[2021] UKFTT 0212 (TC)

TC08162

PROCEDURE – Disclosure – Application for specific disclosure

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00777

BETWEEN

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Applicants

-and-

HYRAX RESOURCING LIMITED

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

The hearing took place on Tuesday 18 May 2020. With the consent of the parties, the form of the hearing was on the Tribunal's video platform.

Having heard Akash Nawbatt QC for the Applicant, and
Conrad McDonnell, of counsel for the Respondents

DECISION

INTRODUCTION

1. This is was a hearing in respect of HMRC's application for specific disclosure dated 17 March 2021. There are four categories of disclosure and the disclosure sought is:

(a) Category One

All communications (including any notes or other record of communications) that Ms Macnamara and/or Mr Hopkins had between 1 December 2013 and 6 April 2014 with

(i) David Gill;

(ii) Nicola Stone;

(iii) Karin Sowden (nee Montain);

(iv) Iain McLeod; and/or

(v) Paul Merill

regarding the introduction and implementation of the Hyrax scheme, their proposed appointment as directors of the Respondent and the notifiability of the Hyrax scheme arrangements.

(b) Category Two

All communications that Ms Macnamara had with

(i) Mr Gill;

(ii) Ms Stone;

(iii) Ms Sowden;

(iv) any other EDF personnel; and/or

(v) any other persons

regarding or relating to HMRC's correspondence with the Respondent between 13 March 2015 and 2 June 17.

(c) Category Three

The contractual documentation pursuant to which EDF Tax Limited ("EDF") provided its services to the Respondent.

(d) Category Four

Identify each and every individual or entity that received a proportion of the difference between the gross contract value paid by the end user and the net amount paid to the Hyrax scheme user and identify the proportions they received; and provide any documents evidencing the same.

2. On 26 April 2021, the respondents ("Hyrax") lodged with the Tribunal a response requesting that the Tribunal dismiss HMRC's application.

The Background

3. On 5 March 2019, Judge Mosedale, found that the arrangements that arise when a person becomes employed by Hyrax Resourcing Trust ("the Hyrax arrangements) were notifiable arrangements within the meaning of Section 306 Finance Act 2004 ("FA 2004")[1] and

[1] [2019 UKFTT 175] ("The Hyrax Decision")

accordingly issued an Order ("the Order") under Section 314A FA 2004. Judge Mosedale also found that, further or alternatively:

(a) The arrangements were to be treated as notifiable arrangements pursuant to Section 306A FA 2004; and

(b) She would have made an order pursuant to that section had she not made the Order.

4. On 2 April 2019, Officer Belli wrote to Hyrax referring to the Order, pointing out

(a) that in issuing the Order the Tribunal had identified Hyrax as a promoter in relation to arrangements within Section 307 FA 2004,

(b) there had been an apparent failure to meet the promoter obligations under Section 308 FA2004, and

(c) HMRC were considering whether and when to commence penalty proceedings and in respect of which period.

5. He asked for a response by no later than 2 May 2019.

6. On 1 May 2019, the appellant's representatives, RPC, responded at some length. They set out their view that:

(a) Following receipt of the Order, Hyrax had complied with its obligations imposed under Section 308(1) and (3) FA 2004, and

(b) Hyrax had a reasonable excuse for not disclosing the Hyrax arrangements to HMRC prior to receipt of the Order, and accordingly no penalty should be imposed on Hyrax under Section 98C TMA.

The key argument was that it was reasonable for Hyrax to have relied on the advice of EDF which was supported by the advice of leading tax counsel to the effect that the arrangements were not notifiable.

7. On 28 June 2019, RPC responded to a further enquiry from HMRC dated 11 June 2019 confirming in particular that:

(a) Advice was given orally by counsel to EDF in a meeting on 27 February 2014.

(b) Hyrax was not given a copy of counsel's written opinion following that meeting although a copy was provided to EDF.

(c) Hyrax was advised orally by EDF that the arrangements were not notifiable.

(d) Ms Macnamara, the director of Hyrax, did not have a role in precursor arrangements to the Hyrax arrangements known as K2/Lighthouse and had no knowledge of the directors of Peak Performance Professional Contracts Limited ("3 PCL") which the Tribunal had found had been part of the K2 structure.

8. On 18 February 2020, HMRC lodged with the Tribunal an application for penalties under Section 98C of Taxes Management Act 1970 ("TMA") supported by a witness statement with exhibits from Officer Belli which was also dated 18 February 2020.

9. Paragraph 43 of that application reads:

"The Respondent is, therefore, put to strict proof to establish, with evidence, that it had a reasonable excuse. In particular, the Respondent is put to strict proof to establish, with relevant witness and contemporaneous documentary evidence, any facts it asserts gave rise to a reasonable excuse."

10. The application went on to put Hyrax on notice that its Statement of Case and evidence should address the points and requests for information raised in HMRC's letters dated 1 April, 11 June and 2 December 2019.

11. On 21 August 2020, Hyrax filed its Statement of Case averring that:

(a) It had complied with its relevant notification obligations earlier than 4 April 2019;

(b) It had a reasonable excuse not to comply with said obligations throughout the period between April 2014 until the date when it did comply; and

(c) Alternatively and on any view the quantum of the penalty was disproportionate and excessive.

12. On 5 February 2021, HMRC wrote to Hyrax setting out six categories of documents for which they sought disclosure and why HMRC considered that it was relevant to make such disclosure.

13. On 25 February 2021, RPC responded stating that:

(a) They should only disclose that which they considered necessary and had no need to disclose anything else. They cited paragraph 57 of *Addo v HMRC*[2] ("Addo") in support of that.

(b) Hyrax was confident that the evidence to be provided by the three witnesses would be sufficient to establish a reasonable excuse and that the witnesses would speak to oral discussions "… which are not reflected in any contemporaneous documents".

(c) It was argued that Hyrax had not knowingly withheld disclosure of any relevant material that might assist the Tribunal.

(d) In relation to the, now, Category one application, on a without prejudice basis since they believed they were not required to disclose documents, Hyrax would attempt to locate any relevant communications and if any were found they hoped to produce them within 28 days. Nothing has been produced.

(e) In relation to the, now, Category two application, they stated that there were no notes of any communications.

(f) In relation to the, now, Category three application they stated that Hyrax did not rely on any specific terms of engagement with EDF so it was simply not relevant.

(g) In relation to the, now, Category four application, to the extent that it might be relevant, Mr Gill's witness statement and the Hyrax Decision provided all of the relevant information. There was no need for further disclosure.

14. In light of that response HMRC removed two of the categories of documents.

Discussion

15. This was not an easy decision in that on the one hand I understood that HMRC were very frustrated at the lack of contemporaneous documentation but, on the other hand, equally Hyrax know that they have the burden of proof to establish reasonable excuse and, in popular parlance, they believe that they have done enough. I cannot judge that at this juncture since that is the subject matter of the substantive appeal and the evidence has not been tested.

16. However, the point is that Hyrax's appeal could stand or fall by their decisions on what they choose to disclose.

[2] [2018] UKFTT 492 (TCC)

17. Hyrax rightly point out that HMRC have not identified any specific document by date or description and there is no specific document upon which Hyrax relies in either its Statement of Case or the witness statements that has not been disclosed.

18. HMRC argue that this is a very unusual situation where Hyrax filed no contemporaneous documentation in support of its position. They have lodged the three witness statements of David Gill, Joanne Macnamara and Karin Sowden but those witness statements do not refer to any contemporaneous documentation.

19. By contrast Hyrax acknowledge that that is the case but point out that there is no document vacuum as 128 documents have been lodged thus far.

20. Rule 5 gives the Tribunal, as part of its general case management powers, the power to direct a party to provide documents and information to another party. The Tribunal also has a specific power, under Rule 16, to order a person to "produce any documents in that person's possession or control which relate to any issue in the proceedings". When exercising a case management discretion or power, the Tribunal must have due regard to the overriding objective set out in Rule 2.

21. In their Skeleton Arguments, both parties cited *McCabe v HMRC*[3] ("McCabe") as authority for the proposition that "the starting point" in a high-value complex cases is that a document which is relevant should be disclosed unless there are good reasons to the contrary.

22. Where the parties differed was HMRC argued that this is a high-value complex dispute whereas Hyrax disagrees.

23. Hyrax's argument is that there is only one principal issue which is whether or not Hyrax had a reasonable excuse for not notifying the arrangements under the disclosure of tax avoidance schemes ("DOTAS") legislation. If there is a reasonable excuse then no penalty would be exigible. They are correct in that.

24. HMRC's argument was that the appeal had been categorised as complex and involved a statutory maximum penalty of £1,153,000.

25. By contrast Hyrax argue that their case is straightforward and that it has only been categorised as complex because of Rule 23(4) of the Tribunal Rules. That Rule reads:

> "(4) The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case—
>
> (a) will require lengthy or complex evidence or a lengthy hearing;
> (b) involves a complex or important principle or issue; or
> (c) involves a large financial sum."

26. In this case it had clearly been allocated as complex because it involved a large financial sum. However, I accept that that sum was simply a product of the accumulation of the daily penalties at a maximum of £600 per day over a long period, and in the post Order period a maximum of £5,000 per day. I agree with Hyrax that that is mechanistic and is not *per se* high value.

27. The case has been listed for hearing for five days. HMRC's argument was that five days was a long hearing. In my view, the duration of the hearing is a neutral matter. This was listed for a video hearing and at the time it was listed, a longer time was allocated to video hearings than would have been anticipated for conventional hearings. In any event five days in the Tax Tribunal is not particularly long!

[3] [2020] UKUT 255 (TCC)

28. It is undoubtedly the case that the question of what amounts to a reasonable excuse is a relatively routine matter that comes to the Tribunal frequently so it does not involve a complex or important principle or issue.

29. I agree that, almost certainly, the case was categorised as complex because of Rule 23(4)(c).

30. Although there is a large sum of money involved, I do not think that this is a high-value complex dispute.

31. Therefore the starting point is Rule 27(2) which provides for what is loosely known as "standard disclosure". That reads:

> **"27.— Further steps in a Standard or Complex case**
>
> (1) …
>
> (2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—
>
> (a) of which the party providing the list has possession, the right to possession, or the right to take copies; and
>
> (b) which the party providing the list intends to rely upon or produce in the proceedings.
>
> …".

32. As Judge Walters made clear in *Ebuyer v HMRC*[4] ("Ebuyer"), and he was upheld by the Court of Appeal,[5]*:*

> *"*Litigation in this tribunal is intended to conform to a different model from litigation in the High Court and the Rules establish the framework within which litigation in this tribunal is to be carried on. Rule 27 provides for the normal disclosure in a standard or complex case and I consider it would not be appropriate for me, at this stage in this litigation, to require wider disclosure than that required by rule 27."

33. In what circumstances could I consider departing from Rule 27?

34. Firstly, there was no dispute that, as the Upper Tribunal pointed out at paragraph 24 in *McCabe* the Civil Procedure Rules ("CPR") have no application to the approach of the Tribunal to disclosure.

35. Secondly, it is Rule 16 that permits the Tribunal to make an order for disclosure that goes beyond Rule 27. However, that Rule must be read in the context of Rule 2 and in particular Rule 2(3)(a) so any decision on disclosure must be proportionate.

36. If I were to make an order for disclosure of the magnitude sought by HMRC, I would have to have very good reasons for doing so.

[4] [2014] UKFTT 921 (TC)
[5] Paragraph 94

37. The Upper Tribunal in *McCabe* cited the decision of the Court of Appeal in *HMRC v Smart Price and others*[6] at paragraph 40 which reads:

> "Disclosure of documents is not an end in itself but a means to an end, namely to ensure that the tribunal has before it all the information which the parties reasonably require the tribunal to consider in determining the appeal. It is only one step in the overall management of the case which should, as the appeal progresses towards a substantive hearing, identify and if possible narrow the issues between the parties. The scope of the issues in contention at the trial depends in part on the legal test to be applied by the tribunal and in part on the parties' respective positions as to which elements of that test are in contention."

38. I think that that is particularly relevant in this case in that I should ask myself two questions:

(1) If I made the order sought by HMRC, and by their own admission it is very wide, would that disclosure identify and narrow the issues between the parties?

(2) Is disclosure required for a fair determination of the issues?

39. Hyrax argues that it could not identify or narrow the issues because the issue is discrete, namely whether there was a reasonable excuse for failure to notify and that the witnesses speak to that. They would be believed or not. I agree.

40. I heard argument from both parties as to the relevance or not of the documents sought to be disclosed. I find that the documents are "relevant" in the very narrow sense that they relate to the Hyrax arrangements.

41. However, I regard the degree of relevance as very low in regard to the question of reasonable excuse. I noted that in the *Hyrax Decision*, Judge Mosedale stated at paragraph 39 that:

> "…in the absence of any explanation at all for the failure of the directors of the respondents to give evidence it is appropriate to draw the inference that the evidence they could have given would not have assisted their case…"

I agree.

42. Hyrax must be aware that in failing to produce any contemporaneous evidence they are running a risk, but that is their entitlement.

43. Even if this were a high-value complex case, and it is not, I would not grant the application in relation to Categories three and four. I can see no basis on which any documentation for either of those would have probative value in relation to the only issue that is in dispute, namely Hyrax's reasonable excuse or not. EDF gave advice, their terms of engagement are irrelevant.

44. Further as far as Category Four is concerned, unless HRMC can persuade me to the contrary which they have not thus far, and they are at liberty to apply, I find that Judge Mosedale, in the *Hyrax Decision* at paragraphs 218 to 222 makes explicit the "fee" situation which Category Four addresses. That is at a high level but I do not accept, that in the context of penalties and reasonable excuse, the Tribunal requires any further information.

45. As far as the first two categories are concerned, since I do not accept that this is a high value complex transaction I see no reason to depart from Rule 27. Hyrax argue that their position is that the correspondence reflects the advice received. They either prove that or not.

[6] [2019]1WLR 5070

46. Mr Nawbatt very sapiently stated that if the application were not to be granted then neither the Tribunal not HMRC would be able to test the witnesses' evidence. Whilst I understand that, the issue is rather that the burden of proof lies with Hyrax.

47. The content of the *Hyrax Decision* itself sets out a good foundation for cross examination as does HMRC's letter of 2 December 2019 and Hyrax's failure to address the issues raised therein.

48. In summary, I agree with Judge Greenbank in *Addo* where he states:

> "57. Under FTR rule 27, it is open to a party to decide the documents on which it intends to rely or to produce at the hearing whether to support its own case or to disprove the case as put by the other party. If the relevant party chooses not to produce a particular document to which a witness refers that may well reduce the value of the evidence given by the witness and affect the strength of that party's case overall. That is a matter for the Tribunal to assess and is a risk that the relevant party takes. While I accept Mr Ramsden's point that, if it is read in this way, the effect of the rule is that the level of disclosure under rule 27 is left largely in the hands of the disclosing party, in my view, on its terms, rule 27 does not require a party to disclose any other documents."

49. I also agree with Judge Walters in *Ebuyer* that given that this is not a high-value complex case, it would not be appropriate to require wider disclosure than that required by Rule 27. This disclosure is not required for a fair determination of the issues.

50. For all these reasons I refuse the application.

Right to apply for permission to appeal

51. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 08 JUNE 2021