[2021] UKFTT 0339 (TC)

TC08273

PROCEDURE – appeals against information notices – application for disclosure of HMRC's electronic file in relation to each Appellant, and for VAT records – application for order that HMRC carry out a search – disclosure of HMRC's electronic file and order for search refused, disclosure of certain VAT records allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers:
TC/2019/05527;TC/2019/05528
TC/2019/05529;TC/2019/05725

BETWEEN

ASIF MALEK
ROSALYN CHOWDHURY
CH LEGAL LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Appellants' application was decided on 10 September 2021 on the papers, with the consent of the parties.

Mr Parvez of Claremont Solicitors Ltd (Claremont Legal) , for the Appellants

Ms McDougall-Moore of the Solicitor's Office of HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. This is a case management decision. HMRC had issued each of the Appellants with Notices under Finance Act 2008, Sch 36 ("Sch 36 Notice" or "Notice"), and they appealed those Notices. In addition, the third appellant, CH Legal Ltd ("CHL") had applied to close a statutory enquiry opened by HMRC.

2. The background to the substantive disputes was that:

   (1) On 3 December 2014 the law changed to prevent companies amortising goodwill obtained from connected parties.

   (2) Mr Malek and Ms Choudhury had previously worked in partnership as Chance Hunter Solicitors LLP ("the LLP"), of which CHL was also a member.

   (3) The LLP's business was transferred to CHL.

   (4) The related goodwill was initially valued at £10.8m, later reduced to £3m.

   (5) Amortisation of the goodwill eliminated two years' of taxable profits.

3. The Appellants' position was that the LLP's business had been transferred in March 2014, before the change in the law. Mr Lee Graham, the HMRC case officer, was "concerned" that the transfer had taken place *after* the law changed; he also had a number of other concerns including the amortisation policy, the valuations and the accounting treatment, and he issued Sch 36 Notices to obtain related information and documents..

4. On 20 May 2021, in the context of their appeals against the Sch 36 Notices and CHL's closure notice application, the Appellants applied for a direction that HMRC disclose the following ("the Application"):

   (1) the entire unredacted file relating to HMRC's enquiries into the Appellants, to include any enquiry or period categorised as a "check of the tax position"; and

   (2) CHL's VAT records from December 2013 to date,

5. Having considered *E-Buyer v HMRC* [2017] EWCA Civ 1416 ("*E Buyer*"); *Smart Price v HMRC* [2019] EWCA Civ 841 ("*Smart Price*") and *McCabe v HMRC* [2020] UKUT 266 (TCC) ("*McCabe*"), I identified the principles which a Tribunal should apply when deciding a disclosure application, see §48.

6. One of those principles is that the Tribunal identify "the legal test to be applied", so that disclosure is "closely related to the issues in dispute in the proceedings". In relation to appeals against Sch 36 Notices, guidance on the legal test is provided by *Derrin Brothers v HMRC and others* [2016] EWCA Civ 15 ("*Derrin*"), and *Kotton v HMRC* [2019] EWHC 1327 (Admin) ("*Kotton*").

7. On behalf of the Appellants, Mr Parvez submitted that disclosure of the Appellants' entire unredacted files would show "how advice on technical accounting, valuation and other issues has been interpreted and applied". However, in relation to the issuance of a Sch 36 Notice, it is clear from *Derrin* and *Kotton* that HMRC are required only to show that there is "rational connection between the information and documents sought and the underlying investigation" and this "does not require any examination of the nature and extent of the underlying tax investigation". In other words, HMRC do not have to demonstrate that Mr Graham's

understanding of the accounting and valuation issues is correct, but only that his view is rational.

8. Mr Parvez also submitted that HMRC had made "very serious allegations about the 'backdating' of documents", and that the file "will show the full extent of the evidence available to [HMRC] to support such allegation". However, a Sch 36 Notice is not an allegation of fraud which requires pleading and particularisation. Instead, subject to meeting the tests set out in that Schedule as to rationality, privilege and other matters, HMRC are entitled to ask for documents and information as a preliminary to forming conclusions as to whether or not a taxpayer has underpaid tax, and if so whether that underpayment has arisen as the result of fraudulent, deliberate or careless behaviour, or was an innocent error.

9. Having considered those issues and others, I refused to direct disclosure of HMRC's "entire unredacted file". However, I directed disclosure of the VAT returns filed by CHL for the period from December 2013 to 30 April 2018 for the reasons explained at §§82-85.

10. The Appellants additionally applied for a direction that HMRC carry out a search of their records in accordance with the "Duty of Search" requirements in the Civil Procedure Rules at CPR 31.7. I refused that application for the reasons given at §§87-90.

11. It follows that the Application is allowed in part.

Documents considered

12. In order to decide the Application, I considered the following documents:

(1) the Application, HMRC's objection to the Application, dated 13 June 2021 ("the Objection"), and the Appellants' Reply to the Objection ("the Reply");

(2) the Appellants' Notices of Appeal, which attached the Sch 36 Notices issued on 27 June 2019 by Mr Graham; a letter in response from the Appellants' accountant, Ms Kelliher of Lindley Adams Ltd dated 17 July 2019; Mr Graham's "view of the matter" letters dated 8 August 2019, and responses from Mr Parvez dated 14 and 15 August 2019;

(3) the Closure Notice application dated 15 August 2019, which had no attachments;

(4) Mr Graham's witness statement dated 6 August 2020. This was prepared for the Sch 36 Notice appeal hearing, but was relied on by the Appellants in the context of the Application; and

(5) Mr Malek's witness statement dated 23 March 2021. This was also prepared for the Sch 36 Notice appeals, and the Appellants relied on it in the context of the Application.

Background to the Application

13. Mr Malek and Ms Choudhury previously worked in partnership as Chance Hunter solicitors LLP; CHL was also a member of the LLP. Mr Malek and Ms Choudhury were directors and shareholders of CHL.

14. The Appellants' position is that on 31 March 2014, the LLP entered into an agreement to transfer its entire business to CHL.

15. On 3 October 2017, HMRC opened an enquiry into CHL's tax return for the periods ending 31 October 2015 and 30 April 2016.

16. On 22 December 2018, the business of CHL was transferred to Claremont Solicitors Ltd, who are now acting for the Appellants in these appeals.

17. HMRC have a number of concerns about the transactions relating to the transfer of the LLP's business. The following points are from Mr Graham's witness statement.

(1) A valuation dated 29 February 2012 valued the partnership's goodwill at £10,808,000 at 30 April 2012. The valuation was based largely on ongoing work-in-progress (WIP) of £5m that was stated to have existed as at 28 February 2012.

(2) The subsequent transfer of the business occurred on 31 March 2014, more than two years after the valuation, at which point the goodwill figure was reduced to £3m. The valuation was therefore primarily based on WIP which never materialised.

(3) With effect from 3 December 2014, the law changed so as to prevent companies amortising goodwill obtained from connected parties.

(4) The Appellants' position was that the LLP's business had been transferred in March 2014, before that change in the law, but Mr Graham was "concerned" that this transfer had taken place *after* the law changed.

(5) The LLP's accounting period would have ended on 28 February 2015, but was shortened so that it ended on October 2014. Mr Graham said that there was "a risk" this had been done retrospectively in order to "mask" the business being transferred after the change in the law.

(6) When Mr Graham asked for a copy of the sale agreement, he was provided with a copy of a single page which "was heavily redacted and did not include any information regarding who the parties to the transaction [were] and when the transaction took place".

(7) In the accounting period ended 31 October 2014, the very substantial level of amortisation not only extinguished all profits for that period, but generated a loss that was sufficient to extinguish all the profits of the previous period.

(8) Prior to obtaining the business, CHL had received 90% of partnership profits despite having made no contribution to the equity of the partnership. However:

(a) as far as HMRC were aware, CHL did not participate in the equity of the LLP and had not incurred any expenditure in exchange for the right to allow it to participate in the profits; and

(b) Mr Graham perceived there to be a risk that the directors had diverted profits chargeable to income tax into CHL for a tax advantage.

(9) It had subsequently been agreed that CHL would pay £3m to be entitled to 100% of the income of the business previously carried on by the LLP, an effective increase of 10%. No explanation had been given as to why the directors, already benefitting from 90% of the business income at no cost to CHL, would agree to incur a very substantial debt for what appears to be a very minimal increase in reward.

(10) Comparing the dividends paid in the period against the self assessment returns of the directors, it appeared that a minority shareholder had received the majority of the dividend.

(11) CHL is not filing VAT returns, and this led Mr Graham to question its relationship with the LLP.

18. Those concerns form part of the relevant background relied on in the Application, see §§32-33 below. They also underpin the Sch 36 Notices. Mr Graham asked for information and documents about the sale/purchase agreement; the goodwill transfer; the change of accounting date; the amortisation policy; dividends; directors' remuneration and other matters.

19. The Sch 36 Notice issued to Mr Malek related to 2014; although the Tribunal was not provided with the Notice for Ms Chowdhury, I have inferred from the other documents filed on her behalf that it also related to 2014. The Notices for CHL related to periods ending 31 October 2014 through to 30 April 2018.

20. On 15 August 2019, Claremont Solicitors applied on behalf of CHL to close the enquiry on the grounds that it had been "going on for too long"; that there had been "considerable delay by HMRC" and that "HMRC has sought to obtain information to which it is not entitled and/or which is not reasonably required".

21. On 20 August 2019, the Appellants appealed the Notices on the following grounds:

(1) The documents are not "statutory records".

(2) The documents are not "reasonably required".

(3) The Appellants relied on Sch 36 para 18 "to the extent that it is applicable". That paragraph reads "an information notice only requires a person to produce a document if it is in the person's possession or power".

(4) None of the conditions A-D of Sch 36 para 21 were applicable. That paragraph provides that a Notice cannot be given where a person has completed a self-assessment return, unless one of conditions A to D were satisfied. I return to this at §67.

(5) The documents are protected by legal privilege and/or by journalistic privilege (Sch 36, para 23 and 19(1)(b)).

22. On 23 March 2021, Mr Malek signed a witness statement. In response to Mr Graham's concern that the sale agreement had been backdated, he said "I resent the accusation and can categorically state that the document is correctly dated 31 March 2014".

The Tribunal Rules

23. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provides as follows:

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

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

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

24. Rule 5 is headed "Case Management Powers" and includes the following provisions:

"(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.

(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."

25. Rule 16(1)(b) gives the Tribunal the power to "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".

26. Rule 27 is headed "further steps in a standard or complex case", and para 2 reads:

"Subject to any direction to the contrary…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."

The Civil Procedure Rules

27. The Civil Procedure Rules have more prescriptive requirements. CPR 31.6 is headed "Standard disclosure – what documents are to be disclosed" and reads:

"Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction."

28. CPR 31.7 is headed "Duty of Search" and reads:

> "(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).
>
> (2) The factors relevant in deciding the reasonableness of a search include the following –
>
> (a) the number of documents involved;
>
> (b) the nature and complexity of the proceedings;
>
> (c) the ease and expense of retrieval of any particular document; and
>
> (d) the significance of any document which is likely to be located during the search.
>
> (3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document."

Mr Parvez's submissions on behalf of the Appellants

29. Mr Parvez submitted that, although the CPR was not "strictly" binding on the Tribunal, it was "more than merely persuasive" and the Tribunal should adopt the same approach. He relied on *Calltel Telecom Ltd v HMRC* (2007) (VTD 20266) ("*Calltell*"), and he referred to *BPP Holdings Ltd v HMRC* [2017] UKSC 55 ("*BPP*").

30. In his submission it followed that the Tribunal should direct the disclosure asked for in the Application, and also direct that HMRC carry out a search; give standard disclosure in accordance with the CPR, and order that an officer of HMRC provide a witness statement stating that:

> (1) the person signing it understands HMRC's obligations to disclose documents that adversely affect their own case or support that of another party and that a reasonable search has been carried out for these documents;
>
> (2) setting out full details of the search; and
>
> (3) specifying the documents which are no longer in HMRC's control or in relation to which they assert a right or duty to withhold inspection.

31. He also cited *Dorset Healthcare v MH* [2009] UKUT 4 (ACC), in which the Upper Tribunal of that Chamber began its judgment at [20] by saying that "the starting point is that full disclosure of all relevant material should generally be given", and adding at [25] that:

> "Given the general rule in favour of full disclosure the burden will be on the responsible authority to demonstrate that it is appropriate to withhold disclosure of any particular documents."

32. In relation to the first item for which the Appellants had applied for a disclosure direction, namely the "entire unredacted file relating to HMRC's enquiries into the Appellants", Mr Parvez relied on the following points:

> (1) HMRC's investigations had been "marred by incompetence resulting in delay, change in personnel and the Respondents seeking irrelevant information".
>
> (2) HMRC's file will show details of the progress of the case.
>
> (3) It will also show "how advice on technical accounting, valuation and other issues has been interpreted and applied", and this "evidence is clearly relevant to the issues before the Tribunal which include whether a closure notice ought to be issued and whether the information sought is reasonably required".

(4) HMRC had made make "very serious allegations about the 'backdating' of documents and their file "will show the full extent of the evidence available to [HMRC] to support such allegations and accordingly will be relevant material to be put before the Tribunal".

(5) The provision of the file is reasonable and proportionate, because it is "simply a case of pressing print".

33. In relation to the second item for which the Appellants had applied for disclosure, Mr Parvez said Mr Graham's witness statement had stated that CHL was not filing VAT returns, and in the Appellants' submission, this was plainly wrong.

34. In the Objection, Ms McDougall-Moore said on behalf of HMRC that Mr Graham now accepted that CHL had submitted VAT returns between 08/14 and 11/17 but had noted that they were nil returns, despite the company's turnover being above the VAT threshold. In the Reply, Mr Parvez said:

> "This just goes to the show the clear need for disclosure. Had the Appellants not sought disclosure of documents on this issue the matter could well have gone to a hearing where the Respondents were able to paint an entirely misleading picture of the Appellants' VAT affairs and to do so in circumstances where the Appellants were unable to challenge the Respondents wrongly made assertions."

Ms McDougall-Moore's submissions on behalf of HMRC

35. Ms McDougall-Moore did not refer to any case law authorities, but submitted that:

(1) HMRC was only required to comply with Rule 27, namely to disclose the documents on which they intended to rely in the proceedings;

(2) the Tribunal Rules did not set out any duty on a party to carry out a search, and the issuance of such a direction "goes against the overriding principles of the Tribunal to avoid unnecessary formality and unnecessary delays";

(3) the Appellants have "misunderstood the Tribunal Rules";

(4) given "the relatively simple nature of Schedule 36 appeals such as those relevant to the Application", it would be "excessive" for HMRC to have to undertake the type of search required by the CPR; and

(5) any issues regarding VAT "should be dealt with at a hearing".

Other authorities

36. As already noted, Ms McDougall-Moore did not cite any authorities. Mr Parvez cited:

(1) *Dorset Healthcare,* which concerned an application for disclosure from an NHS trust holding a patient's medical records containing confidential third party material relevant to the patient's mental health;

(2) *Calltell,* which preceded the introduction of the Tribunal Rules; and

(3) *BPP*, in which the Supreme Court considered the approach to be taken to sanctions.

37. I have preferred to rely on the authorities set out below, which provide guidance on the approach this Tribunal should take when considering an application for disclosure.

E Buyer

38. In *E Buyer v HMRC* [2014] UKFTT 912 (TC), a case involving Missing Trader Intra-Community Fraud ("MTIC") the appellant asked the Tribunal to follow *Calltell*, and having done so, to direct HMRC to give standard disclosure under the CPR. Judge Walters refused. He said at [40]:

> "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."

39. The UT (Nujee J and Judge Herrington) overturned that decision. They held that HMRC had made an allegation of dishonesty against E Buyer, and that company was therefore "entitled to proper particulars of what it is said to have known and the facts on which such a case is based", see *E Buyer v HMRC* [2016] UKUT 123 (TCC) at [103].

40. When the case reached the Court of Appeal, Vos LJ gave the leading judgment; Etherton MR and Hallett LJ delivered concurring judgments. Vos LJ said at [90(iii)] that if "dishonesty or fraud is expressly alleged by HMRC against the taxpayer…that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court".

41. At [93] he summarised the UT's reasons for ordering disclosure, and then said at [94] that of those reasons, the allegation of dishonesty point was "the most important". However, on the facts, HMRC had not alleged dishonesty against E Buyer. He therefore found:

> "In these circumstances, I cannot see how Judge John Walters QC's simple reasoning can be faulted. It is true that this is an important case, but the 2009 Rules were made for important as well as simple cases. The plain fact is that the procedure is different in the F-tT. If fraud or dishonesty had been alleged, there is, as I have said, authority for the proposition that CPR-style disclosure would have been appropriate, but all that is alleged here is knowledge of a fraud, not direct dishonest participation in a fraud."

Smart Price and others

42. In *Smart Price & others v HMRC* [2019] EWCA Civ 841 ("*Smart Price*"), the Court of Appeal considered several appeals by traders who had been refused registration under the regime for wholesale suppliers of alcohol ("AWRS"). Rose LJ, giving the only judgment with which Newey and McCombe LJJ both agreed, said at [40]:

> "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."

43. At [41] she said:

> "HMRC argue that the trend in civil proceedings in recent years has been to reduce the amount of disclosure ordered. I would prefer to say that the trend has been to ensure that disclosure is more closely related to the issues in dispute in the proceedings."

44. She concluded at [53]:

> "…my conclusion is that disclosure from HMRC limited to that required by rule 27(2), would not be not sufficient in these AWRS appeals, even as a starting point. I do not accept that *E Buyer* is authority for the proposition that something exceptional is required for that rule to be displaced. The Chancellor's comment was made in the context of an appeal against a case management decision by the FTT to limit disclosure to the documents on which HMRC wished to rely to refuse input VAT deduction in respect of specified transactions alleged to be part of an MTIC fraud. The focus of the inquiry in such a case is much narrower than the wide ranging assessment of fitness and properness involved in the present appeals. The Chancellor said that wider disclosure such as standard disclosure would have been appropriate had fraud or dishonesty been alleged rather than simply knowledge of the fraud. Further, Hallett LJ noted in *E Buyer* that the order being challenged was expressed by the FTT judge as the one appropriate at that stage of the litigation. I agree with the conclusion of the FTT and Upper Tribunal in these appeals that where HMRC have access to many documents of which the applicant may be unaware, it is vital that the appellant trader have access to any exonerating material in the hands of HMRC. These cases are different from the more common appeals against a tax assessment where most if not all the material considered is provided to HMRC by the tax payer."

45. At [56] she directed that:

> "HMRC should give what corresponds to standard disclosure under the CPR but…excluding documents which are not relied on and which are entirely adverse to the applicant's case."

McCabe

46. In *McCabe* [2020] UKUT 266 (TCC) ("*McCabe*"), the appellant was seeking disclosure of documents which he submitted were relevant to his domicile dispute. Under the heading "principles material to determine relevance in this case", the Upper Tribunal (Fancourt J and Judge Scott) said:

> "22. First, we agree with the FTT (at [26]) that since this was a "high-value complex dispute" the starting proposition was that HMRC should disclose relevant documents to Mr McCabe unless there was a good reason not to...
>
> 23. Second, the FTT must exercise its discretion to order additional disclosure under Rule 16 so as to give effect to the overriding objective: Rule 2(3)(a). That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate.
>
> 24. Third, the approach of the FTT to disclosure is not determined by the Civil Procedure Rules ('CPR'). Rule 27 of the FTT Rules states that a party must (amongst other things) produce a list of documents, which the other party may inspect, which that party intends to rely upon or produce in the proceedings. Importantly, that rule applies to both standard and complex cases: Rule 27(1)….
>
> 25. Fourth, relevance is to be assessed by reference to the issues in the case and the positions of the parties."

47. The UT further expanded the first of those points at [34], saying:

> "The starting point in the FTT in a complex, high-value case may be that a document which is relevant (in the broadest sense) should be disclosed unless there are good reasons to the contrary, but that is only a starting point. On an application for disclosure, the tribunal will need to consider the degree of potential relevance of the document and whether there is a need for disclosure in order to enable a fair determination of the issues to take place. Further, in taking into account the overriding objective, what might amount to 'good reasons' for refusing to order disclosure of documents that are relevant are likely to differ depending on whether a document is materially adverse to a party's case or merely a background document or one which might lead to a train of enquiry".

The principles to be applied

48. From the case law set out above I derive the following principles:

(1) 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 (*Smart Price*).

(2) The FTT's approach is not determined by the CPR but by its own Rules (*E Buyer, McCabe*).

(3) However, the FTT may direct more extensive disclosure than that required by Rule 27 (*Smart Price; McCabe*).

(4) In deciding whether to direct that more extensive disclosure, the Tribunal must exercise its discretion so as to give effect to the overriding objective (*Smart Price, McCabe*), which:

(a) requires the Tribunal to take into account the scope of the issues in contention at the trial, and this "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" and disclosure is to be "closely related to the issues in dispute in the proceedings" (*Smart Price,* reiterated in *McCabe*); and

(b) may require the Tribunal to consider the degree of potential relevance, including whether the document is materially adverse to a party's case or merely a background document or one which might lead to a train of enquiry (*McCabe*).

(5) In most appeals before the FTT, the appellant might be expected to hold or, at least, be aware of, the existence of all relevant materials, and HMRC would not then normally be directed to provide more extensive disclosure than that required by Rule 27 (*Smart Price*).

(6) Where a taxpayer is accused of fraud, this "must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court" (*E Buyer*).

49. It is clear from these authorities that disclosure is not necessarily limited to that set out in Rule 27, as Ms McDougall-Moore had submitted. But equally the CPR does not normally apply, contrary to Mr Parvez's submissions. Instead, the Tribunal must decide whether it is in the interests of justice to direct further disclosure than that required by Rule 27, taking into account the issue in dispute and the test to be applied by the Tribunal, with the object of ensuring that the Tribunal has all the information reasonably necessary to decide the dispute.

Structure of the rest of this decision

50. The Appellants applied for the Tribunal to grant disclosure under two headings:

(1) the entire unredacted file relating to HMRC's enquiries into the Appellants, to include any enquiry or period categorised as a "check of the tax position"; and

(2) CHL's VAT records from December 2013 to date.

51. In relation to the former, I was unable to identify any precedent where a party had applied for disclosure of the other party's entire file, let alone any case in which a court or tribunal had granted such an application. The CPR requires the party itself to carry out a search in order to identify specific documents, and the Court of Appeal had followed a similar approach in *Smart Price*.

52. However, absence of precedent does not decide an issue, and I have therefore considered the Application in the terms it has been made. In relation to both disclosure requests I began by considering the Appellants' appeals against the Sch 36 Notices, before turning to the closure notice application.

HMRC's electronic file on the Appellants: the Sch 36 Notices

53. My starting point is the legal test to be applied in relation to the Appellants' appeals against the Sch 36 Notices, so that the disclosure can be "closely related to the issues in dispute in the proceedings".

The legal test to be applied

54. In *Derrin Brothers Properties v HMRC* [2016] EWCA Civ 15 ("*Derrin*"), the Chancellor, Sir Terence Etherton, gave the only judgment with which Davis and Vos LJJ both agreed. He said at [68] that:

> "The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise."

55. It is clear from the reference to "the statutory scheme" that the Chancellor is here referring to Sch 36 as a whole, and not simply to the third party notices with which the case was directly concerned.

56. In *Kotton v HMRC* [2019] EWHC 1327 (Admin) ("*Kotton*"), Simler J (as she then was) in the context of an appeal against Notices issued to a third party under paras 2 and 3 of Sch 36, said at [60]:

> "the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are 'reasonably required' for the purpose of 'checking' the tax position of the taxpayer."

57. This limited role was, she said, "unsurprising" given that Sch 36 is "directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others". After citing *Derrin,* she then said (in the same paragraph):

> "provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation,

> but is limited to the rationality of the conclusion that the information/ documents are reasonably required for checking the taxpayer's tax."

58. She continued:

> "[61] Nor is it necessary…as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.
>
> [62] …for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required.

59. At [67] Simler J also said that Sch 36 is "directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others".

60. Again, these *dicta* refer to the purpose of the Schedule as a whole; they are not limited to third party notices. The passages at [56]-[58 above were recently approved and endorsed by Singh LJ, giving the leading judgment in *Kandore v HMRC* [2021] EWCA Civ 182 at [71].

61. In the light of the statutory purpose of Sch 36 as set out in *Derrin* and *Kotton*, I considered Mr Parvez's submissions.

Details of the progress of the case

62. Mr Parvez's first submission was that HMRC's file will show "details of the progress of the case" which has been "marred by incompetence".

63. The issues which will be before the Tribunal in the Sch 36 Notice appeals are those in the Appellants' grounds of appeal, see §21, namely whether or not the documents were statutory records, whether they were "reasonably required", and whether the conditions in paras 18, 19(1)(b), 21 and/or 23 were applicable. The manner in which HMRC's officers conducted their investigations is not relevant to any of those issues, and does not provide any basis for disclosure.

Interpretation and application of technical issues

64. Mr Parvez's second submission was that HMRC's file will also show "how advice on technical accounting, valuation and other issues has been interpreted and applied".

65. It is clear from the concerns expressed by Mr Graham (see §17) and from the related Sch 36 Notices, that HMRC have questions about the valuations; the change of accounting date and the amortisation policy, and these concerns underpin the Notices. The Tribunal hearing the Appellants' appeals will need to decide whether to uphold the Notices, or whether any of the Appellants' grounds succeed. I therefore considered each of those grounds to see whether disclosure of the file would be "closely related to the issues in dispute in the proceedings".

66. The Appellants' first ground is that the documents are not "reasonably required". However, it is clear from *Derrin* and *Kotton* that HMRC are required only to show that there is a "rational connection between the information and documents sought and the underlying investigation", which "does not require any examination of the nature and extent of the underlying tax investigation". In other words, HMRC do not have to demonstrate that they are correct in their understanding of the accounting and valuation issues. The correctness or otherwise of HMRC's technical view will therefore not be one of "the issues in contention" at the hearing, and thus provides no basis to direct disclosure.

67. The Appellants also appealed on the ground that "none of the conditions A-D of Sch 36 para 21 are met". That paragraph provides that a Sch 36 Notice cannot be given where a person has completed a self-assessment return unless one of those conditions were satisfied. Condition A is that "a notice of enquiry has been given and the enquiry has not been completed"; this Condition is plainly met in relation to CHL. Condition C is that the Notices do not involve income tax, CGT or corporation tax, and Condition D is that the Notices are required in relation to PAYE.

68. In relation to Mr Malek and Ms Chowdhury, none of Conditions A and C or D is satisfied, and I have therefore taken it that HMRC must be relying on Condition B, which reads:

> "Condition B is that, as regards the person, an officer of Revenue and Customs has reason to suspect that:
>
> (a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,
>
> (b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or
>
> (c) relief from relevant tax given for the chargeable period may be or have become excessive."

69. I have not identified any authorities directly on the "reason to suspect" requirement in para 21. However, in my judgment its meaning can be inferred from *Derrin* and *Kotton,* so that HMRC must show that Mr Graham is acting rationally in suspecting that tax may be due.

70. As with the "reasonably required" test, it is not part of the purpose of a Sch 36 hearing to decide whether the officer is correct or not in his suspicions, but only that his suspicion has a rational basis. The authorities are clear that the whole purpose of Sch 36 is "to assist HMRC at the investigatory stage to obtain documents and information", not to come to conclusions on whether or not the taxpayers have in fact underpaid tax. It is plainly not in the interests of justice to direct that HMRC disclose their electronic file for any reason relating to para 21.

71. The Appellants' other grounds of appeal are that:

(1) The documents were not statutory records, but this will be a mixed question of fact and law.

(2) Some or all of the documents are not in the Appellants' "possession or power". This will be a question of fact.

(3) The documents are protected by legal privilege, which will be a mixed question of fact and law.

(4) The documents are protected by journalistic privilege. This may be an error in the grounds, given that two of the Appellants are lawyers and the third a company to which

that legal business was transferred, but in an event it too is a question of mixed fact and law.

72. It is clear that disclosure to the Appellants of HMRC's electronic file is not relevant to any of these grounds of appeal.

Allegation of fraud

73. Mr Parvez's third submission was that HMRC have made "very serious allegations about the 'backdating' of documents", and their file "will show the full extent of the evidence available to [HMRC] to support such allegation".

74. In *E Buyer*, Vos LJ said that if "dishonesty or fraud is expressly alleged by HMRC against the taxpayer…then that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court", and that if that were to be the position, "CPR-style disclosure would have been appropriate".

75. However, as is clear from *Derrin* and *Kotton*, the purpose of Sch 36 is "to assist HMRC at the investigatory stage" and " to establish the correct position by reference to all the evidence gathered", and "a valid investigation may result in no tax charge at all".

76. It follows that issuing a Sch 36 Notice is not an allegation of fraud which requires pleading and particularisation. Instead, subject to meeting the tests set out in that Schedule as to rationality, privilege and other matters, HMRC are entitled to ask for documents and information as a preliminary to forming conclusions as to whether or not a taxpayer has underpaid tax, and if so whether that underpayment had arisen as the result of fraudulent or deliberate behaviour.

77. At this preliminary stage, HMRC have made no allegation of fraud (or of deliberate behaviour); instead, Mr Graham has asked for documents and information so that HMRC can decide whether or not tax has been underpaid, and if so whether this was the result of fraud, deliberate behaviour, careless behaviour or innocent error. In *E Buyer*, the Court decided that in the absence of such an allegation, the FTT had been correct to refuse to allow further disclosure beyond that provided by Rule 27, and the position is the same here.

Conclusion

78. For the reasons set out above, I refuse to grant the Appellants' Application for disclosure of "the entire unredacted file relating to HMRC's enquiries into the Appellants" in the context of their appeals against the Sch 36 Notices.

HMRC's electronic file on the Appellants: the Closure Notice

79. The Application does not only relate to the appeals against the Sch 36 Notices, but also to CHL's closure notice application. I have therefore considered separately whether the disclosure applied for should be granted in the context of that application.

80. The legal test to be applied by the Tribunal deciding the closure notice application is at FA 2018, Sch 18, para 33, which reads:

> "(1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a partial or final closure notice within a specified period.

> (2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act)
>
> (3) The tribunal shall give a direction unless satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a partial or final closure notice within a specified period."

81. It is clear from the above that the burden is on HMRC to satisfy the Tribunal that it has reasonable grounds for not issuing a closure notice. In other words, at the hearing of CHL's application, it will be for HMRC to put forward their reasons as to why the enquiry should remain open. If HMRC cannot meet that burden, the enquiry will be closed. It is plain that the disclosure of HMRC's entire file is not required in order for the Tribunal to consider and decide CHL's closure notice application.

Disclosure of the VAT returns

82. The Appellants applied for disclosure of "CHL's VAT records from December 2013 to date". Despite the reference to "VAT records", Mr Parvez's submissions were limited to asking that HMRC provide evidence as to the submission of the company's VAT returns.

83. It is clear from Mr Graham's witness statement, and from what appears to be an informal amendment to that statement via the Objection, that HMRC will be relying on CHL's VAT returns when putting their case at the hearing of the Sch 36 Notice appeals.

84. The purpose of disclosure is to put the parties and the Tribunal in the position of having the relevant documents before the hearing, so they can be considered and submissions made. Mr Parvez did not explain why CHL had not retained its own copies of its submitted VAT returns, but for whatever reason this appears to be the position. On that basis, I agree with Mr Parvez that it is in the interests of justice for HMRC to disclose the VAT returns filed for periods covered by the Notices, so for the periods up to 30 April 2018.

85. Mr Parvez did not explain why the Appellants had asked for the disclosure to extend to the date of the Application, rather than being limited to the period covered by the enquiry and the Notices. I limit the disclosure so that it runs from December 2013 through to 30 April 2018, and the Application is allowed to that extent.

86. In so far as the Application was intended to extend to any other unspecified part of HMC's VAT records, it is refused for the same reasons as set out above in relation to HMRC's electronic file: no wider disclosure of the Appellants' VAT records is required for the Tribunal to consider and decide the Sch 36 Notice appeals or the Closure Notice application.

Whether HMRC should be directed to carry out a search

87. As set out at §30, the Appellants had also applied for the Tribunal to direct that HMRC carry out a search and issue an "order" that an officer of HMRC provide a witness statement stating that:

> (1) the person signing it understands HMRC's obligations to disclose documents that adversely affect their own case or support that of another party and that a reasonable search has been carried out for these documents;
>
> (2) setting out full details of the search; and
>
> (3) specifying the documents which are no longer in HMRC's control or in relation to which they assert a right or duty to withhold inspection.

88. It is clear that this part of the Application was additional to that which referred to the disclosure of the electronic file, because the Application said that disclosing the file only required "pressing print", for which no "search" was required. In other words, the Appellants were asking HMRC to carry out a search of their records in addition to the material on each Appellant's own file.

89. The basis for this part of the application appeared to be the Appellants' submission that the CPR should apply, and that CPR 31.6 and CPR 31.7 direct standard disclosure and search, as set out earlier in this decision.

90. However, as I have already explained, the Tribunal is not bound by the CPR, and HMRC has no duty to carry out the sort of search prescribed by CPR 31.7. As the case law makes clear, such a search may be directed where that is in accordance with the overriding objective, see *Smart Price.* But this is not such a case. Instead, the Appellants have been asked to provide information and documents to HMRC under the investigatory powers in Sch 36. There is thus no basis on which the direction and related order can be granted, and I refuse it,

Overall conclusion, directions and appeal rights

91. For the reasons given above I allow the Application in part. By 28 days from the date of issue of this decision, HMRC are to disclose to the Appellants, CHL's VAT returns from December 2013 to 30 April 2018.

92. In all other respects the Application is refused.

Appeal rights

93. 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 REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 15 SEPTEMBER 2021