Neutral Citation: [2023] UKFTT 00729 (TC)

Case Number: TC08918

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal reference: TC/2022/00949

PROCEDURE – Appellant's company issued with civil evasion penalty - Appellant issued with director's liability notice on basis that conduct giving rise to penalty was attributable to his dishonesty – Appellant's application for further disclosure from HMRC – Smart Price and Namli considered and applied – application refused

Judgment date: 25 August 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

ASHLEY CHARLES TREES

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr David Adamson

For the Respondents: Ms Lauren Paris, Litigator of HM Revenue and Customs' Solicitor's Office

INTERLOCUTORY DECISION

INTRODUCTION

1. Mr Trees was the sole director and beneficial owner of CCA Distribution Ltd ("CCA"). In 2007, HMRC issued decisions denying CCA the right to deduct input tax of £9,874,254.54 on the basis that the related transactions were connected with the fraudulent evasion of VAT, and that Mr Trees knew, or should have known, of that connection. .

2. CCA appealed to the FTT. On 14 May 2020, the FTT (Judge Mosedale and Mrs Hunter) refused CCA's appeal. On 7 July 2021, HMRC issued CCA with a civil evasion penalty of £1,974,850 under VATA, s 60(1), and on the same day, issued Mr Trees with a Director's Liability Notice ("DLN") of the same amount under VATA s 61, on the basis that the conduct giving rise to the penalty was wholly attributable to his dishonesty. Mr Trees appealed the DLN to the Tribunal

3. On 14 July 2022, HMRC made an application to the Tribunal to strike out some of Mr Trees's appeal grounds. This application was heard on 20 February 2023 ("the Hearing"). I allowed HMRC's application, and issued a decision dated 24 March 2023, see [2023] UKFTT 00339 (TC) ("the Strike Out decision").

4. On 19 July 2023, Mr Adamson, on behalf of Mr Trees, made a disclosure application ("the Application"). On 28 July 2023, I directed HMRC to "clarify their position on disclosure and to make any further disclosure which they have already accepted is required".

5. On 8 August 2023, HMRC responded to those directions ("HMRC's Response"). On 17 August 2023, Mr Adamson provided a reply on behalf of Mr Trees ("the Reply"), and HMRC filed and served a further response on 18 August 2023 ("the Further Response").

6. Having considered the Application, HMRC's Response and the Further Response, together with the Reply, I **refuse** the Application for the reasons set out below.

THE APPLICATION

7. By the Application, Mr Adamson asked that "HMRC be required to disclose any documentation relating to the fraudsters which mentioned his name or that of CCA Distribution Ltd". and he understood this had been agreed at the Hearing.

8. He continued "even though such disclosure had been agreed…HMRC have advised that instead they have disclosed in line with the standard disclosure with the same qualification as in the *Namli* case". This is a reference to the Court of Appeal decision in *Serious Organised Crime Agency v Namli and Topinvest Holdings International Ltd* [2011] EWCA Civ 1411.

HMRC'S APPROACH TO DISCLOSURE

9. Ms Paris accepted that HMC followed the approach to disclosure summarised by Mr Adamson. She said they had done so on the basis that it satisfied the requirements set out by Rose LJ in *HMRC v Smart Price* [2019] EWCA Civ 841 at [56], which were as follows:

> "…HMRC should give what corresponds to standard disclosure under the CPR but with the same qualification as the Court accepted in the *Namli* case, that is excluding documents which are not relied on and which are entirely adverse to the applicant's case."

10. CPR 31.6 sets out what is meant by "standard disclosure":

> "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."

11. The scope of standard disclosure was considered by the Court of Appeal in *Namli*. Burnton LJ gave the only judgment, with which Carnwarth LJ (as he then was) and Sir Robin Jacob both agreed. The Court held that because CPR 31.6(b)(ii) said that standard disclosure refers to a party disclosing documents which "adversely affect another party's case", SOCA was required to disclose documents adverse to the defendants' case. However, SOCA did not wish to rely on those documents because they had been provided on a highly confidential basis from UK and foreign intelligence sources. The High Court had decided that these documents did not have to be disclosed, and the defendants appealed, for the following four reasons, each of which was rejected by the Court of Appeal.

(1) SOCA "had been a judge in its own cause" in assessing relevance and in concluding that the material was only adverse to the defendants and did not affect SOCA's case. The Court of Appeal dismissed this, saying that "that is the way disclosure works under our procedural rules", and that the assessment made by the litigant as to relevance "is determinative unless or until another party puts evidence before the court demonstrating that that assessment has been wrong or unreliable".

(2) The documents might lead to a train of inquiry that may lead to information or documents helpful to the defendants' case. The Court of Appeal held that this argument was unsustainable, because documents that are only relevant in that sense are not within standard disclosure.

(3) Without wider disclosure the defendants would not be able fully to assess the strengths and weaknesses of their case. This was dismissed on the basis that the court hearing a case is concerned with the fairness of the trial, and that "if the documents are not to be relied on at trial, the fairness of the trial from the point of view of the defendants will be unaffected":.

(4) SOCA was under a separate duty to disclose the documents. The Court rejected that submission.

12. For their part, witnesses for SOCA had given evidence at the High Court to the effect they were not permitted to exclude the material, they were likely to make an claim for exclusion on a "public interest immunity" ("PII") basis, and that such a claim would require significant management time and legal costs, as well as an *ex parte* hearing. The Court went on to uphold the order made by the High Court "having regard to the overriding objective, and including the saving of expense and the need to not involve unnecessary court resources".

The scope of the disclosure

13. HMRC have confirmed to the Tribunal that:

(1) they have completed their disclosure exercise;

(2) they have served 13 boxes of material on Mr Trees;

(3) these contain all the documents on which HMRC relies, and all documents HMRC holds which are adverse to their case (and so support Mr Trees);

(4) they include numerous documents relating to a criminal prosecution of the "controlling minds" involved in a Missing Trader Intra-Community ("MTIC") fraud with

which CCA was involved, although Mr Trees was never interviewed or arrested in connection with that prosecution, which was known as "Operation Inertia";

(5) there is "nothing else" of which HMRC is aware "that adversely affects its own case or supports Mr Trees"; and

(6) HMRC "always keep disclosure under constant review".

THE REASONS FOR THE APPLICATION

14. The Application contained Mr Adamson's reasons and these were amplified in the Reply. I have considered his reasons below, together with HMRC's objections and my view.

The Hearing

15. Mr Adamson said that HMRC's experienced barristers at the Hearing "agreed that HMRC would have to make a more demanding disclosure in order to prove dishonesty and would review all its documentation for such material". He went on to say that Mr Trees had understood this to mean that HMRC would disclose all the documentation they held relating to the fraudsters which mentioned his name or that of CCA. HMRC do not accept that there was any such agreement.

16. Although the purpose of the Hearing was to decide HMRC's application to strike out part of Mr Trees's grounds of appeal, and not to decide any issues of disclosure, HMRC's skeleton argument for the Hearing said at [14]:

> "The Tribunal [at the hearing of Mr Trees' Director's Liability Notice appeal] may conclude Mr Trees entered into the transactions knowing that they were connected to fraud *without* being dishonest. Mr Trees has the right to a fair hearing on this issue with full procedural safeguards. Moreover, as was made clear in *E-buyer and Citibank* [2017] EWCA Civ 1416 [94], HMRC having pleaded dishonesty in these DLN proceedings, it will be faced with a more onerous disclosure obligation."

17. My notes of the Hearing record HMRC's Counsel as saying that HMRC accepted they "have to prove dishonesty – will have to make CPR compliant disclosure – have to see if anything else to be served – will be served in evidence as exhibits".

18. I therefore agree with HMRC that there was no agreement at the Hearing that HMRC would disclose "any documentation relating to the fraudsters which mentioned [Mr Trees'] name or that of CCA". Instead, HMRC accepted at the Hearing that they would "be faced with a more onerous disclosure obligation" than had applied in *CCA 2020*, and that this disclosure would be "CPR compliant". To use Mr Adamson's phrase, the disclosure HMRC have made is "a more demanding disclosure in order to prove dishonesty".

Lack of confidence in HMRC

19. Mr Adamson submitted that, unless all documents in HMRC's possession which name Mr Trees and/or CCA are disclosed, Mr Trees cannot know whether or not a particular document would assist his case. He said that "Mr Trees has no confidence in HMRC being allowed to dictate that he wouldn't gain any litigious advantage if his requested material was disclosed to him", and he gave various examples from Mr Trees's previous dealings with HMRC which had contributed to his lack of trust.

20. However, as the Court of Appeal held in *Namli*, "that is the way disclosure works under our procedural rules". Under those rules, it is for each litigant to determine whether or not a document is relevant, unless or until another party puts evidence before the court demonstrating that that assessment has been wrong or unreliable.

Wider disclosure

21. It is Mr Trees's opinion that:

> "unless HMRC are specifically directed to disclose certain material, perhaps by way of a varied direction, they will not make any further disclosures and…this would give them an unfair advantage. HMRC have been in possession of masses of material for many years. I do not see how the documentation called for can be regarded as irrelevant documents."

22. HMRC's response to this was that disclosing documents which simply name CCA or Mr Trees would be disproportionate and serve no useful purpose, as all documents which assist Mr Trees have already been disclosed. Ms Paris said:

> "CCA Distribution was involved in many fraudulent supply chains that trace back to fraudulent contra and defaulting traders. Some of these fraudulent contra or defaulting traders were themselves involved in very document heavy criminal prosecutions. There are many documents (possibly running into hundreds) which simply contain the name of CCA and a fraudster in the same document (for example, deal sheets, schedules, HMRC tracing email, search warrants listing of traders in the supply chain) but which are entirely anodyne have no relevance to the issue of dishonesty in this case or pass the standard disclosure threshold. Just because CCA is named in the same document as a fraudulent trader it does not pass the standard CPR disclosure test and HMRC should not be put to the significant resource of having to disclose these irrelevant documents."

23. She added:

> "…such material would not adversely affect HMRC's case, withholding any such material would not prejudice Mr Trees case, there would be no unfair advantage to Mr Trees, disclosure of such material would be disproportionate, involve unnecessary cost and may trigger having to make an PII applications that could otherwise be avoided."

24. She also cited the well-known words of Sir Thomas Bingham MR in *Taylor v Anderton* [1995] 1 WLR 447, where he said that the purpose of the rules about disclosure:

> "…is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and will gain no litigious advantage by seeing it. That, in my judgment, is the test."

25. CPR 31.7 was not cited by the parties, but it is also relevant. It 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."

26. I agree with HMRC that directing that they disclose every document which names Mr Trees and/or CCA would be disproportionate. The exercise already carried out meets the standard disclosure obligations at 36.6 as modified by *Namli*, and it also meets the "reasonableness" requirements in CPR 36.7.

27. Mr Trees will not suffer any disadvantage as a result of my refusal of his application to widen the disclosure requirements, because he has already been served with all documents which are adverse to HMRC's case.

The criminal prosecutions

28. Mr Adamson submitted that:

> "It is obvious that HMRC would have 'moved heaven and earth' to try and show that CCA Distribution Ltd had been a knowing participator in these fraudulent transactions and to have acted dishonestly. It is probable that they would have queried the matter with every trader involved. Clearly, they failed to achieve such an aim as despite all the extensive investigations carried out not a single document has been produced to evidence any such allegations. Records of HMRC's actions would have been recorded, and as the outcome negative, Mr Trees feels these records would be supportive of his case.
>
> Not only was Mr Trees not party to the large criminal prosecutions but it wasn't even considered relevant to call him for an interview. What material is available to explain why he was completely left out of these proceedings? Mr Trees believes that if he had access to this documentation, he may very well seek to rely on it in support of his case."

29. In the Further Response, HMRC stated that the focus of Operation Inertia was not on the traders in the supply chain (such as CCA), but on "certain specific organisations and individuals". HMRC also confirmed that any Operation Inertia documents which come with the disclosure parameters set by *Smart Price* have already been disclosed, and that "where a trader was asked about Mr Trees/CCA in interview as part of Operation Inertia, this has been disclosed to Mr Trees". I agree with HMRC that further disclosure is not required.

Reliance on *E Buyer*

30. Mr Adamson relied on *E Buyer UK v HMRC* [2016] UKUT 0123 (TCC). By way of background, the FTT (Judge Walters) had refused E Buyer's application for HMRC to make disclosure "with the level of particularity to be expected when allegations of dishonesty are made in civil fraud proceedings". The UT overturned the FTT decision, and held at [109]:

> "The burden on proof is on HMRC. They hold all the cards, having carried out extensive investigations and gathered information, as they are able to do, from various sources. E Buyer is necessarily unable to have any insight into what material HMRC have uncovered other than that which HMRC chooses to rely on, and is not in a position to carry out a similar investigation itself. In the circumstances it does seem to us to be appropriate for HMRC to disclose not only the material that they wish to rely on, but also any other material uncovered in the course of their investigations which might undermine that case."

31. However, there are two reasons why this case does not assist Mr Trees. The first is that the UT judgment was itself overturned by the Court of Appeal, see [2017] EWCA Civ 1416;

this was on the basis that the issue in dispute did not involve dishonesty but instead turned on whether the appellant "knew or should have known" of the MTIC fraud.

32. The second is that the disclosure being sought by E Buyer was the same as that which HMRC have already accepted is due in Mr Trees's case, namely that they will disclose not only material which supports their case, but also any material adverse to their case.

Material not accepted at the Hearing

33. Mr Adamson also submitted that by the Strike Out decision, Mr Trees had been prevented from relying on "further information" which he had "not had the opportunity" to put forward in *CCA 2020*, yet HMRC are now asking to exclude information from the hearing of his appeal against the DLN. He considers that this is unfair and places the parties on an unequal footing.

34. As explained in the Strike Out decision, Mr Trees's grounds of appeal against the DLN included a list of factual findings made in *CCA 2020* with which he disagreed. Those grounds were struck out as an abuse of process.

35. The exclusion of that material is entirely different in nature from HMRC's disclosure process. HMRC have excluded material which is not relevant to the DLN appeal. By the Strike Out decision, Mr Trees was prevented from relitigating matters which had already been decided in *CCA 2020.*

Conclusion and appeal rights

36. The Application is refused for the reasons explained above.

37. This document contains full findings of fact and reasons for this interlocutory 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: 25th AUGUST 2023