Neutral Citation: [2024] UKFTT 00735 (TC)

Case Number: TC09260

FIRST-TIER TRIBUNAL
TAX CHAMBER

In Public by remote video hearing

Appeal reference: TC/2022/12188

VAT – Debarring and case management – Second appellant's application to debar HMRC – CLN under s69D VATA – HMRC's pleaded case - attribution because of mere directorship – no – application refused – appellants' application for further and better particulars – application refused – further application for specific disclosure – application allowed in part

Heard on: 5 July 2024
Judgment date: 7 August 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

JENERUHL TRADING LIMITED

First Appellant

and

VIVEK NAYAR

Second Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Howard Watkinson of counsel, instructed by ASW Solicitors

For the Respondents: Mr Sam Way of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision deals with two distinct matters. Firstly, the second appellant's substantive application that HMRC be debarred from taking any further part in proceedings ("**the debarring application**") in relation to a company officer liability notice ("**CLN**") issued to him for a penalty notified to the first appellant (or "**the company**") pursuant to section 69D Value Added Tax Act 1994 ("**VATA 1994**").
2. Secondly, both appellants' application for further and better particulars, disclosure, and case management directions, (together "**the case management applications**") in relation to their case on time limits for the purpose of a preliminary hearing ("**the preliminary hearing**") on the "**time limit issue**". That issue arises from the issue of assessments to the first appellant on 9 November 2021 in the total sum of £1,164,739 for the VAT periods 07/19, 10/19 and 01/20 ("**the assessments**").
3. I have decided to deal with these matters in the order set out above, notwithstanding that they were presented to me in reverse order.
4. The factual background can be summarised very shortly. The first appellant traded in scrap metal, plastic goods, and second-hand clothing. Following an extended verification of the transactions in the three VAT periods mentioned above, HMRC considered that the transactions were associated with the fraudulent evasion of VAT and that the first appellant knew or should have known that this was the case.
5. In their view, input tax claimed in these periods should therefore be denied and following notification of this denial by way of a letter dated 5 November 2021, HMRC issued the assessments.
6. On 14 December 2021 HMRC notified the first appellant that it was liable to penalties in the total sum of £349,421.70 pursuant to section 69C VATA 1994 ("**the company penalty**").
7. On 1 March 2022, HMRC notified the second appellant that he was personally liable to pay the company penalty on the basis that under section 69D VATA 1994 the actions of the company which gave rise to the company penalty were attributable to the second appellant as an officer of the company. And so, they issued the CLN.
8. The appellants were represented by Mr Howard Watkinson, and Mr Sam Way appeared for HMRC. While I was very much assisted by their clear and comprehensive submissions, both written and oral, I have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching my conclusions.

THE DEBARRING APPLICATION

The VAT provisions

9. The relevant elements of sections 69C and 69D VATA 1994 are set out below:

> "69C Transactions connected with VAT fraud
>
> (1) A person (T) is liable to a penalty where—
>
> (a) T has entered into a transaction involving the making of a supply by or to T ("the transaction"), and
>
> (b) conditions A to C are satisfied.
>
> (2) Condition A is that the transaction was connected with the fraudulent evasion of VAT by another person (whether occurring before or after T entered into the transaction).

(3) Condition B is that T knew or should have known that the transaction was connected with the fraudulent evasion of VAT by another person.

(4) Condition C is that HMRC have issued a decision ("the denial decision") in relation to the supply which—

(a) prevents T from exercising or relying on a VAT right in relation to the supply,

(b) is based on the facts which satisfy conditions A and B in relation to the transaction, and

(c) applies a relevant principle of EU case law (whether or not in circumstances that are the same as the circumstances in which any relevant case was decided by the European Court of Justice)…

69D Penalties under section 69C: officers' liability

(1) Where—

(a) a company is liable to a penalty under section 69C, and

(b) the actions of the company which give rise to that liability were attributable to an officer of the company ("the officer"),

the officer is liable to pay such portion of the penalty (which may be equal to or less than 100%) as HMRC may specify in a notice given to the officer (a "decision notice")".

The debarring provisions

10. Under rules 8(3)(c) and 8(7) of the FTT Rules the tribunal may strike out/bar a party from taking further part in the whole or of part of the proceedings if the tribunal considers there is no reasonable prospect of the relevant party's case, or part of it, succeeding. Under rule 8(8) the tribunal may summarily determine any or all issues against HMRC if they are barred from further participation in the proceedings.

11. An oft cited approach to summary judgment applications under CPR Part 24 (which involve the application of the same principles as apply to this application) was set out by Lewison, J. (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] and approved by the Upper Tribunal in *The First De Sales Limited Partnership v HMRC* [2018] UKUT 396 (TCC). The approach can be summarised as:

(1) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success;
(2) A "realistic" claim is one that carries some degree of conviction. i.e. it is more than merely arguable;
(3) In reaching its conclusion the court must not conduct a "mini-trial"; This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made;

(4) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
(5) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case; and
(6) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

Submissions
12. In summary Mr Watkinson submitted:

(1) HMRC's position is that mere directorship is sufficient for liability under section 69D VATA 1994, and that the second appellant was responsible for the company's liability merely because of his status as a director of the company. This reflects a fundamental error of law.
(2) The case therefore has no reasonable prospect of success since that cannot be the correct interpretation of the legislation either on its face or applying the principle of doubtful penalisation in favour of the second appellant. HMRC's pleaded case gives no effect to the concept of attribution set out in the legislation.
(3) HMRC's second limb of their pleading namely that the second appellant neglected his obligations and fiduciary obligations as director, has no reasonable prospect of success either. Mere neglect of statutory and fiduciary obligations cannot be actions of the company which give rise to the liability. What needs to be shown to give rise to the company penalty is that the company knew or should have known that the relevant transactions were connected with the fraudulent evasion of VAT, not some lesser negligence or breach of fiduciary duty.
(4) The pleaded case in paragraph 99A of the amended statement of case picks up actions that were undertaken by the second appellant in his capacity as a director. And this provides the context for the pleading in paragraph 99. It is clear therefore that HMRC's position is that mere directorship is sufficient to bring the second appellant within the ambit of section 69D VATA 1994.

13. In summary Mr Way submitted:

(1) The debarring application is based on a misconception about HMRC's case.
(2) In their letter notifying the second appellant of the decision to issue the CLN, HMRC indicated that they thought that the second appellant was personally liable to pay the company penalty because they believed that the actions of the company, which led to the penalty, were caused by the second appellant as a company officer. And that suppliers and customers had stated that he was the point of contact with the company.
(3) As demonstrated, HMRC were not saying that the penalty had been imposed because of "mere directorship". It was based on the second appellant's role within the company's business.
(4) This is reflected in HMRC's pleaded case which states that "the Second Appellant was responsible for the operation and running of the business….". And furthermore, that the

second appellant was responsible for the company entering into the transactions and that he had the requisite state of *Kittel* knowledge.

(5) HMRC's pleaded case is that it was the second appellant's actions which brought about the company's liability for the company penalty. There is a closer connection between the actions of the second appellant and the company than mere directorship.

(6) Paragraph 99A of the amended statement of case identifies a number of facts on which this submission is based which go beyond the second appellant's status as a mere director of the company.

My view

14. HMRC's pleaded case at paragraph 99 of their amended statement of case reads as follows:

> "99. The Respondents assert that the Second Appellant, as the sole director at the material times, was responsible for the First Appellant entering into the transactions and each had the requisite state of *Kittel* knowledge. The actions of the First Appellant giving rise to the s69C VATA penalty were therefore attributable to the Second Appellant. It does not matter that others may or may not have undertaken various aspects of the transactions. The Second Appellant was responsible for the operation and running of the business, and neglecting his obligations and fiduciary obligations as director to ensure that the First Appellant did not enter transactions which it knew or should have known were connected with the fraudulent evasion of VAT is no excuse".

15. In order to get home on the CLN, HMRC must show that the actions of the company which give rise to a penalty under section 69C were "attributable to an officer of the company".

16. I understand that there is no dispute that the second appellant was an officer of the company at the relevant time.

17. Notwithstanding the skill with which Mr Watkinson developed his submissions, I do not think that HMRC's case is that the actions of the company were attributable to the second appellant simply because he was an officer of the company at the time. This is what I understand his assertion of "mere directorship" to mean.

18. Of course, the second appellant must have been an officer of the company. It is a statutory prerequisite. And in his office as director, he clearly had statutory and fiduciary duties towards the company. But HMRC are also saying that the second appellant was operationally responsible for certain elements of the company's business. That much is clear from HMRC's notification letter of 1 March 2022.

19. It is also fleshed out by some of the evidence pleaded in paragraph 99A of the amended statement of case. In that paragraph HMRC assert that the tax agent making submissions to HMRC did so on behalf of both appellants; the only person making submissions to HMRC on behalf of the first appellant, was the second appellant; purchase invoices were made out to the first appellant but at the address of the second appellant; the second appellant's signature is included in the self-billing agreement; the second appellant provided HMRC with the first appellant's VAT records. All of this militates towards the second appellant being operationally involved with the activities of the company, and not behaving simply as a director. HMRC are alleging that he was an executive, rather than a non-executive director.

20. And this is also clear from paragraph 99 of their amended statement of case. HMRC must plead that the second appellant was an officer of the company. They do so. They say that at all material times, he was a sole director. They also go on to say that he was responsible for the first appellant entering into the relevant transactions. They also say that he had means of knowledge.

21. This makes it pretty clear that HMRC are asserting that the second appellant had not merely fiduciary and statutory duties towards the company but also was responsible, for the company entering into the relevant transactions.
22. They are also saying that he had ultimate responsibility even if others might have had intermediate responsibility for actually implementing the transactions.
23. HMRC state in clear terms that "the second appellant was responsible for the operation and running of the business".
24. And I can see nothing mitigating against that in the final limb of the paragraph regarding neglect of obligations and fiduciary obligations as a director. It reads somewhat unhappily but reading "neglecting" as "neglected" makes it clear. I read "obligations" as being his obligations to carry out due diligence on his customers and suppliers (i.e. operational obligations, something which is highly relevant to means of knowledge) and fiduciary obligations as being those obligations to which he was subject by dint of being a director. This is very far from alleging that the attribution is solely due to the second appellant's office as director.
25. In my view HMRC have clearly pleaded that the actions of the company which gave rise to the company penalty were attributable to the second appellant.
26. Mr Watkinson has asked me to grasp the nettle and debar HMRC. I am not prepared to do so. I have not conducted a mini trial but on the evidence that I have seen, including the pleadings, and the witness statement of Officer Gutzmore, they have a realistic prospect of succeeding in their assertion of attribution. And I have no doubt that at the trial the evidence on which this assertion is based will be tested by his admirable forensic skills. This is not a short point of law or construction. It is something that requires testing at trial.
27. I therefore reject the debarring application.

THE CASE MANAGEMENT APPLICATIONS

The time limit issue

28. Section 73(2) VATA 1994 provides for HMRC to make VAT recovery assessments. There are time limits applicable to such assessments. Section 73(6) VATA 1994 provides, in as far as is relevant:

> "73(6) An assessment under sub-section (1), (2) or 3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in Section 77 and shall not be made after the later of the following –
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, …".

29. The assessments for VAT periods 07/19 and 10/19, notified on 9 November 2021 engage the "one year rule" in s.73(6)(b) VATA 1994, because they were notified more than 2 years after the end of those accounting periods.
30. The parties are essentially agreed that the approach that the tribunal should adopt is:

(1) To decide what were the facts which, in the opinion of the officer making the assessment on behalf of HMRC, justified the making of the assessment; and
(2) To determine when the last piece of evidence of these facts of sufficient weight to justify the making of the assessment was communicated to HMRC.

31. The one-year period runs from the date in [30(2)].

32. The burden of establishing that the assessments were made outside the one-year time limit is on the appellant (see *Nottingham Forest Football Club Ltd v HMRC* [2024] UKUT 145 at [46] and [47]).
33. I do not have to determine the time limit issue. This will be dealt with at the preliminary hearing. However, I must deal with the case management applications in relation to the preliminary hearing.
34. There are three of these. The first is an application for further and better particulars of HMRC's case on the time limit issue. The second is an application for specific disclosure. The third application is for further case management directions taking into account my decisions on the two former applications.

The application for further and better particulars

General principles

35. In her decision in *4Site Services London Ltd and others* [2024] UKFTT 00143, Judge Brown summarised the principles which should be adopted when considering an application for further and better particulars. At [33] and [34] of her decision, she said this:

> "33. In accordance with rule 25 FTT Rules HMRC's statement of case is required to state the legislative provision under which the decision under appeal was made and set out the respondent's position in relation to the case. These requirements are set in the context of the parties' obligations to assist the Tribunal to deal justly and fairly with the matter under appeal. As recently noted by Judge Aleksander in *Alpha Republic Limited v HMRC* [2023] UKFTT 750 (TC) endorsing the view taken in *Citibank NA v HMRC* [2014] UKFTT 1063 (TC) the statement of case, where necessary and appropriate by reference to other material including witness statements, must give the appellant the opportunity to properly prepare for the case. By reference to *Tejani v Fitzroy Plance Residential Ltd* [2020] EWHC 1855 (TCC) and the cases cited therein Judge Aleksander notes that a statement of case "marks out the parameters of the case being advanced", only pleading the facts necessary for the purpose of formulating a cause of action/defence.
>
> 34. The question to be asked when considering the F&BP applications is: does the statement of case (taken together with the witness statements) enable the Appellant in this case to know the case it has to meet?"

36. Although not binding upon me, I gratefully adopt these principles for the purposes of this decision.

Submissions

37. In summary Mr Watkinson submitted:

(1) The appellants cannot properly understand HMRC's case from the pleadings or correspondence.
(2) HMRC need to tell the appellants what were the facts which in the opinion of the assessing officer justified the making of the assessments, and when the last piece of evidence of those facts of sufficient weight to justify the making of the assessments was sent to HMRC.
(3) The trial judge will need to determine what facts were needed, when the evidence of those facts was received, the date the last piece of the puzzle fell into place, and then undertake a comparison exercise with the facts which had been known a year before. This is not possible from HMRC's pleaded case. It is not possible to identify the facts relied on, nor when the relevant evidence was received, to allow the comparison to be undertaken.

(4) At paragraph 49 of their amended statement of case: "The Respondents assert that they are within time based on the one-year rule". This is insufficient to enable the appellants to understand the case which HMRC are putting as regards the evidence on which those assessments are based and when that evidence was received by them.
(5) The request for further and better particulars therefore identifies two questions calling for HMRC to identify the facts and the evidence on which they rely.
(6) In the statement of case HMRC say that "they continued to ask the First Appellant and the suppliers for records to verify the transactions". In respect of this pleading the appellants ask HMRC to identify the dates between which HMRC asked the first appellant and suppliers for their records.
(7) HMRC have also pleaded that "the Respondents were entitled to rely… also on information that was not provided as part of their decision-making process". The appellants ask what information HMRC rely on that was not provided.
(8) Finally, as regards the supply chains for the three periods which are set out in Annex A to the statement of case, the appellants ask what evidence of sufficient weight to justify the making of the assessment for the period in question do HMRC say came to their knowledge from Google and Companies House record searches undertaken for each defaulter between March and July 2021.
(9) Without the foregoing information, the appellants cannot properly understand HMRC's position, nor is the tribunal in a position to undertake the appropriate comparative exercise.
(10) There is prima facie evidence from the correspondence that the suppliers in the relevant chains had been deregistered well before a year before the assessment was made.
(11) Paragraph 49A of the amended statement of case doesn't take matters much further. It simply records the dates between which searches were conducted. It identifies that the appellant did not provide a variety of statutory records, and although it then refers to the Google and Companies House record searches, it doesn't explain their relevance to the decision-making process.
(12) Officer Gutzmore's witness statement does not answer the questions either. It simply says that at the point of issuing the assessments she could determine the pattern of the first appellant participating in VAT fraud with successive defaulters, and that combined with the concerns developed during her Google and Companies House searches led her to a point in the summer of 2021 when she had sufficient evidence to issue the assessments. That does not identify the facts on which she relied, nor when she received the last piece of evidence of those facts.
(13) It would be proportionate and reasonable to allow the application.

38. In summary Mr Way submitted:

(1) In truth, the appellants' issue is not that it doesn't understand HMRC's case, but that it doesn't agree with it.
(2) HMRC have served their witness evidence. This is set out in Officer Gutzmore's witness statement. This clearly sets out the evidence on which her decision to assess was based and makes it abundantly clear what case the appellants have to meet.
(3) The final paragraph of that statement, read in conjunction with the rest of the paragraphs explains the relevance of the Google and Companies House searches.
(4) The facts set out in that statement are entirely consistent with the case which has been put forward by HMRC throughout, starting with the decision letter on 5 November 2021, through the statement of case and then in the amended statement of case. The time when the searches were carried out is clearly identified in the latter as being between March 2021 and 15 July 2021.

(5) The decision letter of 5 November 2021 sets out in considerable detail the basis of HMRC's decision and the information on which the decision to assess was based.
(6) It is principally for the appellants to plead and prove their case on the time limit issue. To the extent that HMRC must plead and prove a case, it is that HMRC disputes the appellants' case. Here, the appellants have not pleaded any positive case whereas HMRC have. This might be unsurprising given that HMRC have conducted the investigation, but the appellants have not advanced any case on the date on which they considered HMRC must have had enough evidence to issue an assessment. The only positive case being advanced here is by HMRC.
(7) The appellants are in substance requesting HMRC's evidence on the time limit issue which has now been provided by way of the officer's witness statement. It is not reasonably necessary or proportionate to order HMRC to provide further information by way of further and better particulars. HMRC's case has been adequately pleaded, its evidence has been served, and that evidence will be tested at the preliminary issue hearing.

My view

39. I ask myself the same question as that posed by Judge Brown. Does the amended statement of case together with the decision letter and the witness statement enable the appellants to know the case they have to meet on the time limit issue.
40. This requires the appellants to understand the facts on which the assessing officer relied and when the evidence of those facts came to her attention.
41. I am firmly of the view that the pleaded case combined with the information in the decision letter and in the witness statement enable the appellants to do this without the necessity for any further and better particulars.
42. The facts on which the assessments are based are set out in the decision letter and amplified considerably by the witness statement. The relevance of the Google and Companies House searches and the assessing officer's reliance on them is set out in her witness statement. It is clear from the amended statement of case that the searches took place between March 2021 and 15 July 2021. HMRC also set out that they were not able to assess before February 2021 as it was not until then that the appellant provided comprehensive VAT records.
43. This makes clear the positive case which HMRC is setting out regarding the time limit issue. It is now for the appellants to make out the positive case that HMRC had sufficient evidence to justify the making of the assessments more than one year before they actually made them. They believe there is prima facie evidence of this. And this can be put to the witness in cross-examination at the preliminary hearing. The tribunal will then be able to undertake the comparative exercise suggested by Mr Watkinson on the basis of the facts that are then established. That in my mind is perfectly possible without the need for any further and better particulars.
44. Mr Watkinson submits that the witness statement does not identify when the open source checks were carried out. But this is set out in the amended statement of case. He also says that it is not clear when the last piece of evidence was communicated to HMRC. But it is pretty clear from the witness statement that the officer is saying that it was in the summer of 2021, which chimes with the 15 July 2021 date mentioned above.
45. There is more than enough for Mr Watkinson to tilt at at the preliminary hearing. He can challenge the assessing officer in cross examination on the basis of the pleaded case and the witness statement. On the basis of the facts elicited, he can make out his positive case regarding the time limit issue.
46. I therefore reject the appellant's application for further and better particulars.

The application for disclosure

47. Mr Watkinson frames his application as follows:

"The Appellants ask that the Tribunal directs the Respondents to make disclosure, within 28 days, of all documents in its possession, custody or control relevant to the time limits issue and not yet disclosed, which are to include:

i. All progress logs in relation to the decision to assess the First Appellant (which will include progress logs in relation to each alleged fraudulent defaulter relied upon);

ii. All draft means of knowledge submissions, responses from VAT fraud policy, and all related documents that record input from supervising officers and any relevant technical team in relation to that decision;

iii. All notebooks, electronic folder entries, emails, memoranda, meeting notes or other documents, whoever their author is, recording points relevant to the time limit issue; and

iv. All documents recording when the Respondents received information from the First Appellant and the suppliers in issue".

Submissions

48. In summary Mr Watkinson submitted:

(1) These documents are probative of the time limit issue and are reasonably required to be before the tribunal to determine that issue.
(2) Rule 16(1)(b) of the FTT rules permits the tribunal to require a party to produce documents in their possession or control which relate to any issue in the proceedings.
(3) Disclosure of documents is not an end in itself but the 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 (see *HMRC v Smart Price Midlands Ltd and another* [2019] EWCA Civ 841 at [40]).
(4) HMRC have a duty of candour to the appellant and the tribunal (see *Karulla (t/a Brockley's Rock) v HMRC* [2018] UKUT 255 at [32]), and it is open for the appellants to make an application for specific disclosure in relation to time limit material.
(5) This application is not a fishing expedition. He needs the material in order to conduct an effective cross examination which may assist in establishing his case. They go to the issues in the case. They are documents which will be probative of establishing what facts were known to HMRC and when those facts were supplied to them.
(6) The documents requested have been generated either by HMRC and are certainly not in the public domain.

49. In summary Mr Way submitted:

(1) This application does not seem to be an application for specific disclosure. It is a fishing expedition, the appellants hoping that something might turn up which will enable them to prove their case via cross examination.
(2) HMRC have served their witness evidence and there is no explanation as to why these documents are reasonably necessary for the appellants to prepare their case given that it is now aware of the witness evidence.
(3) The witness statement combined with the pleadings and the 5 November 2021 letter sufficiently set out the basis of which the assessing officer came to her decision and the time when she reached it. The pieces are all there for the judge to determine when the last piece of

the puzzle fell into place and so to conduct the comparison exercise suggested by Mr Watkinson.
(4) HMRC have a duty of candour and the tribunal can rely on the propriety of HMRC's investigation. There is no suggestion that HMRC are holding anything back.
(5) There is no evidence that HMRC have not properly disclosed all relevant documents. Given that this application is being made well after disclosure has been made, I should be slow to order it.
(6) Much of the evidence relevant to the time limit issue was either provided by the appellants or is in the public domain.

My view

50. I am treating the appellants' application for disclosure as an application for specific disclosure. Under the FTT rules, and in particular Rule 16, subject to the provisions of Rule 2, I have power to order specific disclosure.
51. Neither party addressed me on the principles that I should adopt but they 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.
52. 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 the 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.

53. In coming to my decision on this issue, I bear in mind that the burden of establishing that the assessments were made outside the one-year time limit rests with the appellants.
54. Furthermore, I did not understand Mr Way to be saying that these documents are not relevant. It seems to me that he is saying they are not necessary.
55. I take the view that they are potentially highly probative of the time limit issue. They go to the ongoing state of knowledge of HMRC and the assessing officer as they received, processed, and then make further investigations into, the information supplied by the appellants.
56. When the tribunal is asked to undertake the comparison exercise of establishing when the last piece of evidence was disclosed to HMRC compared with the date of the assessments, it will be helped considerably by evidence of the ongoing state of knowledge of HMRC. That will be reflected in the documents which the appellants ask to be disclosed.
57. These documents might be adverse to HMRC's case. But they are all relevant. Disclosure of adverse documents is obligatory in criminal cases and is reflected in HMRC's

duty of candour. No one is suggesting that HMRC's investigation has been anything other than proper. Nor that they have not disclosed information that they perceive to be relevant.

58. But the documents requested by the appellants have a high degree of relevance to the time limit issue. And will assist in a fair determination of that issue.

59. In his submissions regarding further and better particulars, Mr Way considers HMRC's case to be adequately pleaded, and that it is up to the appellants to make out their case by way of cross examination in subsequent submissions. And I have, effectively, accepted this in coming to the decision regarding the appellant's application for further and better particulars.

60. But in making out their positive case, the documents sought by the appellants will potentially considerably assist them in cross-examining HMRC's witnesses, and thus enable them to put forward their positive case. It is fair and just to order disclosure.

61. I am conscious, however, that any disclosure must be proportionate to the relevance of the application in light of the time and cost to HMRC of making the disclosure. And that a targeted disclosure is more likely to be proportionate than an untargeted one.

62. The application therefore for disclosure of all documents which are relevant to the time limits issue, is far too broad and will involve HMRC in disproportionate cost in time and energy.

63. However, the application for disclosure of the progress logs and draft means of knowledge submissions is targeted. Those in relation to notebooks etc and all documents, are not. Indeed, the latter is more in the way of supplementing the appellant's application for further and better particulars which I have rejected. And it seems to me that the last two categories are simply thrown on a "without prejudice to the generality of the foregoing" type basis in view of the overarching application for all documents relevant to the time limits issue

64. I therefore reject the appellant's application for disclosure of all relevant documents, but I allow it, slightly varied, in respect of the specific documents identified at 43i and ii, of their application as set out at [47] above.

65. I therefore Direct that HMRC shall disclose to the appellants, within 42 days from the date of release of this decision:

(1) All the progress logs in relation to the decision to assess the first appellant (which will include progress logs in relation to each alleged fraudulent defaulter relied upon); and

(2) All draft means of knowledge submissions, responses from VAT fraud policy, and all related documents that record input from supervising officers and any relevant technical team in relation to that decision.

But only to the extent of documents in their possession, custody or control and which do not attract legal privilege.

Case Management Directions

66. Following release of this decision, I shall make further case management directions regarding the conduct of the preliminary hearing.

DECISION

67. I reject the second appellant's application to debar HMRC. I reject the appellant's application for further and better particulars. I allow the appellant's application for specific disclosure to the extent identified at [64] and [65] above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. 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: 07th AUGUST 2024