



Neutral Citation: [2024] UKFTT 00223 (TC)

Case Number: TC09105

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2018/03385

*PROCEDURE – Disclosure – Application for specific disclosure*

**Heard on: 30 November 2022  
Judgment date: 16 October 2023**

**Before**

**TRIBUNAL JUDGE KIM SUKUL**

**Between**

**NEWCASTLE UNITED FOOTBALL COMPANY LTD**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Sam Grodzinski QC

For the Respondents: Julian Hickey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. I heard Sam Grodzinski QC, for the Appellant, and Julian Hickey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs ('HMRC'), for the Respondents.
2. With the consent of the parties, the form of the hearing was video using the Tribunal's Video Hearing Service platform.
3. The documents to which I was referred are contained within the 208-page application hearing bundle, authorities bundle (339 pages), supplemental bundle and skeleton arguments from both parties.
4. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

### THE APPLICATION

5. This is an application by the HMRC for a direction under rules 5(3)(d), 6(1) and 16 of the First-tier Tribunal (Tax Chamber) Rules 2009 ('the Tribunal Rules') that:

(1) the Appellant shall provide to the Commissioners a list of all and any documents falling within the descriptions as set out in paragraph 1 of the Draft Directions at Appendix One (subsequently amended) to this application of which the Appellant has possession, the right to possession, power or control over, or the right to take copies, and that the Commissioners be permitted to take copies of all documents listed (subject to all just exceptions for privilege) within 28 days of the date of receipt of the Tribunal's direction; and

(2) the Draft Direction to this application are issued relating to the on-going management of this appeal regarding the arrangements for lodging an amended statement of case, list of documents, statement of agreed facts and issues, witness statements, listing information, hearing bundle, skeleton arguments and bundle of authorities.

6. HMRC submits that they make this application for directions to obtain warrant documents and other relevant documents in order to enable the civil VAT appeal to progress to a substantive hearing; and to ensure that all relevant evidence is placed before the FTT and to assist HMRC in the defence of the VAT assessments which were issued on a best judgment basis.
7. The Appellant opposes the application.

### BACKGROUND

8. The appeal concerns VAT assessments issued for the periods 4/11 to 12/16 in the total amount of £2,034,793. HMRC contends that the Appellant wrongly claimed input VAT for payments made to football players' agents, characterising them as third-party consideration or player remuneration instead of payments for services provided to the players, not the Appellant. The Appellant filed an appeal in May 2018 stating the following grounds:

“2.1 The Appellant has not incorrectly declared VAT in respect of agents' fees. The Appellant has not treated payments to players' agents as if they were payments to agents acting on behalf of the Appellant

2.2 The Assessments have not been made within the timelimits prescribed by section 73(6) of the VATA and are accordingly are invalid.

3. The Appellant reserves the right to supplement and expand on these Grounds of Appeal once HMRC's case is fully particularised. The Appellant has requested HMRC to particularise the basis of its case, however, to date, HMRC has not done so.”

9. The appeal has been categorised as a complex appeal.

10. The Appellant's tax situation involved both civil and criminal investigations. Initially, a compliance check under Code of Practice 8 was initiated in April 2014 regarding football agency fees paid by the Appellant. This investigation later escalated to a criminal investigation in April 2016, involving search and seizure warrants. The Appellant unsuccessfully challenged the legality of these warrants.

11. The criminal investigation focused on suspected evasion of VAT, income tax, and National Insurance Contributions (‘NICs’) related to payments to football agents. However, criminal charges were not brought against the Appellant or its officers, leading to a return to civil proceedings.

12. The Appellant sought the return of documents seized during the criminal investigation under section 59 Criminal Justice and Police Act 2001(‘CJPA’), but HMRC wished to retain copies for use in civil VAT proceedings. An order of Judge Shetty in February 2022 determined which materials should be returned and which could be retained. However, there are ongoing proceedings related to the CJPA application, with the possibility of appeals. HMRC contends that approximately 8,000 documents obtained via the warrants are relevant to the civil proceedings, of which 6,532 relate to the VAT appeal and that HMRC's criminal investigation team has not shared these documents with their civil investigation team.

#### **WITNESS EVIDENCE**

13. Witness evidence, by way of a written witness statement, was provided by Alice Kemp, employed Barrister at the firm of solicitors representing the Appellants. Her evidence was not challenged and is therefore accepted. Her statement referred to the background of the case and the legal proceedings regarding the documents. Ms Kemp’s evidence states: “Of the 8,500 documents referred to by HMRC at paragraph 39 of the Application, the Appellant's position is that 2,917 documents can have no relevance to any civil investigation into any person. Of the remaining 6,500 documents, the Appellant accepts that they may be relevant to a civil investigation into someone, but that 'someone' is not necessarily the Appellant, and the 'civil investigation' to which the documents have relevance is not necessarily the present VAT appeal.”

14. Lee Griffiths, an officer of HMRC, gave evidence and was cross-examined. I consider his evidence to be credible. He stated that the assessments under appeal were made before the expiry of statutory time limits, to protect HMRC’s position. He gave evidence regarding his access to documents held by HMRC’s criminal investigation team and he confirmed that the documents had not been provided to the civil investigation team. Mr Griffiths stated that HMRC has reviewed the facts behind each of the agency fee transactions and determined what levels of VAT, income tax and NICs are payable on each. He stated that even though a document might relate to a player on whose agency fees there was no VAT, he considered that the facts of that transaction are nonetheless relevant to the question of VAT on other players’ agency fees because they help to show an overall pattern as to how the Appellant has acted in reality, which supports HMRC’s case that the Appellant misrepresented the role of agents on several occasions.

#### **LEGAL PRINCIPLES**

15. Rule 5 of the Tribunal Rules provides:

“5(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;”

16. Rule 16 states:

“16(1) On the application of a party or on its own initiative, the Tribunal may—

(a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation;

(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.

...”

17. Rule 27 provides:

“27(1) This rule applies to Standard and Complex cases.

(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.

...”

18. The Tribunal Rules also provide, under rule 2, as follows:

“2(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.”

19. In determining the disclosure application, I am guided by the principles set out by the Upper Tribunal in *McCabe v HMRC* [2020] UKUT 266 at [22] to [25] as follows:

- (1) Where the case concerns a high-value complex dispute, the starting proposition is that the parties should disclose relevant documents unless there is a good reason not to.
- (2) The tribunal must exercise its discretion to order additional disclosure under rule 16 so as to give effect to the overriding objective under rule 2(3)(a).
- (3) The approach of the tribunal to disclosure is not determined by the Civil Procedure Rules 1998. Rule 16 gives the tribunal power to order the production of any document in a person’s possession or control which relates to an issue in the proceedings.
- (4) Relevance is to be assessed by reference to the issues in the case and the positions of the parties. Disclosure of documents is to ensure that the tribunal has before it all the information which the parties reasonably require the tribunal to consider in determining the appeal.

#### **DISCUSSION**

20. I accept HMRC’s contention that the Tribunal has jurisdiction to make the specific disclosure order sought irrespective of the outcome of the CIPA proceedings.

21. The Appellant contends that the disclosure application seeks a very wide range of documents and that HMRC have not explained which of the documents are said to be relevant to the current VAT appeal on the basis that they may relate to as-yet non-existent appeals against income tax assessments and NICs determinations. The Appellant argues that such a broad and unparticularised approach cannot be sustained and is in effect a fishing expedition. I consider the breadth of the disclosure sought is an inevitable consequence of the circumstances of this case and that it would be impossible and impractical in these circumstances to restrict the categories or sources of material sought without having had sight of the material itself. (See *Ellis & Anor v HMRC* [2022] UKUT 254 (TCC) at [122]).

22. HMRC submits that their application for permission to amend their statement of case is made on the basis that any amendment needs to be by reference to the underlying documents (sought by their disclosure application) relied upon by their criminal investigation team. The Appellant argues that any disclosure application should be made and determined after, and not before, HMRC plead their amended statement of case, following any grant of permission to do so. I do not consider the approach suggested by the Appellant to be in the interests of fairness and justice in the circumstances of this case. Whilst the Tribunal is entitled to require some cogent explanation of the relevance of the documents being sought, that cogent explanation does not have to come solely from HMRC’s statement of case. (See *Mitchell & Bell v HMRC* [2021] UKUT 0250 (TCC) at [85]).

23. Relevance is to be assessed by reference to the issues in the case and the positions of the parties. In view of the evidence before me regarding the background to this application, the Appellant’s position, as set out in their grounds of appeal, being that the Appellant did not treat payments to players’ agents as if they were payments to agents acting on behalf of the Appellant, and the evidence of Mr Griffiths that HMRC are seeking to show an overall pattern

as to how the Appellant acted in reality to support HMRC's case that the Appellant misrepresented the role of agents, it is my finding, on a balance of probabilities, that all of the material sought is likely to be relevant.

24. Ms Kemp, for the Appellant, identified 6,500 documents which the Appellant accepts may be relevant to a civil investigation. Ms Kemp refers to the other records sought by HMRC as no longer correctly filed, no longer complete, and no longer in any searchable order/format. In considering whether it is proportionate to direct disclosure, I have taken into account the serious nature and complexity of the issues arising and the substantial overall amount at stake of £2,034,793. I consider a reasonable search for material is likely to lead to identification of the material sought. Although the direction sought is broadly drafted, I do not consider the request to search and access the documents to be unduly costly or burdensome upon the Appellant in the circumstances of this case.

25. I am satisfied that this is a high-value complex case where a wider disclosure than that required by rule 27 of the Tribunal Rules is appropriate. I am also satisfied that HMRC will suffer an unfair disadvantage in the litigation as a result of lack of access to the material sought and that the disclosure is to ensure that the Tribunal has before it all the information which the parties reasonably require the Tribunal to consider in determining the appeal. I therefore consider the material in respect of which specific disclosure is sought is necessary to deal with the case justly.

26. For the reasons set out above, I find this disclosure to be required for a fair determination of the issues. I therefore allow the application. The terms of the order are set out in the attached Directions.

27. I do not consider it appropriate to make further case management directions at this stage, without further representations from the parties. HMRC's application for case management directions is therefore refused. The parties are directed to provide within 42 days their representations (agreed, if possible) on the case management directions required to progress this appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

28. 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.

**KIM SUKUL  
TRIBUNAL JUDGE**

**Release date: 16<sup>th</sup> OCTOBER 2023**