Appeal number: TC/2017/07299

PROCEDURE – Application for a reference to the Court of Justice of the European Union under Article 267 Treaty on the Functioning of the European Union – Whether Tribunal not able to resolve EU law issues with complete confidence – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANCOISE FINDLAY **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 10 April 2018

Timothy Lyons QC, instructed by Charles Russell Speechlys, for the Appellant

Elizabeth Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 29 September 2017 Mrs Francoise Findlay appealed to the Tribunal against the decision, of 7 September 2017, by HM Revenue and Customs ("HMRC") which, following a review, upheld closure notices, issued under s 28A of the Taxes Management Act 1970 ("TMA") for 2008-09 to 2013-14 (inclusive). These increased her liability to capital gains tax ("CGT") by a total of £2,216,474.44.

2. The appeal raises the issue of whether, for CGT purposes, the acquisition cost of several properties in Paris obtained by Mrs Findlay from her mother by way of gift (a 'donation-partage') and subject, under French law, to a usufruct in favour of her mother, should be determined on the basis of their open market value as at 31 March 19182, pursuant to s 35 of the Taxation of Chargeable Gains Act 1992 ("TCGA"), or the open market value as at 26 September 2007, the date of her mother's death and Mrs Findlay becoming absolutely entitled to the properties.

3. Paragraph 10 of her Grounds for Appeal states:

> "… in the interests of the expeditious disposal of the appeals, the question whether the Respondents' construction and/or application of the provisions of the TCGA 1992 is consistent with the said four fundamental freedoms and each of them and with the applicable law of the European Community and/or the European Union generally should be referred, as soon as possible, to the Court of Justice of the European Union pursuant to the Treaty on the Functioning of the European Union, Article 267."

4. On 18 October 2017, following receipt of the Notice of Appeal, the Tribunal wrote to the parties notifying them that the appeal had been categorised as "complex" and that, in view of the application for a reference to the Court of Justice of the European Union ("CJEU"), representations on the issue of a reference under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") were being sought from HMRC. The letter also notified the parties that the requirement for HMRC to provide a Statement of Case (under Rule 25 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) was suspended.

5. The Tribunal received written representations from HMRC on 15 November 2017 and a response from the appellant on 22 November 2017. HMRC replied to the appellant's representations on 29 November 2017 to which there was a further response from the appellant also on 29 November 2017.

6. Mr Timothy Lyons QC, who appears for the Mrs Findlay, refers to the parity of treatment for CGT purposes of those who acquire property on the termination of a life interest under a trust in England and Wales, on the termination a legal interest limited for life under the law of Northern Ireland and on the termination of a proper liferent under the law of Scotland under ss 68, 71 and 73, s 63 and s 63A TCGA respectively and contrasts this with the "less favourable" position of the acquisition of property on the termination of, as he describes it, a "broadly similar" usufruct.

7. This, he contends is "plainly contrary to, and an unjustifiable restriction of," Mrs Findlay's fundamental freedoms under the Treaty establishing the European Community ("EC Treaty") and infringes her directly effective rights and, as such a reference to the CJEU is necessary. He submits that as the facts and legal issue are clear, a reference under Article 267 TFEU should be made at the earliest opportunity.

8. Ms Elizabeth Wilson, for HMRC, contends that the facts are anything but clear and undisputed and that the application for a reference, before the substantive appeal has been heard and before HMRC have provided a Statement of Case, is premature and should be refused.

9. Article 267 TFEU provides:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> …

10. In relation to a reference under Article 267 TFEU, in *Criminal Proceedings Against Atanas Ognyanov* (Case C-614/14) [2016] EUECJ C-614/14, ECLI: EU:C:2017:687 the CJEU observed that:

> "15 … it must be recalled that the preliminary ruling procedure provided for in Article 267 TFEU constitutes the keystone of the European Union judicial system, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).
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> 16 In accordance with settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see orders of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 9 and the case-law cited; of 19 March 2015, *Andre*, C-23/15, not published, EU:C:2015:194, paragraph 4 and the case-law cited, and the judgment of 6 October 2015, *Capoda Import-Export*, C-354/14, EU:C:2015:658, paragraph 23).

17 In accordance with equally settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (see judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26 and the case-law cited, and of 11 September 2014, *A*, C-112/13, EU:C:2014:2195, paragraph 39 and the case-law cited). The choice of the most appropriate time to refer a question for a preliminary ruling lies within their exclusive jurisdiction (see judgments of 15 March 2012, *Sibilio*, C-157/11, not published, EU:C:2012:148, paragraph 31 and the case-law cited, and of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 16).

18 The need to provide an interpretation of EU law which will be of use to the national court means that the national court must define the factual and legal context of the questions it is asking or, at the very least, explain the assumptions of fact on which those questions are based (see orders of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 10 and the case-law cited; of 19 March 2015, *Andre*, C-23/15, not published, EU:C:2015:194, paragraph 5 and the case-law cited, and the judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 114).

19 The requirements concerning the content of a request for a preliminary ruling, are expressly set out in Article 94 of the Rules of Procedure, of which the national court should, in the context of the cooperation instituted by Article 267 TFEU, be aware and which it is bound to observe scrupulously (see order of 3 July 2014, *Talasca*, C-19/14, EU:C:2014:2049, paragraph 21).

20 There is moreover no dispute that the information provided in orders for reference serves not only to enable the Court to provide useful answers but also to give the governments of the Member States and other interested parties the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, and that it is the Court's duty to ensure that that opportunity is safeguarded, given that, under that article, only the orders for reference are notified to the interested parties (see order of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 11 and the case-law cited, and the judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 116).

21 Last, if the relevant factual and legal context is not stated, that may constitute a ground for the request for a preliminary ruling to be declared to be manifestly inadmissible (see, to that effect, orders of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 12; 4 July 2012, *Abdel*, C-75/12, not published, EU:C:2012:412, paragraphs 6 and 7; 19 March 2014, *Grimal*, C-550/13, not published, EU:C:2014:177, paragraph 19, and

> of 19 March 2015, *Andre*, C-23/15, not published, EU:C:2015:194, paragraphs 8 and 9)."

11. As Judge Berner observed at [9] in *Capernwray Missionary Fellowship of Torchbearers v Revenue and Customs Commissioners* [2016] STC 172, the proper approach to be adopted in considering whether to make a reference to the CJEU has been authoritatively summarised by Sir Thomas Bingham MR (as he then was) in *R v International Stock Exchange of the United Kingdom and Northern Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534 where he said, at 545:

> "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer. I am not here attempting to summarise comprehensively the effect of such leading cases as *H P Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226, [1974] Ch 401, *Srl CILFIT v Ministry of Health* Case 283/81 [1982] ECR 3415 [2016] STC 172 at 177and *R v Pharmaceutical Society of GB, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, but I hope I am fairly expressing their essential point."

12. Rose J in *Coal Staff Superannuation Scheme Trustees v HMRC* [2017] STC 1064, noted that:

> "[28] Judge Berner considered that that test had not been overtaken by the decision of the CJEU in *Wiener SI GmbH v Hauptzollamt Emmerich* (Case C-338/95) [1997] ECR I-6495. In my view, it has not been overtaken, either, by the service of notice under art 50. The question before me is therefore the same as the question before Judge Berner in *Capernwray*, namely whether at this stage of the proceedings I am satisfied that this tribunal will not be able, with complete confidence, to resolve the issues of EU law before it, issues that are necessary to enable the tribunal to decide this appeal. In considering that, I must have regard to the factors described in *Else* such as the nature of the issues, whether they are likely to have application beyond the particular facts of this case and the existence or absence of an established body of case law of the CJEU setting out the principles that should be applied to these facts.
>
> [29] Judge Berner in *Capernwray* also commented on the fact that the application was being made to him before the hearing of the substantive appeal. He said the following (at [15]):

> 'I accept that counsel for both parties have developed the arguments on the issues very fully, setting out not only where they consider there is a lack of clarity in the jurisprudence of the CJEU but also their own respective submissions on the EU law. That is not, however, the same as being in the position of a tribunal on the substantive appeal which will have heard all the arguments in a different context, namely that of deciding the appeal, with the sharp focus that necessarily provides. It would not, in those circumstances, in my view be appropriate for the test to be that a reference should be made at this stage unless I am satisfied that the tribunal hearing the appeal will be able to determine the matter with complete confidence. That, it seems to me, would tip the balance too far in favour of making a reference at an early stage, and would encourage such applications without the case proceeding to a substantive hearing, and without the tribunal being in the best position to judge the degree of confidence it actually has. I have therefore taken the approach that for a reference to be made at this stage I need to be satisfied that this tribunal will not be able to resolve the relevant issues with complete confidence.'
>
> [30] I agree with that passage and I find myself in a similar position here."

13. Similarly, in the present case, the application for a reference under Article 267 has been made not only before the substantive appeal has been heard but before HMRC has served a Statement of Case setting out its position in relation to the case and stating the legislative provisions under which the decision under appeal was made in accordance with Rule 25 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. I am therefore in the same position as Judge Berner and Rose J and adopt their approach, namely that for a reference to be made at this stage I need to be satisfied that this tribunal will not be able to resolve the relevant EU law issues with complete confidence.

14. Mr Lyons submits that I can be satisfied of this and therefore a reference to the CJEU should be made without delay. He says that the facts are clear and have been set out more than once in correspondence between the parties since 2015 and relied on by HMRC when issuing the closure notices under s 28A TMA. As an example, Mr Lyons refers to the following passage in a letter, dated 10 April 2017, from HMRC to Mrs Findlay in relation to her 2009-10 self-assessment tax return:

> "HMRC reserves the right to additional arguments but, in brief:
>
> (a) Mrs Findlay's mother, Madame Willmott, made a donation partage on 26 August 2015 in connection with a number of French properties.
>
> (b) Madame Willmott had a usufruct over the properties.
>
> (c) Mrs Findlay and her sister had the bare title subject to that usufruct.
>
> (d) Madame Willmott died on 26 September 2007 and the usufruct ceased at that time.

> (e) Mrs Findlay has subsequently disposed of a number of the French properties. As the disposal was after 6 April 2008, I am of the view that the acquisition costs for CGT purposes should be rebased to 31 March 1982 in view of s 35 TCGA 1992."

15. Although details of the properties concerned and the sale proceeds on their disposal are listed in a schedule to the letter Mr Lyons contends that that this information is not material to the issue of whether a reference should be made. Neither, he says, is the precise acquisition value of the properties as, although not agreed, it is common ground that there is a substantial difference between an acquisition value as at 31 March 1982 and an acquisition value as at 26 September 2007.

16. The legal context, Mr Lyons contends, is equally clear. He argues that Mrs Findlay has been discriminated against as she is being subjected to different and less favourable treatment by HMRC's decision that, because Mrs Findlay's late mother, Madame Willmott, had a life interest in the properties under a usufruct in accordance with French law, the acquisition cost of the properties should be ascertained at 31 March 1982 rather than 26 September 2007, the date of her death, as would have been the case had she had a life interest as a proper liferenter under the law of Scotland under s 63 TCGA, a life interest under a legal interest limited for life under the law of Northern Ireland by virtue of s 63A TCGA or a life interest in property held in trust in accordance with ss 68, 71 and 73 TCGA under the law applicable in England and Wales. In support of his argument Mr Lyons refers to HMRC's Capital Gains Manual (CG31305) where is stated:

> "A usufruct governed by French law would be regarded as a non-trust arrangement as it is broadly similar to a Scottish proper liferent."

17. Such discrimination, Mr Lyons contends, is contrary to Mrs Findlay's fundamental freedoms under the EC Treaty particularly free movement of capital and establishment. Additionally, he contends that there has also been an infringement of Madame Willmott's right to free movement of capital on which Mrs Findlay, as she has been affected by the infringement, can also rely. Although Mr Lyons addressed the fundamental freedoms of capital and establishment, which he says have been infringed, in some detail it is not necessary for me, in deciding whether a reference should be made at this stage in proceedings, to reach any conclusion on these matters or, indeed, consider them further.

18. Ms Wilson contends that I cannot be satisfied that this tribunal will not be able to resolve the relevant EU law issues with complete confidence in this case as the facts are disputed. She submits that as Mrs Findlay's case is that a usufruct is similar to a Scottish proper liferent and should be treated accordingly, to determine the substantive appeal it will be necessary for the Tribunal after hearing the expert evidence adduced by the parties to analyse the rights and duties of the parties to the usufruct as a matter of French law, a question of fact, and make appropriate findings before analysing the application of the relevant UK tax law to those findings of fact.

19. Such an approach in relation to the classification of foreign legal entities is in line with the decision of the Court of Appeal in *Memec plc v Inland Revenue Commissioners* [1998] STC 754 in which Peter Gibson LJ said, at 764:

> "What in my judgment we have to do in the present case is to consider the characteristics of an English or Scottish partnership which make it transparent and then to see to what extent those characteristics are shared or not by the silent partnership in order to determine whether the silent partnership should be treated for corporation tax purposes in the same way. The judge aptly cited the remark of Rowlatt J in *Garland* (*Inspector of Taxes*) *v Archer-Shee* (1929) 15 TC 693 at 711 in relation to an American trust:
>
> > 'The question of the American law is, what are exactly the rights and duties of the parties under an American trust, and when you find what those rights and duties are, you see what category they come in, and the place they fill in the scheme of the English Income Tax Acts which the Courts here must construe.'"

20. Although Mr Lyons contends that it is an economic analysis rather than classification or clarification of entity exercise that is required this would seem to rely on a usufruct being broadly similar economically to a Scottish proper liferent or life interest under a trust. However, not only is Capital Gains Manual which sets out HMRC's view of the law not binding on the Tribunal but it is clear from the following excerpts from the correspondence between the parties that the nature of the usufruct and rights under it are disputed:

> "2.7 While *Memec* (and CG31305) require our computational method to be adopted and not yours, there is another reason why your suggestion that 31 March 1982 values should be used for the base cost of the French Properties is incorrect. It appears to assume that what Mrs Findlay has sold is the property which she inherited in 1975. Such an approach appears to be based on a very "English" view of a usufruct. This English view of property law is well shown by your description of a usufruct as a "possessory interest". We appreciate the deep cultural reasons why an English person would be comfortable using the term "possessory" in this context. English land law, in particular, developed its unique flexibility from its ability to derive enforceable rights from the act of possession. That is not a Napoleonic view of the world, to put it mildly, nor one which French law adopts today.
>
> 2.8 It is our understanding that under French law, the property interest retained by Madame Willmott in 1975 and the nue-propriété conferred by Mrs Findlay and her sister at that time remained separate items of property and not, as your analysis would require different aspects of the same property interest. On the expiry of Madame Willmott's usufruct in 2007, Mrs Findlay and her sister became entitled to the outright ownership if the properties. Their outright interests were quite distinct from the nue-propriété they received in 1975. Under the usufruct a series of different interests exist. There is no merger of

interests. Consequently what was sold in 2009-10, 2011-12 and 2012-13 was different from what was acquired in 1975."

(Extract from letter of 13 November 2014 from Dixon Wilson Chartered Accountants (then acting for Mrs Findlay) to HMRC)

"10. The factual situation regarding the French law is that it effectively splits the interest in a property between the usufructuary and the bare owner. The usufructuary has the right to use the property and receive income from it, whilst other rights over the property, including the right to dispose of it, belong to the bare owner. The bare owner also has the right to use the property and receive income from it on the cessation of the usufructuary's interest. The relationship between a bare owner and the usufructuary therefore has some similarities with that between freeholder and a leaseholder in English law.

…

14. We have been unable to corroborate the suggestion in paragraph 2.8 of your letter that the nue-propriété and the outright ownership on the expiry of Madame Willmott's usufruct in 2007 are separate items of property in French law so that Mrs Findlay's ownership of the properties she subsequently disposed of only began in 2007. Indeed such a proposition cannot readily be reconciled with the way that the French tax authorities have apparently treated the disposals given that we are told they used an acquisition date of 26 August 1975 – Mrs Findlay gaining an exemption on the basis that she had owned the properties for more than fifteen years."

(Extract from letter of 23 June 2015 from HMRC to Dixon Wilson)

"… HMRC respond by asserting that a French usufruct has similarities to a leaseholder. If anything that would assist Mrs Findlay as it implicitly acknowledges, as we contend, that she has two property interests: a lifetime interest and an interest after Madame Willmott's death. We note the very careful wording in paragraph 14 [of HMRC's letter] that "We have been unable to corroborate the suggestion … that the nue-propriété and the outright ownership … are separate items of property …" That as may be. Clearly cannot refute "the suggestion" otherwise it would have done. In any event, what HMRC call a suggestion is, we would say, no more than a statement of the obvious on our part."

(Extract from letter of 28 July 2015 from Dixon Wilson to HMRC)

21. In its recent decision in *SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* (C-52/16), and *Günther Horváth v Vas Megyei Kormányhivatal* (C-113/16) [2018] EUECJ C-52/16, ECLI:EU:C:2018:157, EU:C:2018:157, the CJEU confirmed, at [98]:

"It should be recalled that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter

> for the national court (judgment of 8 May 2008, *Danske Svineproducenter*, C-491/06, EU:C:2008:263, paragraph 23 and the case-law cited). Likewise, it falls exclusively to the national court to interpret national legislation (see, to that effect, judgment of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 58 and the case-law cited). Finally, it is for the national court alone to determine the subject matter of the questions which it proposes to refer to the Court (judgment of 1 October 2009, *Gaz de France -Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 19 and the case-law cited)."

22. Given that the determination of the nature of a usufruct under French law is a matter of fact, that such facts are disputed and that any assessment of the facts is for the national court or tribunal, not the CJEU, it will be necessary for the Tribunal to make the necessary findings of fact and consider the application and interpretation of the national legislation, the TCGA, to the facts found, another matter falling exclusively to the national court.

23. In making such findings of fact in this case it is possible that if the Tribunal were to find, as Mr Lyon's contends, that a usufruct is equivalent or "broadly similar" to a Scottish proper liferent and applied the provisions of the TCGA accordingly that Mrs Findlay would succeed in her appeal. Of course, were the Tribunal to conclude that a usufruct is different it would find for HMRC. In any event, given these possibilities and the very early stage of the present appeal, I cannot be satisfied that the Tribunal will not be able to resolve the relevant issues with complete confidence.

24. Therefore, for the reasons above, the application is dismissed and I decline to make a reference to the CJEU under Article 267 TFEU.

25. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 18th APRIL 2018