

*a* **McCabe v Revenue and Customs Commissioners**

[2019] UKFTT 317 (TC)

*b*

FIRST-TIER TRIBUNAL (TAX)

JUDGE RICHARDS

HEARING DATE: 2 MAY, DECISION DATE: 20 MAY 2019

*c*

---

*Mutual agreement procedure – United Kingdom – Information – Disclosure – Appeal to Tribunal following mutual agreement procedure – Application by taxpayer for disclosure of documents exchanged during*

*d* *MAP – Whether relevant to question before Tribunal – Whether of great or low relevance – Whether indicated adoption of inconsistent positions by HMRC – Whether transparency required disclosure – Whether good reasons for non-disclosure – UK-Belgium double taxation agreement, arts 25, 26.*

*e*

*Procedure – United Kingdom – Discovery – Appeal to Tribunal following mutual agreement procedure – Application by taxpayer for disclosure of documents exchanged during MAP – Whether relevant to question before Tribunal – Whether of great or low relevance – Whether indicated*

*f* *adoption of inconsistent positions by HMRC – Whether transparency required disclosure – Whether good reasons for non-disclosure – UK-Belgium double taxation agreement, arts 25, 26.*

---

*g* The taxpayer submitted a tax return in the UK on the basis that he was resident in Belgium during the tax years concerned. HMRC amended his tax returns on the basis that he had been resident in the UK. At the taxpayer's instigation, the respective authorities applied the mutual assistance procedure under art 25 of the UK-Belgium double taxation

*h* agreement and concluded after applying the tie-breaker provisions that the taxpayer had been resident in the UK. The Belgian tax authorities sent an email to the taxpayer stating that the UK competent authority had not opposed the Belgian arguments that he had had a permanent home at his disposal in Belgium; that he had had vital interests in Belgium; and was

*i* normally resident in Belgium. HMRC had considered that these matters were equally true of the UK and that therefore the tie-breaker consideration was citizenship and the taxpayer was a British citizen. The taxpayer appealed to the Tribunal claiming that he had not been resident in the UK or alternatively that if he had been resident in the UK he had

also been resident in Belgium and that correct application of the tie-breaker provisions would have led to the conclusion that he had been resident in Belgium. HMRC contested these arguments and referred in its statement of case to the mutual assistance process. The taxpayer applied for disclosure of the information and representations exchanged during the mutual assistance process arguing that HMRC was adopting a position in the hearing different from that which it had adopted during the mutual assistance process. The taxpayer argued that transparency was required, referring to the OECD Manual of Effective Mutual Agreement Procedures, para 3.7.1 and Best Practice No 17.

**Held** (dismissing the taxpayer's application):

(1) The documents requested were relevant in the narrow sense that they related to a matter that HMRC had referred to in their statement of case but their degree of relevance was low. The determination of the taxpayer's residence would depend largely on primary facts including where he had spent his time in the relevant tax years and his intentions. The documents requested would shed no light on those facts but only include views on the primary facts that the tax authorities expressed some ten years after the years in dispute. The conclusions of the mutual assistance process were not only not binding on the Tribunal but would have been reached following a very different process from that that the Tribunal would be following (see [26], [28]–[31], below).

(2) When the email from the Belgian tax authorities was read as a whole, there was no obvious inconsistency in HMRC's position. The Belgian tax authorities had not adopted the positions the taxpayer adopted in the hearing and it was not *prima facie* inconsistent for HMRC to adopt a different position in the hearing from that adopted during the mutual assistance process (see [36]–[39], below).

(3) Transparency did not require that all documents exchanged during MAP had to be disclosed to the taxpayer. The OECD Manual did not go that far but emphasised the importance of the taxpayer understanding the reasons for the competent authorities' decision and the principles that lay behind it. The taxpayer was not arguing that he did not understand the reasoning or decision but sought to uncover the discussions the authorities had had before coming to their decision (see [52], below).

(4) The tax authorities had put forward good reasons why the documents ought not to be disclosed. Weight and respect had to be afforded to their views that a degree of confidentiality was important to the proper functioning of the mutual assistance procedure and that without such confidentiality co-operation between tax authorities might suffer (see [54], [55], below).

**a** EDITOR'S NOTE

This is, so far as one can tell, the first time in the UK that a taxpayer has sought an order from a tribunal requiring HMRC to disclose documents that were part of a failed attempt to resolve a matter with another country through the Mutual Agreement Procedure (MAP). The taxpayer was contending that he was a resident of Belgium, and a MAP with the Belgian tax authorities had failed to resolve the issue based on the tie-breaker provisions relating to residence. The taxpayer in a subsequent First-tier Tribunal case concerning his residence sought disclosure of the position paper of the UK revenue authorities during the MAP as he alleged that they had taken a contradictory position to the one they were taking in the Tribunal hearing.

The Tribunal concluded that it had power to order disclosure of the documents, but a discretion whether or not to do so. The documents would have been of some relevance, but relatively low relevance. Both the UK and the Belgian tax authorities argued for confidentiality of the MAP proceedings. At the end of the day, the tribunal – somewhat predictably – gave predominance to the issue of confidentiality.

One suspects that, in virtually any case where a revenue authority argues the need to maintain confidentiality of inter-governmental proceedings, the tribunal will exceed to the request of the government's concern. However, the judgment does leave open the possibility that, in appropriate circumstance, access may be granted to documents used in MAP. That, of itself, raises some issues since the tax authorities participating in the procedure will be aware that, if the circumstances are appropriate, disclosure of documents will be granted.

The difficulty, of course, is the exact nature of the MAP. Is it really an inter-governmental negotiation, where a government can take a position that may be completely different to one that it would take in domestic litigation? Alternatively, is it effectively a dispute-resolution procedure, which should be transparent, and where the taxpayer should have full opportunities to participate in the procedure? This decision seems to place MAP somewhere between the two extremes.

There is a small irony in the fact that the taxpayer was accused of carrying out a 'fishing expedition', when that is usually an accusation made against tax authorities.

**Cases referred to**

- i* *Brian Kennedy v Revenue and Customs Comrs* (unpublished).  
*Revenue and Customs Comrs v Ingenious Games LLP* [2014] UKUT 62 (TCC), [2014] STC 1416.  
*Worldpay (UK) Ltd v Revenue and Customs Comrs* [2019] UKFTT 235 (TC).

**Counsel**

*Patrick Way QC and Imran Afzal* for the taxpayer.  
*Christopher Stone* for HMRC.

*a***Solicitors**

*Mazars LLP* for the taxpayer.  
*Solicitor for Revenue and Customs* for HMRC.

*b*

The tribunal took time for consideration.

20 May 2019. The following decision was released.

*c***JUDGE RICHARDS.****INTRODUCTION AND BACKGROUND***d*

[1] This is my decision on Mr McCabe's application for the Tribunal to direct HMRC to disclose documents and information to him under r 5 and/or r 16 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009, SI 2009/273 (the 'FTT Rules').

[2] Following enquiries into Mr McCabe's self-assessment returns for the years 2006–07 and 2007–08, HMRC concluded that he was resident in the United Kingdom in those tax years. They have therefore issued closure notices amending his tax returns for those years so as to impose charges to income and capital gains tax.

*e*

[3] Mr McCabe has appealed to this Tribunal (the 'FTT') against those closure notices. His primary contention in that appeal is that he was not resident in the United Kingdom in those years and so is not subject to the income tax and capital gains tax that HMRC charged him.

*f*

[4] If, contrary to Mr McCabe's primary contention, he was resident in the United Kingdom in 2006–07 and 2007–08, Mr McCabe argues that he was also resident in Belgium in those years. Where a person is ostensibly resident in both Belgium and the United Kingdom, reg 4(2) of the double tax treaty between the United Kingdom and Belgium of 1 June 1987 (as amended) (the 'Treaty') contains a 'tie-breaker' that is designed to establish the single jurisdiction in which the person is resident. Mr McCabe's secondary contention in his appeal is that the application of the tie-breaker results in him being resident only in Belgium for tax purposes, thereby providing a further reason why he is not subject to the tax HMRC have charged him.

*g**h**i*

[5] In 2016, at Mr McCabe's instigation, the UK and Belgian tax authorities applied the 'mutual agreement procedure' ('MAP') set out in art 25 of the Treaty to try to resolve the issue of Mr McCabe's residence. That procedure concluded with an agreement between the tax authorities

*a* that, applying the tie-breaker provisions of the Treaty, Mr McCabe was resident in the UK for tax purposes. It is common ground between the parties, however, that this does not provide a conclusive answer to the question and that Mr McCabe is free to argue in FTT proceedings that the Belgian tax authorities and HMRC are wrong and that the tie-breaker provisions of the Treaty result in him being resident in Belgium.

*b* [6] Mr McCabe applies for HMRC to disclose documents relating to the application of the MAP and HMRC resist that application.

*c* RELEVANT PROVISIONS OF THE TREATY

[7] The tie-breaker provision of the Treaty is set out in art 4(2) as follows:

*d* ‘(2) Where by reason of the provision of paragraph (1) of this Article an individual is a resident of both Contracting States, then his status shall be determined as follows:

*e* (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);

*f* (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

(c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

*g* (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.’

*h* [8] The parties agree that art 4(2) sets out a ‘hierarchy’ of tie-breaker clauses so that it is only if a clause higher up the hierarchy fails to resolve the tie-break that it is necessary to consider subsequent clauses.

[9] The provisions governing the mutual agreement procedure and exchange of information are contained in arts 25 and 26 of the Treaty, which provide, so far as relevant, as follows:

*i* ‘Article 25 Mutual agreement procedure

(1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those

States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention. *a*

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States. *b*

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together to consider measures to counteract improper use of the provisions of the Convention. *c*

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs and for the purpose of giving effect to the provisions of the Convention. *d*

...

#### **Article 26 Exchange of information**

(1) The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed by or on behalf of the Contracting States, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2. *f*

(2) Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the *g*

*a* supplying State authorises such use.’

#### THE APPLICATION

##### *The terms of the disclosure application*

*b* [10] Mr McCabe applies for HMRC to disclose the following documents and information:

(1) All documentation relating to the MAP and all of the documentation in the possession or power of HMRC generally including the documentation provided to HMRC by the Belgian tax authorities.

*c* (2) Without prejudice to the generality of (1) above:

(a) All representations of the Belgian tax authorities to HMRC;

(b) All representations of HMRC to the Belgian tax authorities; and

*d* (c) All correspondence internal to HMRC relating to the preparation and issue of (b) above (including emails, memoranda and notes of conversations) between the issuing officer and any other individual containing advice, instruction, opinion or recommendation as to the application to Mr McCabe’s circumstances of art 4(2) of the Treaty and/or the position, arguments or approach to be adopted by HMRC in response to the Belgian tax authorities.

*e* (d) All advice received by HMRC in relation to (a) and (b) above.

*f* (e) Specifically, Mr McCabe seeks a copy of a ‘position paper’ that HMRC are known to have sent the Belgian tax authorities.

##### *Mr McCabe’s grounds for seeking disclosure*

*g* [11] Mr McCabe argues that there is evidence that the position HMRC adopted in the MAP is significantly different from the position they are adopting in the appeal before the FTT. On 3 July 2017, following conclusion of the MAP, the Belgian tax authority sent Mr McCabe’s advisers an email that contains the following paragraphs (in translation):

*h* ‘The UK-CA<sup>1</sup> does not oppose any of the Belgian arguments which we used to support our position that Mr McCabe for the period in question (5 April 2006 to February 2014):

– had a permanent home at his disposal in Belgium

*i* – had vital interests in Belgium, bearing in mind his close personal and economic relations with our country;

– was normally resident in Belgium.

---

<sup>1</sup> ie the UK Competent Authority for the purposes of art 25 of the Treaty.

Conversely the UK-CA cites a number of important facts and elements, on the basis of which they decide that Mr McCabe in that same period, also had a permanent home at his disposal in the UK as well as close personal and economic relations and was normally resident there. Hence, they decide that applying the so-called tie-breaker rule ... Mr McCabe must be considered to be a resident of the state of which he is a citizen (sub-paragraph (c) of Article 4(2)). In view of the fact that Mr McCabe is a UK citizen he is therefore deemed to be a resident of the UK.' *a*  
*b*

[12] Mr McCabe submits that this email demonstrates that, in the course of the MAP, HMRC were arguing that art 4(2)(c) provided for the 'tie-breaker' to be resolved by reference to his UK citizenship. That, he submits, demonstrates that HMRC accepted in the MAP both of the following propositions: *c*

(1) that Mr McCabe's 'centre of vital interests' could not be determined (as, if it could, the tie-break would have been resolved under art 4(2)(a) and it would not be necessary to read as far as art 4(2)(c)); *d*

(2) that Mr McCabe had a 'habitual abode' in both the UK and Belgium (as otherwise the 'tie-break' would have been resolved under art 4(2)(b)). *e*

[13] That, Mr McCabe submits, demonstrates that HMRC is adopting a contradictory position in FTT proceedings since HMRC's position in those proceedings is that Mr McCabe's centre of vital interests can be determined (and is in the UK) and that he has a 'habitual abode' in the UK (and not in Belgium). *f*

[14] Mr McCabe argues that, particularly in the face of this apparent inconsistency, fairness and justice require that he sees submissions that HMRC made in the course of the MAP so that he can understand the extent to which HMRC's submissions made in the course of FTT proceedings are justified. *g*

[15] He emphasises that he is not seeking simply to embarrass HMRC by highlighting to the FTT the extent to which he considers HMRC took a different approach in the MAP. Conclusions reached in the MAP are, independently of any inconsistency on HMRC's part, of clear weight and relevance to the FTT proceedings, such that fairness requires he understand how those conclusions were reached. That in turn will, he submits, help the FTT understand and weigh the evidence before it. *h*  
*i*

[16] The force of the above points is only strengthened, in his submission, by the fact that HMRC have referred to the outcome of the MAP in their Statement of Case. The fact that HMRC attach significance to the outcome of the MAP, in Mr McCabe's submission provides a further



- a reason why it is fair and just that he understand how the conclusions of the MAP were reached.

*HMRC's grounds for resisting disclosure*

[17] HMRC resist disclosure on the following grounds.

- b [18] First, HMRC deny that the email referred to at [11] discloses any prima facie case that HMRC were adopting a contradictory position in the MAP.

[19] Second, HMRC deny that the documents sought will be of any material relevance for the following reasons:

- c (1) The outcome of the MAP is not determinative of, or binding in, the FTT proceedings. The FTT will reach its conclusions as to Mr McCabe's residence in the relevant years based in large part on the evidence of fact that is before the FTT. The way that the HMRC and  
d Belgian tax authorities approached those facts, some 10 years after the event, will be of little, if any, assistance to the FTT.

- e (2) Mr McCabe evidently hopes that the outcome of the disclosure exercise will reveal that HMRC officers were making points as to the location of his 'centre of vital interests' or his 'habitual abode' that are supportive of his case. Because HMRC were not adopting any contrary position in the MAP, he is likely to be disappointed in this regard. Moreover, Mr McCabe is ably represented by leading and junior counsel who have full access to the relevant factual background.  
f Even if any of HMRC's statements did support Mr McCabe's case, they are unlikely to add anything to the case he is already advancing, or acquire any more weight by having been said by HMRC rather than by Mr McCabe's legal team.

- g [20] HMRC also argue that there are reasons of public policy why disclosure should not be directed. The UK and Belgian tax authorities have a common understanding that mutual agreement procedures under double tax treaties will be conducted in secret so that both tax authorities can speak frankly to each other during those discussions. Both tax authorities object to disclosure of the documents. If HMRC are directed to disclose  
h the documents Mr McCabe seeks future co-operation between the UK and overseas tax authorities might suffer.

[21] Finally, HMRC argue that the scope of the request for disclosure is too wide and amounts to a 'fishing expedition'.

- i *Relevant provisions of the FTT Rules*

[22] Rule 5 of the FTT Rules provides, so far as relevant, as follows:

**'5 Case management powers**

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction. a

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—...

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party ...' b

[23] The FTT has a specific power under r 16 of the FTT Rules relating to the disclosure of documents as follows:

**'16 Summoning or citation of witnesses and orders to answer questions or produce documents'** c

(1) On the application of a party or on its own initiative, the Tribunal may—...

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.' d

[24] When exercising a case-management discretion or power, the FTT must have due regard to the overriding objective set out in r 2 of the FTT Rules as follows: e

**'2 Overriding objective and parties' obligation to co-operate with the Tribunal'**

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. f

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings; g

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues. h

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or i

(b) interprets any rule or practice direction.'

*The approach I will take*

[25] The parties were both agreed that I have the power to direct HMRC to disclose the documents Mr McCabe seeks. As regards the

- a* approach I should take to the exercise of my discretion, both parties referred to the decision of the Upper Tribunal in *Revenue and Customs Comrs v Ingenious Games LLP* [2014] UKUT 62 (TCC), [2014] STC 1416 and to the decisions of the FTT in *Brian Kennedy v Revenue and Customs Comrs* (unpublished) and *Worldpay (UK) Ltd v Revenue and Customs Comrs* [2019] UKFTT 235 (TC).

[26] I do not consider that the parties differed greatly as to the approach that I should follow in the light of the provisions of the FTT Rules quoted above and those authorities. I have concluded that I should take the following approach:

- c* (1) This is a high-value complex dispute between Mr McCabe and HMRC. The starting proposition in a case such as this is that HMRC should disclose relevant documents to Mr McCabe unless there is a good reason not to.
- d* (2) A document that is relevant to an aspect of HMRC's case as pleaded in their Statement of Case is likely to be 'relevant' when considering the starting proposition set out above.
- e* (3) In assessing whether there is a good reason not to direct HMRC to disclose relevant documents, I should pay regard to the overriding objective set out in r 2 of the FTT Rules. That will involve a consideration, and weighing up of all relevant factors. The degree of relevance may be a relevant factor in the sense that, if a document is of relatively low relevance, less will be needed to displace the starting proposition that the document should be disclosed. By contrast, if a
- f* document is of high relevance, more will be needed to displace that starting proposition.

#### DISCUSSION

- g* [27] Given my conclusions above, I will order my discussion by considering first the extent to which the material that Mr McCabe seeks is relevant. Then I will consider the weight that should be attached to the reasons HMRC advance as to why the documents should not be disclosed. I will conclude by weighing up the various factors in accordance with the
- h* overriding objective in r 2 of the FTT Rules.

#### *Relevance*

- i* [28] I consider that the documents Mr McCabe seeks are 'relevant' in the narrow sense that HMRC refer to the MAP in their Statement of Case and those documents relate to the MAP. They are not, therefore, 'irrelevant'. They relate to an issue that HMRC regard as of sufficient importance and relevance to warrant inclusion in their Statement of Case.

[29] Having said that, I regard the degree of relevance of the documents as low. Mr McCabe's residence will, as Mr Stone correctly submits, depend

largely on primary facts including where he spent his time in the relevant tax years and his intentions. The documents that Mr McCabe seeks will shed no light on those primary facts. At most those documents will include views on the primary facts that HMRC and the Belgian tax authorities expressed some 10 years after the end of the tax years in dispute. a

[30] I do not accept Mr Way's submission that the documents are likely to help the FTT to decide the primary facts, or evaluate the weight to be attached to different pieces of evidence. I also reject the submission that was advanced throughout his skeleton argument (and orally) that the documents requested 'go to the root of' the residence dispute between HMRC and Mr McCabe. Of course, the FTT may be interested to see how other bodies have approached the question. But the process followed during the MAP will be very different from the process the FTT is following. The MAP involved the UK and Belgian tax authorities having a frank discussion, largely behind closed doors, of aspects of Mr McCabe's case. It heard no live evidence from Mr McCabe. By contrast, the proceedings before the FTT will be in public and Mr McCabe will have a full right to participate in the proceedings both by giving his own evidence and testing any evidence on which HMRC rely. b

[31] Therefore, not only are the conclusions of the MAP not binding on the FTT, they will have been reached following a very different process from that the FTT will be following. In those circumstances, I consider it unlikely that even a full understanding of why the MAP concluded as it did would be of much assistance to the FTT in undertaking its, very different, task. c

[32] I therefore consider that the documents requested are 'relevant' in the narrow sense that they relate to a matter that HMRC have referred to in their Statement of Case. However, I regard the degree of relevance as low. d

*Whether there is a prima facie case that HMRC were running contradictory arguments during the MAP*

[33] I do not actually consider that it is of much relevance whether HMRC were running contradictory arguments during the MAP for reasons that I have given at [29] to [31] above. However, since Mr McCabe justifies his application, at least in part, by arguing that there is an inference that HMRC have been taking contradictory positions, I will consider the point briefly. e

[34] Mr McCabe supports his allegation of inconsistency by reference to the Belgian tax authorities' email of 3 July 2017 from which I have quoted extensively at [11]. However, I agree with HMRC that the email do not bear the weight that Mr McCabe seeks to put on it. f

[35] It is true that the email does not record HMRC as making a positive g

- a* submission that Mr McCabe had his centre of vital interests in the UK (so that the ‘tie’ was broken by art 4(2)(a) of the Treaty). Nor does the email record HMRC as making a positive submission that Mr McCabe had a habitual abode in the UK but not in Belgium (so that the ‘tie’ was broken by art 4(2)(b) of the Treaty). It is also true that HMRC are arguing in the
- b* FTT proceedings that Mr McCabe’s centre of vital interests was in the UK (see para 31 of HMRC’s Statement of Case) and that he had a habitual abode only in the UK and not in Belgium (see para 33 of their Statement of Case).

*c* [36] However, when the email is read as a whole, there is no obvious inconsistency in HMRC’s position.

- [37] First, the email makes it clear that both HMRC and the Belgian tax authorities accept that there were some ‘vital interests’ in both the UK and Belgium. Moreover, the email makes it clear that the Belgian authorities
- d* were not arguing that Mr McCabe’s centre of vital interests was in Belgium (as if they were, they would scarcely have agreed to a determination that Mr McCabe was resident in the UK since art 4(2)(a) would have resolved the tie break in favour of Belgian residence). Therefore, the email indicates that during the MAP, the UK competent authority was not having to meet
- e* a case to the effect that the centre of vital interests was in Belgium and, accordingly, did not have to advance a positive case that the centre of vital interests was in the UK (since the UK was content with the tie-break being resolved in favour of the UK under art 4(2)(c) of the Treaty). That is in marked contrast with the position in the FTT proceedings in which
- f* Mr McCabe is advancing a positive case that, at relevant times, his centre of vital interests was in Belgium. Since the Belgian tax authorities were apparently not adopting the approach that Mr McCabe is adopting in the FTT proceedings, it is not prima facie inconsistent for HMRC to adopt a different position in the MAP from the one adopted in the FTT
- g* proceedings.

- [38] A similar point arises in relation to the ‘habitual abode’ tie-breaker under art 4(2)(b). The email records that both the Belgian tax authorities and the UK competent authority considered that Mr McCabe was
- h* ‘normally resident’ in both the UK and Belgium. It followed, therefore, that the Belgian tax authorities were not apparently arguing that Mr McCabe’s ‘habitual abode’ was only in Belgium and therefore the UK competent authority did not need to respond to such a case with a counter-argument that his habitual abode was only in the UK. By contrast,
- i* in the FTT proceedings, Mr McCabe is arguing that his habitual abode was only in Belgium at material times. Again, therefore, since HMRC were clearly responding to different arguments in the MAP, they cannot be accused of ‘inconsistency’ on the issue of habitual abode.

[39] I do not, therefore, consider that, even if it mattered, the email on

which Mr McCabe relies establishes any prima facie inconsistency in HMRC's position. *a*

[40] During the hearing, HMRC offered to make certain documents relating to the MAP available to me (but not to Mr McCabe or his advisers) so that I could satisfy myself, by reference to underlying documents, that HMRC's position was not inconsistent. Mr Way explained that Mr McCabe saw little utility in this suggestion because his interest is not simply in resolving an academic debate about whether HMRC is adopting 'inconsistent' positions; rather he wants sight of the MAP documents in the hope that this will help him to bolster his case on residence (or help to dismantle HMRC's contrary case). Therefore, even if I reviewed the documents and confirmed to Mr McCabe that I saw no inconsistency, that would be of little comfort or interest to him since his underlying interest is in seeing documents relating to the MAP. *b*

[41] Since Mr McCabe saw no utility in me reviewing the documents that HMRC offered to make available, I have decided that I will not review them. I have therefore reached the above conclusions as to whether there is any prima facie inconsistency by reference only to material to which Mr McCabe has access. *c*

*e*

#### WHETHER THERE IS A GOOD REASON NOT TO DIRECT DISCLOSURE

[42] It is clear that both HMRC and the Belgian tax authorities object to the documents being disclosed. HMRC's objection is demonstrated by the fact that they are contesting the application for disclosure. The objection by the Belgian tax authorities is demonstrated by the fact that although the 'Committee for the access and reuse of administrative documents' advised, on 18 December 2017, that documents relating to the MAP should be disclosed, the Belgian tax authorities have declined to follow that advice. Mr McCabe is, therefore, taking legal proceedings in Belgium to seek to obtain the documents. *f*

[43] Of course, the mere fact that the UK and Belgian tax authorities object to disclosure is not conclusive. I will, therefore, evaluate the reasons for the objection. *g*

[44] The objections of the Belgian tax authorities, which Mr Stone confirmed on instruction that HMRC share, is summarised as follows in their decision of 8 January 2018 refusing to disclose documents to Mr McCabe: *h*

'The procedure for mutual consultation is a procedure set out in the double taxation treaties which purely takes place between member states (the tax payer does not appear as a party, see point 36 at article 25 of the OECD Commentary of 2017 with the OECD model treaty) in which a solution is agreed in a confidential, constructive, *i*

*a* informal and pragmatic way to undo a specific situation of double taxation.

It goes without saying that if the Belgian administration were to disclose the confidential communication which took place both verbally and in writing in the context for the consultation procedure,

*b* and certainly if both member states expressly opposed such disclosure, that this would seriously damage the relations with the partner state both for the current as for communication procedures.’

*c* [45] In essence, therefore, both the UK and Belgian tax authorities stress the importance of discussions forming part of a MAP taking place in confidence. Some support for that approach can be found in the OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, Commentary on Article 25. I heard no submissions as to whether this commentary has the force of law when construing a treaty but it

*d* clearly sets out views that should command respect as to how contracting states who are party to conventions, such as the Treaty, that are based on the OECD Model, expect it to be applied. Paragraphs 58 to 61 (pp C(25)-31–32) of that Commentary read as follows:

*e* ‘58. The competent authorities may communicate with each other by letter, facsimile transmission, telephone, direct meetings, or any other convenient means. They may, if they wish, formally establish a joint commission for this purpose.

*f* 59. As to this joint commission, paragraph 4 leaves it to the competent authorities of the Contracting States to determine the number of members and the rules of procedure of this body.

*g* 60. However, whilst the Contracting States may avoid any formalism in this field, it is nevertheless their duty to give taxpayers whose cases are brought before the joint commission under paragraph 2 certain essential guarantees, namely:

- a right to make representations in writing or orally, either in person or through a representative;
- the right to be assisted by counsel.

*h* 61. However, disclosure to the taxpayer or his representatives of the papers in the case does not seem to be warranted, in view of the special nature of the procedure.’

*i* [46] I do not accept Mr Way’s submission that para 61 of the OECD Commentary is directed only at situations where a ‘joint commission’ is established. Nor do I accept his submission that different considerations necessarily apply given that Mr McCabe and HMRC are now engaged in a dispute before the FTT. Paragraph 61 clearly sets out a view that a MAP involves a ‘special’ procedure such that a taxpayer should not generally

expect to see all the ‘papers in the case’.

*a*

[47] Mr Way submitted, however, that even if the OECD Commentary on art 25 of the Model Convention supports restricted disclosure of papers relevant to a MAP, art 26 of the Treaty supports the proposition that such documents may be disclosed.

[48] I agree that art 26 of the Treaty is of broad application: art 26(1) provides that the UK and Belgium are to share such information as is foreseeably relevant for carrying out the provisions of the Treaty (which includes the application of art 25 as the OECD Commentary explains at p C(26)-6 (para 7(d)). Article 26(2) permits such information to be disclosed to persons concerned with the administration or collection of tax and p C(26)-14 (para 12) of the OECD Commentary explains that this includes the taxpayer.

*b**c*

[49] Therefore, I accept Mr Way’s submission that art 26 would permit documents relating to the MAP to be disclosed to Mr McCabe or his advisers. (It follows that I respectfully disagree with a suggestion that the Belgian tax authorities have made in correspondence that art 26 is of no application whatsoever to information obtained as part of a MAP). However, I do not accept that art 26 compels such documents to be disclosed and, as I have noted, the OECD Commentary on art 25 envisages that documents that tax authorities prepare in connection with a MAP would not be disclosed.

*d**e*

[50] Mr Way submitted that it is important that MAPs are conducted transparently and made the more general point that transparency tends to improve the quality of decision making by public bodies. That, he submitted should incline me to direct disclosure in the circumstances of this appeal. In support of that argument, he referred me to the OECD Manual of Effective Mutual Agreement Procedures. Paragraph 3.7.1 of that document reads as follows:

*f**g*

#### **‘3.7.1 Transparency at the resolution stage**

Transparency is one issue where competent authorities in general can improve. It becomes even more important at the resolution stage of the MAP to dispel allegations that competent authorities have traded cases. Thus, advising the taxpayer not only of the outcome but how the competent authorities arrived at the decision is important.’

*h*

[51] That in turn leads to a ‘best practice’ recommendation as follows:

#### **‘Best Practice No 17: Decision Summaries**

*i*

A summary of a MAP decision provided to the taxpayer, which describes the underlying reasons and principles of an outcome, will assist in examining why a particular result was agreed to.

These summaries can be either via closing letter to a case or



- a* provided orally in a closing meeting. Meetings would be beneficial in contentious cases or cases with unusual outcomes to ensure all elements of the decision are understood.’

- [52] I recognise that transparency is an important consideration.
- b* However, I do not consider that transparency can be achieved only if all documents that competent authorities prepare and circulate in connection with a MAP are disclosed to the taxpayer concerned. The extracts from the Manual of Effective Mutual Agreement Procedures do not themselves go that far. Rather, they emphasise the importance of the taxpayer
- c* understanding the reasons for a decision and the principles that lie behind it. Mr McCabe is not arguing that he does not understand the competent authorities’ reasoning, or decision. Rather, he seeks information and documents that go behind the reasons so as to uncover the discussions that
- d* the competent authorities had between themselves before coming to their decision or their reasons.

- [53] Mr Way referred to aspects of HMRC’s published Litigation and Settlement Strategy. That document emphasises the importance that HMRC attach to a collaborative approach to settling disputes. However, I
- e* do not consider that the document sheds much light on how I should approach the exercise of my discretion to direct disclosure in this case. In any event, the involvement of the Belgian tax authorities, and their objection to the disclosure of documents, takes this dispute outside the ordinary so, even if transparency and collaborative working are generally
- f* laudable aims, they are not necessarily determinative in the circumstances of this case.

- [54] Overall, I consider that HMRC have put forward a good case as to why the documents should not be disclosed. That case is not unassailable as it can be argued, as Mr Way did, that considerations of transparency
- g* are important. However, I consider that weight and respect should be afforded to the views of HMRC and the Belgian tax authorities that a degree of confidentiality is important to the proper functioning of the MAP (both between the UK and Belgium and other tax authorities) and,
- h* without that confidentiality, future co-operation between tax authorities might suffer particularly since that point is echoed in the OECD Commentary.

*Conclusion*

- i* [55] Overall, I have concluded that the material sought is relevant, but of low relevance. I have concluded that HMRC have put forward a good, albeit not unassailable, case as to why the documents should not be disclosed. Having weighed up those factors in the light of the overriding objective, I have concluded that HMRC’s objections (and those of the

Belgian tax authorities) set out a good reason why the documents should not be disclosed. I have therefore decided that Mr McCabe's application should be refused. a

RIGHT TO APPLY FOR PERMISSION TO APPEAL

[56] 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 r 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273. 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. b  
c

*Application dismissed.*