Neutral Citation: [2024] UKFTT 00348 (TC)

Case Number: TC09148

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/01474
TC/2022/02493
TC/2022/11999
TC/2022/12000

Procedure – MUCs – significant volume of evidence – application by HMRC for only a sample of evidence to be disclosed by them – whether evidence to be served on Appellants should be limited – whether Appellants should be subject to heightened disclosure obligations similar to those of HMRC

Heard on: 8 March 2024
Judgment date: 19 April 2024

Before

TRIBUNAL JUDGE KEVIN POOLE
LESLIE HOWARD

Between

HORIZON CONTRACTS LIMITED (IN LIQUIDATION)
MARK GRIERSON
GAIL CORRIGAN

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Bedenham of counsel, instructed by Jurit LLP

For the Respondents: Howard Watkinson and Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

CASE MANAGEMENT DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video), using the Tribunal's own video hearing system. A face to face hearing was not held because, at the request of the parties, a video hearing was considered more efficient to deal effectively with the matters at issue. The documents to which we were referred were a hearing bundle of 635 pages and an authorities bundle of 395 pages. The parties had also delivered written skeleton arguments in advance of the hearing.

2. 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.

3. These appeals are concerned with the denial of the right to deduct input VAT of some £12.8 million under *Kittel*, associated penalties under section 69C Value Added Tax Act 1994 ("VATA") and officer liability notices in respect of those penalties under section 69D VATA.

4. The appeals arise from the Appellants' participation in what HMRC contend to have been a fraudulent scheme involving the supply of personal services through a co-ordinated network of numerous (at least 1,520, and possibly approaching double that many) mini-umbrella companies ("MUCs") which allegedly abused the VAT flat rate scheme in accordance with an overall scheme in which the First Appellant was pivotal.

5. The appeals are at an early stage procedurally. HMRC have served an amended statement of case in response to amended grounds of appeal. The next stage is therefore disclosure of evidence, and this is the first of the major points of issue between the parties.

THE ISSUES

6. In draft case management directions originally submitted by HMRC in July 2023, they proposed to limit the evidence in relation to the MUCs to a sample of 50 out of the known total of 1,520, with 25 selected by each side. The Appellants objected, insisting that whilst sampling might be appropriate at a later stage of proceedings, so as to limit the volume of evidence actually placed before the Tribunal, HMRC should be required to deliver to the Appellants all their evidence in relation to all of the MUCs involved.

7. In response, the Appellants sought to amend their grounds of appeal (to which HMRC did not object, subject to the ability for them to amend their statement of case in response), and also contended that HMRC should, in relation to the penalty appeals, provide disclosure of all material which either undermined their case or assisted the Appellants' case.

8. By the time the disputed issues could be listed for hearing, the amendment of the Appellants' grounds of appeal was no longer in issue, and HMRC had delivered their amended statement of case in reply. The Appellants made a tentative objection to the scope of HMRC's amendments, but did not pursue that objection at the hearing; they also reserved the right to raise arguments as to the effect of the amendments which HMRC had made. In addition, HMRC accepted in their skeleton argument for the hearing that "a direction that modified CPR style standard disclosure (*Namli* disclosure that excludes documents which (i) are not relied on by a party, and (ii) which are entirely adverse to the other party's case) should apply to the proceedings, is appropriate." However, they also argued that a modified standard disclosure order in similar terms should apply to the Appellants as much as to HMRC.

9. There were also some *Fairford* style directions under consideration, but it was agreed that the detail of those directions should be left in abeyance until the other two issues had been resolved.

10. Thus in summary, the Tribunal was asked to address three matters at this case management hearing:

(1) whether HMRC should be required to deliver their evidence in respect of all the MUCs in relation to which they claimed the right to disallow the First Appellant's input tax, or just a sample of them ("the Sampling Issue");

(2) Whether modified CPR style disclosure should be directed against the Appellants (or any of them) as well as against HMRC ("the Disclosure Issue"); and

(3) Whether HMRC's amended statement of case should be admitted as it stood ("the Pleadings Issue").

The Pleadings Issue

11. We can dispose shortly of the Pleadings Issue. Whilst noting that disputes may arise at a later stage as to whether the amended statement of case adequately pleads HMRC's position, we see no reason to refuse permission for HMRC to amend their statement of case at this stage of the proceedings. It is therefore **DIRECTED** that HMRC's amended statement of case dated 6 February 2024 is admitted in substitution for their statement of case dated 26 June 2023.

The Sampling Issue

12. The essence of the Appellants' argument was that in a situation where HMRC bear the burden of proof, the Appellants have put HMRC to proof on every relevant aspect of their case and the proceedings involve the abrogation of the fundamental right to deduct input VAT and penalties which amount to criminal charges for the purposes of Article 6 of the European Convention on Human Rights, the Appellants were entitled to see all the evidence which HMRC say proves the case against them. This was a matter of fundamental fairness.

13. For HMRC, Mr Watkinson argued that it was only in respect of certain basic facts that HMRC proposed a sampling exercise. He referred to a schedule annexed to the amended statement of case, which included columns setting out, in relation to each MUC, various information about its incorporation and subsequent existence, its initial VAT registration (including its stated main business activity and flat rate claimed), its officers (both up to and subsequent to its VAT registration) and their contact details and subsequent amendments to various of those details. He argued that it was proportionate and fair in the circumstances for HMRC to be allowed to give the evidence contained in that schedule by means of a written witness statement confirming its accuracy, which could then be tested by reference to a randomly selected sample of the underlying documents relevant to 50 of the MUCs.

14. Mr Bedenham, for the Appellants, argued that HMRC were "seeking to have their cake and eat it". HMRC, in their proposed directions, were seeking a direction that no additional permission would be required for them to adduce additional evidence to link the "sampled" to the "unsampled" MUCs, and that if there were "exceptional circumstances", they could adduce additional evidence in relation to "unsampled" MUCs.

15. It was also quite likely that HMRC would be seeking to rely on commonalities between some of the evidence in relation to the 50 sampled MUCs and similar evidence in relation to the "unsampled" MUCs which would simply be set out in HMRC's schedule in seeking to establish an overall fraudulent scheme. For example, contact telephone numbers for MUC officers – HMRC might well seek to argue that the same contact number for numerous

companies supported their claim of an overall coordinated scheme; if the only evidence as to the vast majority of the MUCs was that contained on the schedule prepared by HMRC, it would deprive the Appellants of the opportunity of testing the accuracy of HMRC's claims by reference to primary evidence. Furthermore, the proposal to allow the Appellants to select one half of the random sample only gave an illusion of fairness – as the Appellants would not have seen any of the underlying documentary evidence, their sample selection would of necessity be made "blind".

16. We were referred to the decision of Judge Dean in *Ezy Solutions Limited and another v HMRC* [2023] unreported. That decision was concerned with an application which was very similar to that in the present case. Judge Dean referred to a number of authorities to which her attention had been drawn, which she found chiefly (so far as relevant) were concerned with the question of whether the evidence adduced at the hearing could properly be limited to a representative sample of the overall evidence. Those cases supported the proposition that it could, but Judge Dean considered that irrelevant to the question before her (and us), namely whether it would be appropriate to limit the evidence actually disclosed by HMRC to the Appellants on a "sample" basis. She said this:

> 35. Having considered the authorities to which I was referred, I consider that while it may be that sampling in this appeal is an appropriate method by which to manage the issues and evidence in due course, this application is premature.
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> 36. In *Megantic*, Judge Berner's conclusions that sampling causes no unfairness was predicated on the basis that "the sample must be representative". I agree. However, at this stage, the Appellants are in possession of no more than the MUC schedule which, as submitted by Mr Bedenham, is no more than an assertion. As described by Judge Berner in *Megantic* such documents are "mere constructs of the Respondents" and "it will be the evidence itself which either established the accuracy or otherwise of a deal sheet".
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> 37. At present, the Appellants are unable to check the accuracy of HMRC's assertions and I do not see how, in those circumstances, the Appellants' representatives can be expected to carry out their profession duties to their clients. Whilst I agree that sampling is, where appropriate, an efficient method by which to keep evidence within sensible bounds, it is not a course which envisages depriving the Appellant of the evidence or knowing the case it must meet.
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> 38. It is a fundamental principle of natural justice that a party must know the case against it. I cannot see how in circumstances where HMRC propose not to serve the evidence which formed the basis of its decisions, the Appellants could form a view as to whether any sample is representative or whether there is commonality.
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> 39. The FTT rules recognise the importance of parties to be able to participate fully in proceedings. If HMRC's proposal is adopted at this early stage, I consider that the Appellant would be disadvantaged and unable to do so.
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> 40. In due course, once the underlying evidence is served, the Appellants may or may not agree the accuracy of the MUC schedule. The tax loss and/or connection to fraud may or may not be challenged. They may or may not agree that sampling is appropriate. However, as things stand, the Appellant simply does not have the underlying evidence upon which HMRC's decisions are based to make an informed view on any issue.

> 41. The burden of proof in this case rests with HMRC. Many appeals which involve decisions relying on *Kittel* are substantial in volume. I do not consider it a sufficient reason for HMRC to argue that serving its evidence would take "an inordinate amount of time". Given that HMRC reached its decision in 2020 the evidence must be readily available to it. No doubt the Appellants' review of the evidence will be equally as onerous, but that is the nature of such cases. I do not accept that it is disproportionate to require the evidence upon which HMRC have raised assessments and imposed penalties amounting to approximately £50m to be served. In the context of these joined appeals I take the view that this is an unavoidable consequence of the large volume of evidence generated by case of this nature.
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> 42. For the reasons set out above I refuse the application at this stage.

17. Mr Watkinson sought to persuade us that because in *Ezy* there were allegations that individual MUCs had defaulted on their VAT obligations other than by reference to their ineligibility to use the flat rate scheme, Judge Dean's reasoning should not apply to the present case because no such allegations were any longer being made in this case.

18. With respect, we disagree with this argument. We agree with Judge Dean in *Ezy* that (without prejudice to the Disclosure Issue, as to which see below) it is fundamental to natural justice that in such cases an appellant should be entitled to see all the evidence which HMRC have relied on in constructing their case. In short, we agree with Judge Dean's conclusion and the reasons which she gave for it.

19. We therefore **REFUSE** HMRC's application for a direction that the evidence to be disclosed at this stage may be limited to a sample of the totality of such evidence, however selected. Sampling may well be an appropriate way to proceed for the purposes of the ultimate hearing, but that is a matter to be resolved at a later stage, once the full evidence upon which HMRC rely has been disclosed to the Appellants.

The Disclosure Issue

20. HMRC having initially proposed that they ought only to be required to disclose documents upon which they intended to rely, by the time of the hearing they had accepted it was appropriate that as they had pleaded dishonesty against the Appellants, they should also be required to disclose documents that adversely affect their own case or support the Appellants' case, in accordance with *HMRC v Citibank NA and another* [2017] EWCA Civ 1416 and *SOCA v Namli and another* [2011] EWCA Civ 1411.

21. The issue before us was whether the Appellants should also be subject to a disclosure obligation in similar terms. Mr Watkinson argued that the "default position" on disclosure in civil proceedings was that the same regime should apply to each party, and this was obviously fair. He also cited *HMRC v Malde* [2021] EWHC 100 (Ch), arguing that although the penalty assessment and officer liability notices involve a "criminal charge" for the purposes of Article 6 of the European Convention on Human Rights, that did not mean that the privilege against self-incrimination applied in the present case to preclude a direction of the type he was seeking. The practical effect of such a direction would depend on what documents the Appellants had in their possession. For example, in relation to the issues of "control" and "dominant influence" over the MUCs, it may well be that emails existed which supported HMRC's case; this was an easy example, but there might well be others.

22. Mr Bedenham argued that this approach was fundamentally flawed. The cases showed that "one way" heightened disclosure was appropriate where relevant. He cited in particular *Smart Price Midlands and another* [2019] EWCA Civ 841, where no question of two-way heightened disclosure arose. He argued that if HMRC's position were correct, all that they

had to do in any case to obtain heightened disclosure from an appellant was to allege dishonesty; and if an appellant sought heightened disclosure from HMRC, all it needed to do in turn was to allege dishonesty on HMRC's part. This would make no logical sense and would be contrary to the overriding objective. Furthermore, he submitted, Mr Watkinson's example of what documents might be expected to exist amounted to a classic fishing expedition.

23. We prefer Mr Bedenham's arguments. We see no reason why it should be appropriate, simply because HMRC have alleged dishonesty on the part of the Appellants, that they should be entitled to heightened disclosure from the Appellants to match the heightened disclosure which they (correctly) accept they must themselves provide.

CONCLUSION

24. HMRC's amended statement of case is admitted as set out at [11.] above.

25. HMRC's application for directions which would require disclosure of only a sample of the underlying documentary evidence upon which they rely is refused as set out at [19.] above.

26. HMRC's application for the Appellants to be subject to heightened disclosure on terms similar to those applying to HMRC is refused as set out at [23.] above.

27. In consequence, the following Directions are hereby made:

DIRECTIONS

1. All exhibits to any party's witness statements are to be treated as included within that party's list of documents and the parties shall not be required to serve a separate list of documents pursuant to rule 27(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules").

2. The parties shall confer and provide to the Tribunal within 21 days, proposed draft Directions for endorsement by the Tribunal which make provision for the further conduct of these appeals in the light of the Decision set out above.

3. If the parties are unable to agree draft proposed Directions, then each party shall, within the same 21 day period, submit their own draft with written submissions on the matters which the parties have been unable to agree, with a view to the Tribunal being able to decide the final form of Directions, if at all possible, without the need for a further hearing.

4. Any party may apply for these Directions to be amended, suspended or set aside, or for further Directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

5. This document constitutes the relevant decision notice for the purposes of Rule 39(2)(za) of the Procedure Rules. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Procedure Rules. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 19th APRIL 2024