Neutral Citation: [2024] UKFTT 1046 (TC)

Case Number: TC09357

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2018/04296

CASE MANAGEMENT – application for specific disclosure – application rejected

Heard on: 15 November 2024
Judgment date: 21 November 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

MILTON KEYNES HOSPITALS NHS FOUNDATION TRUST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Martin Kaney of Liaison Financial Services

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

DECISION

INTRODUCTION

1. The appellant has made an application for specific disclosure ("**the application**"). The application was made by way of an email dated 27 January 2023 to which copies of certain items of correspondence were attached and relates to an appeal against an assessment issued by HMRC on 11 July 2017 under section 73 of the VAT Act 1994 ("**VATA 1994**"). That assessment was issued as a result of the appellant having claimed refunds of VAT under section 41 VATA 1994 in relation to various supplies made to it, under the Contracted-Out Services Direction ("**the Direction**") to which HMRC believed it was not entitled under the Direction.

2. The amount of the original assessment for over recovered VAT was £114,988, to which default interest of £6,508.63 was added. Following the provision of additional information and ADR, the amount now in issue in this appeal is £13,289.25.

3. There is no dispute about the law or the facts. I was greatly assisted by the clear written and oral submissions by Mr Kaney and Miss Inglis, but I have not found it necessary to refer to each and every argument advanced, or all of the authorities cited, in reaching my decision.

THE LAW

4. Under Rules 5 and 16 of the First-tier Tribunal (Tax Chamber) Rules, I have power to direct that one party to an appeal provides documents to another part in that appeal. When deciding whether I should exercise that power, I must bear in mind the overriding objective, in Rule 2, that I must deal with cases fairly and justly.

5. The principles that I should adopt when considering an application for specific disclosure 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.

6. 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.

7. Also relevant is the First-tier Tribunal decision in *Mehta* [2015] UKFTT 396, in which Judge Aleksander stated that when considering an order for the production of documents, the guiding principle is that there must be a real likelihood that the evidence will materially assist the tribunal in determination of an issue in the proceedings. "The test is not whether the party making the application hopes that the evidence will assist its case. The test is whether the Tribunal considers that there is a real likelihood that its determination will be assisted. That may be the case where the Tribunal considers that the evidence will be reasonably likely, one way or another, to resolve an area of uncertainty".

THE APPLICATION

8. The application was made by an email dated 27 January 2023.

9. It states as follows:

> "There have been several policy rulings for the supplies that were assessed where the HMRC guidance was unclear. Please find enclosed additional documents with the correspondence for the issues under appeal. We would request that copies of the rulings issued by Policy are provided to the appellant and Tribunal under rule 5 3 (d) of the Tribunal Procedure Rules".

10. Annexed to this email were several items of correspondence.

11. Following a direction to this effect by the tribunal, the appellant provided further and better particulars of its application on 18 March 2024 ("**the further and better particulars")**.

12. The further and better particulars clarify that the relevant provisions of the Direction in respect of which disclosure is sought are those under Headings 14, 31 and 33 (and this was further clarified in the appellant's skeleton argument).

13. In the further and better particulars, the appellant states that "where the HMRC Guidance is unclear it is common practice for HMRC Officers to check the position with HMRC Policy; the relevant information requested is therefore the confirmation from HMRC Policy referred to in the HMRC correspondence below where this has been provided to clarify areas of uncertainty i.e. the rulings (our emphasis added)".

14. The further and better particulars then go on to recite extracts from various letters and emails written by HMRC, dated 12 July 2004, 1 August 2006, 16 May 2014, 3 April 2018, 24 May 2018 and 17 September 2018 (and highlights certain sentences in each of those documents as set out below). The first four of these letters or emails do not relate to the appellant The last stems from HMRC's application for a stay in these proceedings.

15. In the letter dated 1 August 2006; "…was subject to a formal review by our Policy team…".

16. In the letter dated 12 July 2004; "…taken further advice from our policy team…".

17. In the email dated 6 May 2014; "As per our phone conversation on 28 April I now accept the deductibility of the invoices referred to below. This is based on the 2005 NHS guidance issued by HMRC which does not make it clear that software maintenance is not deductible on off-the-shelf software. <u>This is likely to be clarified in future</u>.

18. In the letter dated 3 April 2018; "…HMRC have ruled it was not recoverable under COS Heading 14, you can now quantify the under claimed VAT on Scriptswitch software going back to 1 April of the tax year you submitted your ruling request…".

19. In the email dated 24 May 2018; "… concluded its review, representations have been submitted to Treasury and Treasury's responses have been received.

20. In the letter dated 17 September 2018, from HMRC's Solicitors Office to the tribunal; "… await the outcome of the review and then to reconsider the assessment in the light of that outcome".

DISCUSSION

Burden

21. Miss Inglis submitted that the burden of establishing that specific disclosure should be ordered lies with the party making that application. Mr Kaney did not demur from this submission, which is one with which I agree. It is therefore up to the appellant, in this application, to persuade me that I should order disclosure.

Submissions

22. In summary Mr Kaney submitted as follows:

(1) The information sought by the appellant will enable it to formulate its case and will be of assistance to the tribunal in resolving the points at issue in this appeal.

(2) The information requested will be readily apparent to the Public Bodies Group, a small highly specialised unit within HMRC (as were its predecessor groups) who deal with claims under the Direction on a daily basis. Members of that group will have a ready access to the relevant information on their computers. It will not be onerous therefore to provide the information requested.

(3) The appellant does not seek disclosure rulings which relate to different taxpayers but rather the documents and information giving rise to the legal interpretation of the Headings in the Direction.

(4) HMRC's legal interpretation of the Direction must be the same irrespective of the facts and circumstances and must, therefore, be of general application.

(5) The reviews identified in the correspondence are highly likely to have been recorded in documentary form.

(6) The original request for disclosure has been refined rather than broadened.

(7) Proportionality must be viewed not just in the context of this appeal but with regard to future activities.

23. In summary Miss Inglis submitted as follows:

(1) Notwithstanding the further and better particulars, it is not clear to HMRC precisely what documents the appellant requires. It is difficult for them, therefore, to be confident that they could comply with any direction.

(2) The grounds for the application have changed from the original application itself, through the further and better particulars and in the appellant's skeleton argument.

(3) The Public Bodies Group is not, contrary to Mr Kaney's submission so familiar with the issues that it will be easy for them to "flick a switch" and obtain the necessary documents. Many records are not held electronically and would require HMRC to manually search physical documents.

(4) Furthermore, there is no evidence that such documents actually exist. The appellant has produced no evidence that any of the reviews referred to in the correspondence resulted in a document which can be disclosed. This is a fishing expedition by the appellant in the hope that something will turn up which might assist its case.

(5) The important legal principles are that the documents must be relevant, and disclosure must be proportionate. The documents sought here are not relevant. The review in the letter dated 1 August 2006 was in relation to the VATability of the supply rather than whether the VAT charged on that supply was recoverable under the Direction. The further advice referred to in the letter dated 12 July 2004 referred to a specific taxpayer and that taxpayer's specific circumstances. It is not relevant to this appellant. As regards the remaining documents, all of which relate to Heading 14, one is specific to enquiries raised by a different taxpayer. The appellant cannot rely on rulings given to another taxpayer. The Scriptswitch software is not an issue in the present appeal. While there might have been reviews, some of these have not been concluded and there is no evidence that any documents resulted from such reviews.

(6) The information sought is not vaguely probative of the issues which need to be decided in this appeal. It is largely irrelevant.

(7) It is also disproportionate when considered against the amount of tax still outstanding (£13,289.25). It will require HMRC to do a considerable amount of work to find certain documents that may not exist.

(8) Whilst an appellant might be entitled to rely on published rulings, it is not entitled to rely on unpublished rulings.

My view

24. I start by considering relevance. It is clear from the authorities cited above that I should only exercise my judicial discretion and order disclosure if the relevant documents are reasonably likely to resolve an area of uncertainty and will assist the tribunal to fairly determine the issues in this appeal.

25. The issue in this appeal is straightforward. It is a question of whether the services supplied to the appellant, viewed realistically, fall within the statutory description in the relevant Heading of the Direction construed purposively.

26. That statutory construction is the sole province of the trial judge. HMRC might have a view which is reflected in documents made available to the general public, or indeed in the specific correspondence with particular taxpayers. And that view might reflect what they considered to be the purpose for which the legislation was introduced in the first place. But ultimately it is not HMRC's role to determine the interpretation of the relevant statute. That is, as I say, for the trial judge.

27. The legislation must be construed purposively, i.e. in light of the purpose for which was introduced in the first place. But I agree with Miss Inglis that when considering that purpose, it is not permissible to take into account specific advice or information provided to particular taxpayers. The purpose must be divined from published documents, whether published by Parliament or a government department.

28. The contents of specific advice provided to a particular taxpayer may be highly relevant if that taxpayer wishes to impugn HMRC for acting unreasonably or for failing to act in accordance with the taxpayer's legitimate expectation. But in this appeal, the appellant does not suggest either.

29. I also accept Miss Inglis' submissions that some of the information sought is specific to different taxpayers, (notwithstanding protestations to the contrary from Mr Kaney) and in certain circumstances has been given in relation to facts which are specific to those taxpayers. We do not know of those facts. Furthermore the documents are not disclosable by HMRC due to their duty of confidentiality.

30. Furthermore, there is no evidence that the reviews mentioned in the correspondence resulted in any document for which I could direct disclosure. It is not enough for the appellant to suggest that any such document will be readily known to those in HMRC who deal with claims under the Direction. I agree that this is a fishing expedition.

31. Frankly I am at a slight loss to understand why the appellant requires these documents if it is not impugning the propriety of HMRC's decision to issue the assessment. I cannot see that even if they exist, they would shed any relevant light on the purpose for which the Headings in the Direction were introduced. Whilst the appellant might be interested in understanding what policy changes HMRC might have made and recorded in writing, following certain reviews, I cannot see that they are relevant to the decision that the trial judge will have to make regarding the interpretation of the Headings in the Direction.

32. As I say, the issue in this case is straightforward; do the services supplied to the appellant fall within the relevant Heading in the Direction. In my view, the determination of that issue will not be assisted by disclosure of the information sought by the appellant.

33. I am also the view that, even if the documents were in existence, and relevant, to order disclosure would be wholly disproportionate in that the amount at stake in this appeal which has now reduced to the pretty modest sum of £13,289.25.

34. Mr Kaney suggests, without producing any evidence to this effect, that the documents (if any) could be readily obtained by those officers who are familiar with this area of VAT law, as they would have that information on their computers.

35. Miss Inglis suggests (again without producing any evidence to this effect) that electronic records are only retained for a limited number of years, and that the request for information contained in the correspondence in 2004, 2006 and 2014 will only exist in hard copy form. And this would require a considerable exercise in manpower to sift through the archives on the off chance that the relevant document might exist, and then to identify and produce it.

36. Once again, I am with Miss Inglis. Given the amount at stake, and the virtual irrelevance of the information sought, it would be wholly disproportionate to ask HMRC to undertake this exercise.

DECISION

37. For the foregoing reasons I reject the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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: 21st NOVEMBER 2024