



Neutral Citation: [2024] UKFTT 00905 (TC)

Case Number: TC09313

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2022/12137

*Disclosure – application by second respondent – application refused – direction for an oral hearing*

**Judgment date:** 10 October 2024

**Decided by**

**TRIBUNAL JUDGE NIGEL POPPLEWELL**

**Between**

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

**Applicant**

**and**

**ELITE MANAGEMENT CONSULTANCY LIMITED  
(in administration)**

**Respondent**

**and**

**ADAM BALE**

**Second Respondent**

## DECISION

### INTRODUCTION

1. On 31 January 2022 HMRC made an application for the respondents to disclose certain arrangement under section 314A, or alternatively 306A, of the Finance Act 2004 (“**DOTAS Application**”).
2. Following a video hearing held on 19 June 2024 (originally listed to take place over two days on 19-20 June 2024) the First-tier Tribunal (“**FTT**”) ruled, in its decision dated 26 June 2024 that the DOTAS Application was struck out at 5:01pm on 17 June 2024 for failure to comply with an unless order as stipulated in Direction 17 of the FTT Directions dated 20 September 2023 (as amended) (“**FTT Directions**”) due to a delay by HMRC in filing the Bundle of Authorities as required by Direction 12 of the FTT Directions.
3. On 18 July 2024, HMRC made an application to reinstate the DOTAS Application (“**the reinstatement application**”). In that application, HMRC expressed the view that the reinstatement application should be decided on paper. Annexed to the reinstatement application and referred to therein, is a witness statement of Mr Athel Hodge (“**Mr Hodge**”), a solicitor in HMRC’s Solicitors Office and Legal Services Department, which advises HMRC (“**the witness statement**”).
4. The second respondent’s objection to the reinstatement application was submitted on 5 August 2024 (“**the objection**”). The objection also included an application for disclosure of documents referred to in the witness statement (“**the disclosure application**”). The second respondent also expressed the view that the reinstatement application should be dealt with at a face-to-face hearing.
5. HMRC submitted a response to the disclosure application on 10 September 2024 to which the second respondent responded on 13 September 2024.
6. This decision deals with the disclosure application and the format of the reinstatement application.

### THE LAW

7. The disclosure application is made under Civil Procedure Rule 31.14(1)(b) which states that a party may inspect a document mentioned in (relevantly here) a witness statement.
8. Rule 16(1)(b) of the FTT rules permit the tribunal to require a party to produce documents in their possession or control which relate to any issue in the proceedings.
9. Rule 2 of the FTT rules obliges me to give effect to the overriding objective of dealing with cases fairly and justly when exercising any power under those rules or interpreting any rule or practice direction.
10. The principles that I have adopted towards the disclosure application are set out in the First-tier Tribunal decision in *Staysure.co.uk Ltd v HMRC* [2018] UKFTT 584 and the Upper Tribunal decision in *McCabe v HMRC* [2020] UKUT 266.

11. The essential principles are these:

(1) 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.

(2) 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.

(3) A document is capable of being relevant in a broad sense but of low relevance in that it is not potentially adverse but only part of the background, or one capable of leading to a train of enquiry, and therefore one that may not need to be disclosed in order for a fair determination of the issues to take place

(4) In light of the overriding objective of dealing with cases fairly and justly, any application for disclosure will necessarily involve an assessment of whether considerations of fairness point in favour of disclosure. And whether it is proportionate to direct disclosure, taking into account, among other matters the nature of the issues arising and the overall amount at stake.

## **THE DISCLOSURE APPLICATION**

12. The disclosure application is for a direction that HMRC are to disclose:

(1) Any notes of the conference referred to at [7]-[8] of the witness statement; and

(2) Any documents recording the internal enquiries and responses thereto referred to at [10] of the witness statement (together “**the documents**”).

13. The relevant paragraphs in the witness statement are as follows:

“7. Two days prior to the date of the hearing (on 17 June 2024) at 10:00, the Applicants held a conference call in connection with preparations for the DOTAS Proceedings.

8. The conference call was attended by Counsel and various HMRC stakeholders including myself and the case paralegal. The conference call was scheduled to last for one hour but ran over by 1.5 hours, finishing at approximately 12:30. [...]

10. Counsel considered including additional authorities to the bundle in response to the Second Respondent’s Skeleton Argument. This required me to make internal enquiries at short notice. Final decision as to whether the additional authorities ought to be included was dependent upon the result of these internal enquiries. While, ultimately, the decision was made not to include any additional cases, this caused some delay as I had to await responses from colleagues, consider the information received in consultation with counsel before making the decision”.

## **DISCUSSION**

### *Submissions*

14. Mr Watkinson submits, in summary, as follows:

- (1) It is appropriate for the reinstatement application to be dealt with by way of an oral hearing given the evidence of Mr Hodge and the witness statement.
- (2) The documents are clearly relevant to the issues in the reinstatement application since Mr Hodge relies on them and their contents in the witness statement.
- (3) HMRC's assertion that the documents are subject to Legal Professional Privilege ("**privilege**") is misconceived. The documents were mentioned in the witness statement and any privilege over them has been waived.

15. HMRC submit, in summary, as follows:

- (1) Mr Hodge does not refer to any documents in the witness statement and does not seek to rely on any documents which have not been disclosed in it.
- (2) HMRC can withhold disclosure on the basis of privilege.
- (3) The mentioning of the documents in the witness statement does not amount to a waiver of privilege.
- (4) Privilege is likely to be waived where the content of a document is being relied on. Reliance on the effect of such a document is unlikely to amount to a waiver of privilege.
- (5) Understood properly, the reliance by Mr Hodge on the conference and subsequent internal enquiries is as to their effect (i.e. the impact on the timing of the filing of the authorities bundle). No reliance is placed on the content of the documents. Accordingly, there has been no waiver of privilege and HMRC are entitled to withhold their inspection.
- (6) In any event there were no minutes or any note of the conference referred to at [7] of the witness statement.
- (7) Given the exchange of submissions and the opportunities that the second respondent has had to consider the reinstatement application, it would reduce cost and delay for the reinstatement application to be dealt with on the papers.

#### *My view*

16. I am conscious that I have done the respective representatives, and in particular Mr Watkinson, a considerable disservice in providing such a brief synopsis of their extensive, erudite, and persuasive submissions. I assure them that I have read them in detail and have taken them into account when reaching my decision. I have not felt, however, that I need to set them out in greater detail, in this decision.

#### *Format of the hearing*

17. HMRC have made a number of cogent and persuasive submissions as to why the reinstatement application should be dealt with on paper. These include cost, speed, proportionality, and the fact that the legal principles are well known and do not require oral submissions.

18. In the absence of the tendering of the witness statement, I would have no hesitation in ordering that the reinstatement application should be dealt with on paper, for the reasons given by HMRC.

19. However, it is clear (and in this I agree with Mr Watkinson) that HMRC consider that the witness statement is relevant to the reinstatement application (it goes to the reasons as to why the time limit was missed). HMRC have not asked for the witness statement to be taken as read, and I doubt, very much, given what I say below, that Mr Watkinson will agree to this. Having tendered the statement, it is only right that Mr Hodge is available for cross-examination on it. Indeed, it would not be either in the interests of justice, nor fair to him, for me to infer anything from that statement in the absence of any such cross examination. And HMRC have not suggested that the witness statement should be withdrawn and thus allow the hearing to be dealt with on paper.

20. If HMRC wish to rely upon the contents of the witness statement, then as I say, Mr Hodge must give oral evidence and be prepared to be cross examined on it. This will enable the trial judge to consider the position, fairly and justly. Testing the evidence in this way cannot be undertaken by a paper hearing.

21. I therefore direct that the reinstatement application will be dealt with by way of face-to-face hearing by way of video link.

#### *Disclosure*

22. I also agree with Mr Watkinson, given the extensive case law to which he has referred in his submissions, that as a matter of principle, where a document has been referred to in a witness statement (or rather, mentioned in it) then it is potentially up for inspection.

23. And clearly the documents are mentioned in the witness statement.

24. HMRC assert that there are no notes of what was discussed on the conference call, nor were there any minutes. Mr Watkinson suggest that this needs to be reinforced by some form of solicitor's certificate. Given that he can cross examine Mr Hodge at the hearing, no doubt he will question HMRC's assertion.

25. But to my mind it cannot be right that simply mentioning the fact that there was a conference call with counsel brings with it a waiver of any privilege which attaches to the contents of that call or any documents prepared in preparation for, or resulting from, it. That would drive a coach and horses through privilege. If I refer in a witness statement to the fact that I had a conference with counsel, that mention cannot bring with it a waiver of privilege.

26. I agree with Mr Watkinson if I then go on, in that witness statement, to make assertions based on the advice that I had received, then that might constitute a waiver of privilege.

27. But that is not the case with what Mr Hodge says in the witness statement. He is not saying that counsel advised that certain things should or should not be done. He is simply saying that there was a conference call attended by counsel as a result of which he made further internal enquiries. The reference to the call, and the further enquiries, do not of themselves waive privilege.

28. I agree with HMRC that the reliance by Mr Hodge on the conference and subsequent internal enquiries is as to their effect. The authorities on which HMRC rely made clear that,

given that there has been no detail of the contents of the call provided, nor any summary of those contents, there is no waiver of privilege. It is equally clear that privilege is a basis on which disclosure can be withheld.

29. Furthermore, even if the documents are not privileged and do exist, I am not convinced that they are particularly relevant to the issues which will be canvassed in the reinstatement application. What is more important is the fact that the conference call took place, and that there were subsequent internal enquiries thereafter.

## **DISPOSITION**

30. I order that:

- (1) The disclosure application is refused.
- (2) The reinstatement application shall be dealt with by way of a face-to-face hearing to be conducted by way of a video link.
- (3) Within the next 28 days the parties should seek to agree directions for the hearing of the reinstatement application. In the absence of any agreed directions within that time, either party may refer the matter to the tribunal for resolution.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

31. 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.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**Release date: 10<sup>th</sup> OCTOBER 2024**