Appeal number: FTC/39/2010
[2012] UKUT 59 (TCC)

Income tax - whether taxpayer can invoke section 739 of the Income and Corporation Taxes Act 1988 as against HMRC – effect of sections 739-741 – can costs be awarded in the Upper Tribunal on an appeal from the First-Tier Tribunal.

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

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

- and -

GEORGE ANSON **Respondent**

TRIBUNAL: MR JUSTICE MANN

Sitting in public at The Rolls Building, Fetter Lane, London EC2A 1NL on 27th January 2012

Mr David Ewart QC (instructed by Solicitors for HMRC) for the **Appellant**

Mr Jonathan Peacock QC (instructed by **Ernst & Young LLP**) for the **Respondent**

Introduction

1. This is a further hearing in this matter which has become necessary as a result of my decision on a first point which was released on 3rd August 2011 ([2011] UKUT 318). Reference should be made to that decision for the background to this case – I do not intend to repeat any of it here. In that decision I determined that Mr Anson was not entitled to double taxation relief, with the effect that (and subject to this decision) he sustained US tax at the rate of 45% on income distributions from the Delaware entity, and then further UK tax (at 40%) on the balance which was remitted to this jurisdiction. The result is that for every 100p paid out in income, 45p is paid in US tax and 22p paid in UK tax.

2. As an alternative to his double taxation point, and having now lost it, Mr Anson has another claim to reduce his tax burden by invoking section 739 of the Income and Corporation Taxes Act 1988. The First Tier Tribunal decided that point against Mr Anson, though it did so only briefly because it had decided the first point in his favour. I decided to deal with the double taxation point first, and to deal with the section 739 point only if it became necessary to do so. In the light of my prior decision that has become necessary. This decision deals with it.

The legislation

3. Section 739 is an avowedly anti-avoidance provision. Subsections (1) and (2) are the relevant provisions. They read as follows:

> "**739. Prevention of avoidance on income tax**

(1) Subject to sections 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.

…

(2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of the individual for all purposes of the Income Tax Acts."

4. On its face that paragraph seems to provide a means for charging individuals with tax which they would otherwise not pay because of avoidance steps taken by them. Section 741 provides an escape route for transactions which are not in fact thought to be objectionable:

"**741. Exemption from sections 739 and 740**

Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either –

(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or

(b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

> The jurisdiction of the special commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

5. Section 743 contains supplemental provisions, two of which are relevant:

> "743…(2) In computing the liability to income tax of an individual chargeable by virtue of section 739, the same deductions and reliefs shall be allowed as would have been allowed if the income deemed to be his by virtue of that section had actually been received by him.
>
> …
>
> (4) Where an individual has been charged to income tax on any income deemed to be his by virtue of section 739 and that income is subsequently received by him, it shall be deemed not to form part of his income again for the purposes of the Income Tax Acts."

The arguments in this case and its trip into Wonderland

6. Those sections seem to provide a clear regime. One would expect it to operate as follows in all cases. The mechanism is designed to enable individuals to be brought in to a charge to tax which they have sought to avoid by their avoidance measures. The Revenue can make an assessment under section 739. The whole premise of the ability to catch these transactions is that the taxpayer has sought to avoid tax which he ought to be made to pay because there is no underlying basis for the relevant transactions other than the avoidance of tax. The taxpayer is given an opportunity to challenge the application of that premise in his particular case via section 741 – the taxpayer can seek to convince the Revenue that the transactions in question did not have the purpose of avoiding tax, or that the transaction had a genuine commercial purpose and was not for tax avoidance. If that is established to

the satisfaction of the Board, or (now) to the satisfaction of the First Tier Tribunal on appeal, then the charge to tax cannot be made. If a charge is properly made, then the taxpayer is entitled to his reliefs (including double taxation relief), and the taxpayer is protected from having to pay tax on the same income twice by section 743(4). All that is an intelligible scheme.

7. In this case it is sought to turn the operation of the statute on its head, because it is the taxpayer who seeks to invoke section 739. Mr Anson says that the factual underpinnings of section 739 are present in this case – he has entered into transactions which have sent assets out of the jurisdiction as a result of which income has become payable to a person outside the UK (the Delaware entity). The income from that entity is therefore deemed to be his. He is therefore liable to tax on (in the above example) the 100p. In the relevant years he would be liable for tax at 40% on those sums. However, under section 743(2) he is entitled to the same relief as he would have been entitled to had the income actually been his, and that includes double taxation relief. On this footing he effectively insists that he is entitled to be charged under section 739 and thereby acquires the double taxation relief that he cannot achieve through the route which I determined against him in my first decision.

8. At first sight that seems to me to be a remarkable invocation of what is a plain anti-avoidance provision. There are not many statutes which contain a clear express indication of their purpose in the section in question, but this is one of them. Mr Anson is ostensibly relying on a clear anti-avoidance provision in order to improve his position. One would have expected the Revenue to take the line that it is for them, and not for the taxpayer, to invoke a section which

is apparently for the protection of the Revenue. However, it does not take that line. It joins in the game. In this litigation the Revenue accepts that the factual basis of the application of section 739 has been made out by Mr Anson. It seeks to avoid the consequences by invoking section 741. The Revenue has declared itself to be quite satisfied that the purpose of the transactions entered into by Mr Anson was not, and did not include, the purpose of avoiding liability to taxation. It therefore seeks to avoid the enforced application of its anti-avoidance mechanism by deploying an escape route which would normally be available for the taxpayer, even though the taxpayer has not (understandably on the facts of this case) sought to invoke it himself.

9. This Lewis Carroll-like inversion is not quite complete. Mr Anson is prepared to acknowledge that the transfers that he made did have a genuine commercial purpose. However, he does not seek to complete the oddities by actually saying that he did indeed have the purpose of avoiding tax. As will be seen, his position is a little more subtle than that.

The decision below

10. The First Tier Tribunal recorded that it was common ground that the conditions of section 739 were fulfilled.

> "and accordingly in principle a proportion of the income of SPLLC is deemed to be the Appellant's by section 739(2):"

It then recorded the evidence of Mr Graham Turner, a senior technical adviser in relation to the transfer assets legislation, that he, as the delegate of the Board for this purpose, was satisfied that section 741 was applicable on the

basis of the information provided by the Appellant to his advisers. The decision then records the submission of Counsel in one sentence each, and in particular the submissions of Mr Peacock QC for Mr Anson:

> "25. Mr Peacock made various criticisms of Mr Turner's approach as set out in his witness statement, suggesting that he could not have been satisfied that paying tax on 55 out of a share of profits of 100 did not avoid income tax."

11. The reasoning of the Tribunal then appears in one paragraph:

> "27. As we have already stated, if HMRC were right on the main issue, the financial effect would be that out of the Appellant's share of profit of 100 roughly 45 has been paid in US tax, 55 has been distributed to him and 22 tax would be charged in the UK, for which no credit for US tax would be available. If section 739 applied his income would be 100 on which he would pay tax in the UK of 40 but the whole of the UK tax would be covered by double taxation relief for the US tax paid of 45. If section 741 is not satisfied so that section 739 applies, the effect would be that instead of his paying UK tax 22 he would pay no UK tax after double taxation relief. We cannot see that, on this basis, the Appellant could have avoided any UK taxation and so we cannot see how he can have had the purpose of avoiding liability to taxation. We entirely agree with Mr Turner's conclusion that one or both of the conditions in section 741 is satisfied and whatever the scope of our review we would have come to the same conclusion."

12. Accordingly the Tribunal records that, had the point been relevant, it would have determined it in favour of HMRC and against Mr Anson.

Mr Anson's case in relation to that decision

13. Mr Anson's case, as advanced by Mr Peacock, was that the reasoning of the First Tier Tribunal was wrong. It approached an assessment of the question of whether or not there was a purpose to avoid tax by looking to see what tax was avoided. Having concluded that tax was not avoided, it concluded that Mr Turner's decision was correct. Mr Peacock says that the reasoning by which it

came to the conclusion that no tax was avoided was faulty. He accepted the correctness of the first and second sentences in paragraph 27 of the Tribunal's decision. However, he pointed out that the third sentence posed a problem. On its face it seems to be repeating the second sentence, in which case it provided no support for the conclusion. A more generous interpretation may be that the Tribunal was comparing a world in which section 739 does apply with a world in which it does not apply (because of the operation of section 741). He said that if that was what was meant, then it was a wrong comparison, leading to the wrong result. He said that the correct comparison for these purposes was to compare a world in which there were no offending transactions with a world in which there were. Had that been done the Tribunal would have realised that the UK tax bill paid by Mr Anson (22p) was lower than it would have been assuming that the same property had generated income which bore UK tax (40p). Accordingly, on this footing, tax actually was avoided. That, said Mr Peacock, meant that Mr Turner could not reasonably have come to the conclusion that there was no purpose to avoid tax.

14. In those circumstances section 741 did not provide an escape route (for the Revenue) and section 739 had to apply. That meant that his client was entitled to double taxation relief (see section 743(2)).

15. Mr Ewart QC, for the Revenue, did not engage fully in an analysis of the Tribunal's paragraph 47. He did, however, observe that looking at what had happened (Mr Anson suffered US tax of 45 and then UK tax of 22 on the remitted 55), he had paid significant tax and could not really have been said to

have been avoiding it in any meaningful sense. He pointed to all the evidence available to the Revenue, which demonstrated that the transactions were bona fide commercial transactions in respect of which Mr Anson had been entirely open. What the Tribunal did, albeit shortly (because the ground was not relevant to their overall decision) was to accept Mr Turner's evidence as to what the Board had decided. That was a conclusion which was open to the Board and to the Tribunal, and the Tribunal could not be criticised for it.

16. Mr Ewart went on to consider the position if he were wrong about that. He maintained that if section 739 were to apply (and the Revenue did not seek to say that it did) then it did not affect the charge which had otherwise been made in relation to Mr Anson's income (22 on the 55 remitted). While section 739 deemed the Delaware entity's income (or Mr Anson's attributed part of it) to be Mr Anson's, it did not affect the previous charge to tax, which was, technically, on different income, as I am said to have decided in my first decision.

17. Mr Peacock's riposte to this last point is that section 743(4) was inconsistent with this analysis. The section 739 income was deemed to be Mr Anson's, and section 743(4) prevented there being two separate charges. Once section 739 was invoked Mr Anson could not be charged a second time (whether before or after the section 739 charge) because the remitted income could not be deemed to form part of the section 739 deemed income again.

Conclusions

18. I confess to a certain amount of reluctance to start this case on the apparent shared premise of the parties, which is that section 739 is capable of having

anything to do with it at all. It seems to me to be extremely odd that a section which in terms is expressed to have anti-avoidance as its purpose can actually be turned to account by the taxpayer invoking it. The whole structure of section 739 and the following sections clearly anticipates that it will be the Revenue invoking sections 739 and the taxpayer resisting it. That is apparent from the terminology of section 741 and the assumptions obviously underlying it. It is also the sort of thing that Parliament is likely to have had in mind in enacting section 745, which I have not set out in this decision but which gives the Revenue power to seek information. I am sure that Parliament had in mind the need of the Revenue to get information in order to see whether a case could be made under section 739, not to get information in order to rebut the taxpayer's claim to apply it, and in particular to establish that there was no intention to seek to avoid tax. I am surprised that it is no part of the Revenue's case to advance arguments which would prevent its invocation at all.

19. However, and again reluctantly, I shall not go down that road myself in the absence of assistance by way of submissions from the Revenue, because I think there is another clear answer to the case which arrives at the same result as if the taxpayer were unable to invoke section 739. I have come to the conclusion that the Tribunal's decision on section 741, to the effect that the Board had determined that the section applied, was a decision which the Tribunal was entitled to reach, and in addition was actually the correct decision. The brevity of the Tribunal's reasoning is understandable because it was dealing with a point that it did not think it had to decide. However, I do think that two things have gone wrong in, or in relation to, paragraph 27 of its decision. First, the way the decision is phrased suggests that a calculation as

to the tax payable on various hypotheses somehow determines the question of the taxpayer's purpose, or at least is the prime consideration. That seems to me to be wrong. The taxpayer's purpose must be determined by reference to the evidence of what that subjective purpose was. That is not determined by notional tax calculations, though it is obviously right to say that such calculations are relevant. Both sides accept that the reference to taxation in section 741 is a reference to UK taxation, but in assessing whether a transaction was carried out with the purpose of avoiding UK transaction one is entitled to look to see what the overall burden on the taxpayer is as a result of the transactions. But that is just one factor.

20. The other thing that seems to have gone wrong in paragraph 27 is that referred to by Mr Peacock in his submissions – the third sentence seems to be repeating the second and it really is not clear that it should be given the more charitable interpretation suggested by Mr Peacock.

21. That being the case I have considered the evidence which was available to the Tribunal. The evidence took the form of a witness statement and cross-examination of Mr Turner. His witness statement indicated that he had considered evidence of Mr Anson's status as a member of the Delaware entity; he considered the documentation surrounding that entity and its operation; he considered Mr Anson's tax returns; and he considered the correspondence passing between the Revenue and Mr Anson's agents. He records that he had seen nothing which suggested that the purpose, or one of the purposes, of the transactions was the avoiding of a liability to taxation. He recorded his satisfaction that the conditions for section 741 to apply were met, "in

particular section 741(a)". In his cross-examination he went on to confirm that he really thought that both limbs of section 741 were satisfied. He was not challenged as to whether or not those conclusions were reached; nor was he challenged as to the bona fides of those conclusions. What was suggested to him was that he could not have arrived at his state of satisfaction given the facts and circumstances that he had. He did not agree with that.

22. Mr Peacock's challenge on this point was a carefully worded one. He did not assert that Mr Turner's conclusion was wrong, i.e. he did not assert that Mr Turner ought to have concluded that it was the taxpayer's purpose to avoid tax. It was no part of his case that Mr Anson had any particular intention either way. His case is that, on the material available to it, the Board could not have been satisfied that it was no part of Mr Anson's purpose to avoid tax. In other words, the evidence was insufficient to satisfy the Board that his client was not a tax avoider (it is impossible to address this part of the case without introducing double negatives). He bolsters this by his appeal to comparisons and says that (as outlined above) when one compares the 22p which Mr Anson actually paid here with the 40p he would have paid had all the income been UK taxable income, one can see that tax has been avoided. As I have indicated, that is not determinative, and anyway it is not the right comparison. If one is comparing anything it is more appropriate to see what actually happened in terms of tax, as a result of the acts which Mr Anson did. He has sustained tax of 67 as opposed to tax of 40 had the money been left in this jurisdiction. True it is that only 22 of that 67 is UK tax, but it is hardly plausible to suggest that Mr Anson would have wished to avoid paying 40 in this country by submitting to a global tax bill of 67.

23. However, it seems to me that there is a falsity even in that comparison. This litigation strongly suggests that Mr Anson thought that he would be paying only US tax of 45%; it cannot readily be inferred that he intended to pay US tax plus UK tax on remittances since that is what he has been trying to avoid. The most likely inference is that he anticipated paying US tax at 45, and hoped he would pay no UK tax at all. However, if he had paid UK tax he would have paid at 40, which is less than, not more than, the US rate. That does not provide any material for supposing that he was particularly seeking to avoid paying UK tax.

24. All this means that there is, at best, nothing in any of the sensible tax comparison figures which would support a suggestion that Mr Anson was seeking to avoid UK tax. When coupled with the evidence of Mr Turner that he had reviewed the information and found no evidence elsewhere, it means that the Revenue could be satisfied as it proclaimed itself to be satisfied, namely that the conditions within section 741 were fulfilled. Accordingly, if the reasoning of the Tribunal in its paragraph 27 is faulty, the Tribunal's agreement with the conclusion of Mr Turner is both justifiable and correct.

Other points

25. That conclusion means that it is not necessary for me to go on to consider the other lines and ripostes advanced by the parties. I shall not do so.

Conclusion

26. I therefore conclude that the attempt of Mr Anson to overturn the decision of the First Tier Tribunal on this point fails. It is somewhat satisfying to note

that, having travelled through the upside-down world proposed by Mr Peacock, one does arrive at a result which coincides with the wording of the statute, the purpose of the statute and common sense.

Post-script

27. After this judgment was provided in draft to the parties, they made submissions in relation to costs which I have to deal with.

28. Mr Anson has lost this appeal. If I have jurisdiction to award costs, and in the absence of some special reason, costs would normally follow the event. However, Mr Anson, through Mr Peacock QC, submits that I do not have jurisdiction to order costs, or if I have I should not exercise it. He bases his submissions on the fact that this case started life as an appeal to the General Commissioners which was then transferred to the Special Commissioners. Its existence at the coming into force of the new Tribunal regime on 1st April 2009 means it fell into the category of legacy cases for which transitional provisions had to be made.

29. They were made in the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). Schedule 3 para. 6 provides that then current proceedings should continue after the commencement date as proceedings before the First-Tier Tax Tribunal. That they did. Under para. 7(7):

> "An order for costs may only be made if, and to the extent that, an order could have been made before the commencement date (on the assumption, in the case of costs actually incurred after that date, that they had been incurred before that date)."

Mr Peacock points out that if the proceedings had continued before the Special Commissioners, no order for costs would have been made because neither party had acted "wholly unreasonably".

30. Thus far I do not think that there is any dispute between the parties. However, the dispute comes in the application of the Tribunal Procedure (Upper Tribunal) Rules 2008 SI2008/2698. Mr Peacock submits that the power of the Upper Tribunal (which is where this appeal currently is) as to costs is conferred by Rule 10 of those Rules. That provides that the Upper Tribunal may not make an order in respect of costs on an appeal from another tribunal except in certain circumstances. Those circumstances are:

> "(a) In proceedings…on appeal from the Tax Chamber of the First-Tier Tribunal; or
>
> (b) To the extent and in the circumstances that the Upper Tribunal had power to make an order in respect of costs…"

31. Mr Peacock submits, on the basis of that drafting, that the draftsman of the Rules has failed to appreciate that there is a sub-category of cases where there are appeals from the First-Tier Tribunal to the Upper Tribunal in which the First-Tier Tribunal itself could not have awarded costs (i.e. legacy cases such as the present). He says that in such circumstances, and so as to preserve the special status of those legacy cases, the Rules dealing with costs should similarly limit the power of the Upper Tribunal to award costs in appeals from the First-Tier Tribunal to cases where the First-Tier Tribunal itself could have awarded the costs. In the circumstances, it is said, I should make no award as to the costs of this appeal. Alternatively, even if I have power to make an award of costs, I should exercise my discretion against making such an order

because these proceedings were commenced under what was said to be, in effect, a "no costs" regime.

32. I am afraid I have difficulty grasping Mr Peacock's submissions. The provisions of Rule 10(1) seem to me to be quite clear. Sub-paragraph (a) describes the appeal before me. That sub-paragraph allows me to make an order for costs. Sub-paragraph (b) is dealing with other things. It does not qualify sub-paragraph (a). I simply apply sub-paragraph (a).

33. That empowers me to make an order for costs. I can see no reason for not making what would be the normal costs order against the loser. The previous regime was not a fully "no costs" regime. Under the old regime there would have been an appeal to the High Court, in respect of which an order for costs could be made. Mr Peacock's alternative submission therefore also fails.

34. In the circumstances I find that I can make an order for costs in favour of HMRC as the victor in these proceedings, and since no reason has been advanced as to why the normal prima facie rule should not apply, I order that Mr Anson shall pay those costs.

DECISION

TRIBUNAL JUDGE – MR JUSTICE MANN
RELEASE DATE: 16 February 2012