involving matters of law and principle, are outwith the general run of matters dealt with by County Courts. District Judges (for it is they who usually deal with third party debt orders and charging orders) are more used to dealing with small claims actions and matters generally turning on factual issues and so may not, perhaps, be the most appropriate

persons to deal with MARD / FA 2002 jurisdiction issues.

The UK tax authorities, in the recent case in which I was involved, withdrew the case after the first (five minute) hearing before the District Judge, when it became apparent from the Appellant's skeleton argument that the Applicant Authority had not made a valid request for assistance under MARD: the foreign claim was being contested in the foreign territory, and the UK tax authorities were not permitted by the laws of the UK (para 4(1) Sch 39 FA 2002) to enforce a claim that was being contested. The interim orders were, therefore, discharged.

The net result of this exercise was that the taxpayer/debtor had to expend time and money in order to show that the UK tax authorities had no jurisdiction to enforce the foreign claim in the first place. In our case, the UK tax authorities agreed to pay the costs of the action. However, it is arguable that payment of costs alone does not adequately recompense the taxpayer/debtor for the anxiety pending the hearing nor for the taxpayer/debtor's inability to deal with the assets subject to the interim orders.

Conclusion

From the foregoing, it is clear that MARD and its UK enactment in FA 2002 raise several issues of principle and practice. One of the difficult issues relates to the commencement, by the UK tax authorities in

compliance with MARD, of enforcement proceedings in respect of contested claims.

Given the fact that a number of taxpayers now resident in the UK were recently resident in an EU country, it seems likely that the UK tax authorities will face a high volume of requests for assistance under MARD. Further, given the apparent inability on the part of the UK authorities to check the validity of the requests made under MARD by the Applicant Authorities, it seems increasingly likely that FA 2002 proceedings will be brought which may, where the taxpayers/debtors resist such proceedings, eventually be abandoned by the UK tax authorities.

It is, therefore, in the interest of taxpayers/debtors to ascertain whether the UK tax authorities have the jurisdiction to bring such recovery proceedings. Although this course of action could be expensive, at least initially, it may well be rewarded with a withdrawal of the recovery proceedings by the UK tax authorities.