Claim No: HC08C3362

NEUTRAL CITATION NUMBER: [2009] EWHC 3433 (Ch)
IN THE HIGH COURTS OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 12th November 2009

BEFORE:

THE HONOURABLE MR JUSTICE FLOYD

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BETWEEN:

	HER MAJESTY'S REVENUE & CUSTOMS	Claimant
	- and -	
	ROGERS	Defendant

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MR E McNICHOLAS (instructed by Howes Percival) appeared on behalf of the Claimant
MR L SYKES appeared on behalf of the Defendant

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JudgmentMR JUSTICE FLOYD:

1. This is an action by Her Majesty's Revenue and Customs against Mr Kieran Rogers to recover a statutory debt of some £2.7m, which they claim to be due pursuant to a notice of assessment dated 3rd November 2006. The notice of assessment arises because it is said that in around June 2001, Mr Rogers was allocated 540 Class A shares and 9 Class B shares in a Netherlands Antilles company called Scorex NV. The notice of assessment was raised because, so HMRC allege, the allocation of these shares was an emolument of Mr Rogers's employment and that accordingly, income tax was payable on their value pursuant to section154 of the Income and Corporation Taxes Act 1988.

2. Two application notices are before me. The first in time is dated 6th May 2009, and seeks a stay of the action until the High Court has reversed or affirmed the

determination of the General Commissions of 27th March 2009 and thereafter, if the determination is reversed, until the section 6.55 application (as to which see below) has been decided upon by the relevant tribunal. The second in time is dated 1st June 2009, and is an application by HMRC for summary judgment on their claim pursuant to CPR Part 24.

3. Mr Rogers joined a group of companies called Scorex in 1988 and worked there until 2003. His case is that he and two others were promised some shares in the company by the owner, Jean Michel Trousse. After the promise was made but before the shares were allocated, Mr Trousse and his wife were killed when their aeroplane crashed taking them to their honeymoon destination in the Caribbean. The promises to allocate shares were nevertheless given effect to by Mr Trouss's father following his son's death. Mr Rogers placed the shares in an off-shore trust for the benefit of his children. He did so on the advice of an associate, Graham Lupton. His case is that he was defrauded of most of these funds by Mr Lupton. Details of all this, which are currently under investigation by the New Zealand Serious Fraud Office, do not matter for present purposes. Mr Rogers declared the sums he had received by way of income from the trust in his tax returns for the years 2003/2004, 2004/2005 and 2005/2006. This promoted enquiries from HMRC and led to an assessment to income tax in the sum of £2.8m on the basis that the receipt of the shares was to be taxed as income from employment. The value of the shares, taken for the purposes of the assessment, was £7m. HMRC's assessment was based on a valuation of the shares in Scorex NV at £5.9m with an extra £1.1m added on top in case it turned out that Scorex NV had any other assets other than its wholly owned subsidiary, Scorex BV. £100,000 has been paid on account, hence the claim for £2.7m in this action.

4. The assessment was appealed. The appeal has not yet been heard. The present action was commenced on 26th November 2008. A defence has been filed to which I will have to return.

5. Following the lodging of Mr Rogers's appeal he applied under section 55 of the Taxes Management Act 1970 to postpone the payment of income tax. Under this provision if the taxpayer can show that there are reasonable grounds for believing that he is overcharged to tax a postponement can be ordered - section 55.6. Moreover, under section 55.4, a further application can be made by either side if there is a change in circumstances of the case as a result of which either party has ground for believing that the amount determined has become excessive. The applications in question at the material time would have been made to the General Commissioners.

6. A first application section 55 was made on 20th November 2006, which was consented to by HMRC as is apparently customary. However, in July 2008, HMRC themselves made a section 55 application for the amount postponed to be reduced to nil. The application was heard in the absence of the Defendant and his

advisors despite the fact that the tribunal had been notified that neither Mr Rogers nor his advisors would be able to attend the hearing. The General Commissioners heard the application and reduced the amount postponed to nil. The General Commissioners were apparently influenced by allegations made by HMRC that Mr Rogers was seeking to dissipate his assets. It does not appear that the General Commissioners specifically directed their minds to whether Mr Rogers still had reason to believe that the amount of the assessment was excessive.

7. A further section 55 application was made by Mr Rogers and came before the General Commissioners in March 2009, that is to say after this action had commenced. The application was based on an alleged change of circumstances. Firstly, it was based on the fact that Mr Rogers had received advice from new tax advisors that the case was one in which the principle enunciated in Bridges v. Beardsley [1957] 1 WLR 59 would apply, the allocation of the shares being by way of gift rather than as an emolument of employment. If this argument were correct, the allocation of the shares would not be taxable at all. A second argument in support of a change of circumstances was that the accounts of the Dutch company had now become available.

8. At the hearing in March 2009 after lengthy consideration of the matter, the General Commissioners refused Mr Rogers's application on the grounds that there had not been a change of circumstances. They accordingly held that they had no jurisdiction to go on and consider whether Mr Rogers had, as a result, reason to believe the assessment to be excessive. Mr Rogers expressed his dissatisfaction at the finding and asked for a case to be stated for the opinion of the High Court. There has been delay, largely, as it seemed to me on the part of the Revenue, in moving that appeal by way of case stated forward. If the appeal is successful the matter may have to be remitted to the General Commissioners for a fresh determination unless the High Court Judge feels able to reach a conclusion on the material in the case already. There are, accordingly, three sets of proceedings in play; the appeal in the section 55 proceedings; the substantive appeal against the assessment and this action.

Stay pending the result of the section 55 proceedings

9. The court has a very wide discretion to grant a stay of proceedings in a case where it is just to do so. Mr Sykes, who appeared on behalf of Mr Rogers, put his case for a stay on the following basis: (1) If the section 55 application is ultimately successful, but this High Court action carries on, significant costs will be wasted. Of course, the strength of this submission is dependent on whether this is a case where summary judgment will be granted or refused. If it is refused the point is a powerful one. But if this is a case where summary judgment can be given, then the costs saved by the grant of a stay may not be a significant factor. For the time being I put that factor out of account. (2) Mr Rogers has limited resources. The High Court action will bankrupt him and leave him with insufficient funds to pursue any further action. This is an unjust result, as Mr Sykes submits. The effect will not be capable of being remedied by a simple repayment with interest. I think this is a factor which I should take into account, although it is fair to say that Mr Rogers's Trustee in Bankruptcy could, if so advised, pursue the matter for

the benefit of the bankrupt estate. That, it seems to me, is only a partial answer. If the tax turns out to be incorrectly assessed Mr Rogers will suffer a degree of irreparable harm. (3) A stay will allow agreement to be reached on the valuation of the shares, a matter which is the subject of ongoing negotiation. I do not consider this to be a factor to which much weight should be attached. The negotiations could continue if I do not grant a stay. (4) On the other hand, as Mr Sykes submits, there is a no danger to HMRC if the application is granted. There is no basis for HMRC's allegations about dissipation of assets. Mr Sykes dealt in detail with the matters alleged on behalf of HMRC. I have to say that, in the light of the explanations he gave it is extremely difficult to understand the basis of HMRC's concerns and Mr McNicholas, who appeared on behalf of the Revenue, did not persuade me otherwise. Whilst it is fair to say that the General Commissioners appear to have been influenced by these concerns in 2008, they did so at a time when they did not have the benefit of any explanation of the kind which I have received from Mr Sykes. (5) Finally, Mr Sykes submits that it is unusual, unfair and somewhat perverse for Mr Rogers to have an assessment enforced against him when the valuation is in excess of the correct valuation. Mr Rogers has been defrauded of the proceeds; the inevitable bankruptcy will not be remediable by repayment; the parties are negotiating a proper value based on new information; there is a strong possibility that the shares are not taxable at all and the section 55 application allows the position to be restored to what it should be, namely that the debt can be pursued once the appeal has been heard.

10. Mr McNicholas submitted that I should not grant a stay. The statutory debt created by the assessment was due and payable and subject only to the procedure provided for by section 55 and the existence of an appeal which do not render the debt non-payable. In his submission the change of circumstance appeal had little if any prospect of success as did the substantive appeal. The Revenue had not been precipitate in seeking to enforce the debt and should be allowed to do so.

11. There is no dispute that once an assessment has been raised the proper means of challenging the assessment is the exclusive statutory procedure, so for example as Commissioners of Inland Revenue v. Pearlberg [1953] All ER 388 shows:

> "If a taxpayer does not appeal or appeals and loses, then he cannot plead in his defence to an action or a bankruptcy petition that the assessment was invalid; see also Lamb v. IRC [2005] EWHC 592; [2006] STC 393 per Blackburn J at paragraphs 12 to 13." (Quote unchecked)

But those cases, as it seems to me, do not touch upon the question of whether the court can exercise its discretionary power to grant a stay in the exercise of its case management powers of a High Court action where there is an appeal and the appeal process is still pending or the section 55 procedure has not run its course. Mr McNicholas drew my attention to the decision of the Court of Appeal in Pumahaven v. Williams [2003] EWCA Civ 700and in particular to the judgment of Peter Gibson LJ, at paragraph 19. That appeal was largely concerned with whether the judge was right to remit the case to the Commissioners to give a ruling on an argument that they had not dealt with. At paragraph 19 Peter Gibson LJ says this after referring to section 55(6) and section 50(6):

> "Parliament has entrusted to the Commissioners, and to no one else, the functions specified in those sections subject to the provisions for appeal and to what the Appellate Tribunal is authorised to do by section 56(a)(4). In relation to the postponement of tax the Commissioners are the tribunal to which the taxpayer says the tax can apply and they must have regard to the representations made to them and to the evidence adduced to them in reaching their decision whether it appears to them that there are reasonable grounds for believing that the taxpayer is overcharged to tax and in what amount."

12. Mr McNicholas submitted that it was for the Commissioners to decide whether to postpone the tax and given what is said by Peter Gibson LJ, it is not for this court to interfere by granting a stay. I can well understand that it might be said that to make an application for a stay of proceedings in the High Court without having first availed oneself of the mechanism provided in section 55 might, in some circumstances, be said to subvert the statutory procedure if all that is sought is to be done is to postpone the payment of tax on the grounds that an appeal will show that it is not due. It is not necessary for me to decide whether that would be so, although one can certainly envisage cases where the High Court might intervene in the exercise of its case management powers where the statutory postponement procedure had not been utilised. It seems to me, however, that the present case is different. The statutory postponement procedure has not been exhausted, because it is being challenged by way of an appeal to the High Court. It would be bizarre if the High Court could not grant a stay in support of that appeal. The situation is analogous to the case where the Court of Appeal is asked to grant a stay of execution of a judgment, which is being appealed to that court from the High Court. It would by no means do so automatically, but will do so when the balance of justice so requires. In exercising that discretion the court normally considers that the Respondent to the appeal should not be lightly deprived of the benefit of a judgment obtained below. On the other hand, if the refusal of a stay may render an appeal nugatory, then that is a strong factor which militates strongly the other way. It is necessary to balance the prejudice to each side if a stay is granted or refused. The court will also have regard in appropriate cases to the prospects of success of the appeal and all other relevant circumstances.

13. Mr McNicholas accepted that a change in the legal advice given to the taxpayer could amount in some cases to a relevant change of circumstances, but he submitted it did not in the present case. He did not dispute that the advice Mr Rogers had been given had changed radically. Indeed, a letter written by his previous advisors apparently accepted that a charge to tax might be appropriate. He submitted that, in the present case, the advice that the Beardsley principle might apply was unrealistic given the absence of any contemporaneous reference to the shares having been allocated as a gift. He relied very heavily on Mr Rogers' statement in an earlier witness statement that he had become "entitled" to the shares. I think the Revenue's submission on this point confuses two matters. If the change of advice given to Mr Rogers is capable of being a change of

circumstances I do not see how it ceases to be a change of circumstances because of the Revenue's submission that the advice was wrong. It seems to me that either legal advice given to a taxpayer is not a relevant circumstance at all, or it is a relevant circumstance and one then turns on to the question of whether it is reasonable in consequence to believe on the basis of the advice that the sum charged is excessive.

14. In the present case I do not think it is possible to say that the section 55 appeal does not have a realistic prospect of success. I think it does. I was not shown any direct authority on the question of what amounts to a change of circumstance for the purposes of the section. It is well arguable at the very least that the matters relied on by Mr Rogers did indeed amount to a change in circumstances and that the Commissioners were applying an incorrect approach in law.

15. On balance, I consider that this is an appropriate case on which to grant a stay. If a stay is refused irreparable harm may be caused to Mr Rogers. There is no countervailing prejudice to HMRC which outweighs this prejudice. This conclusion is fortified by taking into account the view which I have come to on the summary judgment application to which I now turn.

Summary Judgment

16. There is no dispute about the standard for giving summary judgment. I may grant it if Mr Rogers has no realistic prospect of defending the claim and there is no other compelling reason for a trial. The test has been interpreted as being one in which it is necessary to show that there is an absence of reality in the Defendant's defence; see per Hobhouse L in Three Rivers v. Bank of England No. 3 [2001] UKHL 16 at 158. It is sufficient to consider the defence raised by Mr Rogers that it is an abuse of HMRC's statutory powers to seek to enforce a debt in the present specific circumstances. There is no dispute that HMRC have a discretion to enforce a statutory debt whilst an appeal is pending. Nevertheless, like any public law power it must not be exercised in an abusive manner.

17. Mr Sykes submits that the administrative law can be used by a taxpayer to resist a statutory demand for tax and he relies on Inland Revenue Commissioners v. Aken [1990] STC 497, a case where there was an assessment which could be appealed. In that case Fox LJ said at 502 to 503:

> "That then is a true principle applicable in these cases, namely that the statutory machinery is exclusive machinery for an appeal from a notice of assessment. There is normally no other, however, I do not say that there are no cases in which exceptionally a challenge by way of judicial review or otherwise to a decision of the Revenue would be possible. There may be cases where, for example, there has been some abuse of power or unfairness, which would justify the intervention of the court; see, for example, Preston v. IRC [1985] STC 282. Now that is exceptional. Normally the statutory machinery under the Tax Management Act 1970 is the exclusive machinery for challenge to an assessment by a taxpayer."

At page 507 Parker LJ said:

> "It was, however, fully argued and the Crown is understandably anxious that the judge's decision that the defence that was open to it should not stand. I therefore deal with it shortly. It is expressly accepted by the taxpayer that it will only be in rare cases that a challenge to an assessment or to an agreement under section 55 or section 55 of the Tax Management Act 1970 can be made otherwise than by way of the statutory machinery provided by that Act. I am content to accept the possibility that such cases may arise, not only by way of judicial review proceedings, but also by way of defence to proceedings to recover tax, although such cases must, in my view, be rare in the extreme. I am quite satisfied, however, that this is not such a case."

18. Mr Sykes submits that it is not fanciful to suggest that Mr Rogers might succeed in showing on the facts of the present case that HMRC are acting so unfairly and disproportionately at the moment that its actions amount to an abuse of its powers. He relies in particular on the arbitrariness of the £7m figure and the repercussions which the enforcement of the debt would have on Mr Rogers at this time. He says the Revenue's insistence on enforcement when Mr Rogers has not had a proper opportunity to place his case before a court is abusive.

19. Mr McNicholas relied on the fact that an assessment to tax necessarily involved some guesswork especially where information was not forthcoming from the taxpayer. He drew my attention to the decision of the Privy Council in Biflex v. Caribbean Board of Inland Revenue [1990] 63 TC 515 at 522 to 523. While this is no doubt so, HMRC have a duty to exercise due care and diligence and come to a *bona fide* belief as to the amount of tax chargeable; see R v. The Bloomsbury Income Commissioner [1915] 3 KB 768 to 783. If they do not meet this standard, then it seems to me that it at least arguable that they run the risk of exceeding their powers. Mr McNicholas argued that it was for the taxpayer to show that the assessment was wrong and not for the Revenue to investigate. There was basis for saying that the £5.9m was not the true valuation of the shares and that there were other companies in the Scorex Group and these might have been subsidiaries of Scorex NV. Although the Revenue was unaware of such assets and was unaware of the corporate structure of Scorex at the time it made its assessment, it is not unreasonable to add £1.1m to the value in the light of Mr Rogers's failure to provide information. The Revenue's submissions may turn out to be correct. Nevertheless, I must remind myself that I am being asked to grant summary judgment. It seems to me that Mr Rogers's defence is arguable and that on this ground summary judgment should be refused.

20. Mr McNicholas urged me; nevertheless, to grant summary judgment for a sum based on the lower valuation of £5.9m. However, there are problems with this as well. Firstly, this is not a case which the Defendant has been asked to meet. Secondly, I am not sure whether it is possible in these circumstances to regard the

assessment as good in parts and bad in others. It may be necessary for a fresh or amended assessment to be issued based on the material now possessed by the Revenue and for proper care to be taken at arriving at it.

21. Given that the statutory procedure is by way of appeal and the appeal by way of case stated are still to be heard and given that I am granting a stay, I should not be taken as precluding a further application for summary judgment based on any changed circumstances once those procedures are at an end. Nevertheless, it follows that I must dismiss the application for summary judgment and I grant a stay of the action.