[2019] UKFTT 524 (TC)

PROCEDURE – HMRC application for clarification of disclosure directions – Whether compliance with disclosure directions – Whether 'unless direction' appropriate – Appellant's application for extension of time to file and serve witness statements

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07320

Appeal number: TC/2017/02434

BETWEEN

STAYSURE.CO.UK LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 6 August 2019

Andrew Macnab, counsel, instructed by Brian White Limited, for the Appellant

Laura Prince counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. In his decision of 5 October 2018, in *Staysure.Co.UK Limited v HMRC* [2018] UKFTT 584 (TC), Judge Jonathan Richards, at [35], directed that:

> (1) HMRC must, within [period to be determined] provide the appellant with the names of all HMRC officers who had material involvement in HMRC's decision of 28 October 2016 that the appellant was liable to be registered for VAT with effect from 1 January 2009 (the "Relevant Officers").
>
> (2) Subject to (3) below, HMRC must, within [period to be determined] provide the appellant with (i) copies of all written communications (including emails and internal memoranda) between any Relevant Officer and any other officer or employee of HMRC (whether a Relevant Officer or not) and (ii) any notes of meetings involving a Relevant Officer which, in either case, are relevant to the question of when HMRC as an institution became fully aware that the appellant was liable to be registered for VAT.
>
> (3) The following documents or categories of documents need not be disclosed pursuant to (2) above:
>
> > (a) Any document that is subject to legal professional privilege or litigation privilege.
> >
> > (b) Any document created before 17 December 2013 or created after 28 October 2016.
> >
> > (c) Any document of which the appellant already has a copy.

2. HMRC say it has complied with these directions (the "Disclosure Directions). However this is disputed by the appellant, Staysure.Co.Uk Limited ("Staysure"). This hearing was therefore listed to determine the following:

   (1) the application of Staysure, dated 21 December 2018 for an extension of time in which to file and serve its witness statements;

   (2) the application of Staysure, dated 27 February 2019, that unless the respondents comply with the Disclosure Directions and provide the information requested in the letter of 25 January 2019 (which requested that HMRC should state when it became "fully aware" of Staysure's alleged liability to register for VAT, the basis upon which that date was identified and provide a list of documents provided by Staysure which were necessary for HMRC to be fully aware of its liability to register) that HMRC be barred from taking further part in the proceedings; and

   (3) the application of HMRC, dated 6 June 2019, for the Tribunal to provide clarification of the Disclosure Direction decision.

3. I am grateful for the assistance of Mr Andrew Macnab, counsel for Staysure, and Ms Laura Prince, counsel for HMRC, neither of whom appeared before Judge Richards.

4. I should also commend the approach of both counsel which clearly reflected the obligation on the parties, under Rule 2(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to help the Tribunal to further the overriding objective to deal with cases "fairly and justly". This can be contrasted with the wholly inappropriate stance taken by Staysure's representative, Brian White Limited, which, to give an example, in an email of 18 June 2019, opposing HMRC's clarification application stated:

> "The Appellant does not accept the need for "clarification". It is obvious HMRC have always had zero intention of complying with the [disclosure]

> Order ab initio and their whole thrust has been to negate and obfuscate the Order. Requesting "clarification" over 7 months after its issue, is not only proof of that intention, but is equally disingenuous and intellectually bankrupt and morally reprehensible."

Clearly there is no place for such an approach which does nothing to further the overriding objective. I hope and trust that this will be recognised and reflected in the further progress of this matter towards a substantive hearing.

BACKGROUND

5. I can do no better than refer to the following summary of the substantive dispute between the parties given by Judge Richards:

> "2. This appeal is complicated, involves a large amount of money and an analysis of detailed aspects of the appellant's business and its transactions with affiliated companies. I will therefore summarise only the essence of its appeal with the detail necessary to consider the appellant's application for disclosure.
>
> 3. The appellant is a limited company that was incorporated in England and Wales on 1 June 2004. It carries on business as an insurance broker, primarily specialising in providing travel insurance for people aged 50 and over. In addition to travel insurance, it also provides home insurance and cover for holiday homes and motor vehicles. The appellant's business, in large part, therefore involves it making supplies that are exempt for VAT purposes. In the period up to 31 March 2015, the appellant did not consider that it made sufficient taxable supplies to trigger a requirement to become registered for VAT and the appellant was not, therefore, VAT registered at any point before 31 March 2015.
>
> 4. The appellant receives some services from an affiliated company which belongs in Gibraltar for VAT purposes. Between 2013 and 2016, HMRC pursued enquiries into the nature of those services and their classification for VAT purposes. In the course of those enquiries, the appellant provided significant quantities of information and attended a number of meetings with HMRC. Ultimately, HMRC formed the view that these services were, for VAT purposes, standard-rated and subject to the "reverse charge" in s8 of the Value Added Tax Act 1994 ("VATA 1994"). As such, HMRC considered that the appellant was treated, by s8, as supplying standard-rated services to itself with the result that, contrary to the appellant's view, it was required to be registered for VAT. The appellant disagrees with HMRC's conclusions in this regard.
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> 5. Following a group reorganisation in or around 2016, the appellant concluded that it was liable to be VAT registered and it accordingly applied to be so registered. It was registered for VAT with effect from 1 April 2015.
>
> 6. On 28 October 2016, HMRC issued a decision letter which set out their conclusion that:
>
>> (1) The services received from abroad were taxable under the reverse charge mechanism in s8 of VATA 1994.
>>
>> (2) In consequence of the decision at [(1)], the appellant was liable to be registered for VAT from 1 January 2009 and the appellant's VAT registration was accordingly backdated to that date.
>>
>> (3) The appellant would be sent a single VAT return covering the period from 1 January 2009 to 31 March 2015. If the appellant did not

> return that completed return by the due date, HMRC would make an assessment based on figures available to them.
>
> 7. On 26 January 2017, HMRC made a VAT assessment of £7,910,276. HMRC's position is that this was a single assessment covering the entire period from 1 January 2009 to 31 March 2015. The appellant's position is that it was a series of separate assessments, each covering a part of that period. In referring to the "assessment" in the singular, I should not be taken as expressing any view on that issue.
>
> 8. On 23 February 2017, HMRC imposed a penalty on the appellant pursuant to s 67 of VATA 1994 which has since been repealed. HMRC calculated that penalty as £1,186,541 on the footing that the "date on which the Commissioners received notification of, or otherwise became fully aware of" the appellant's liability to be VAT registered was 1 April 2015.
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> 9. On 17 March 2017, the appellant appealed to the Tribunal against HMRC's various decisions. The appellant's Notice of Appeal and surrounding correspondence makes it clear that the appellant is disputing HMRC's decisions for the following reasons (insofar as relevant to the application for Disclosure Directions):
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> > (1) The appellant argues that HMRC are out of time to issue the assessment by virtue of s 73(6) of VATA 1994.
> >
> > (2) The appellant argues that it has a "reasonable excuse" for any failure to notify HMRC that it was liable to be registered for VAT purposes and therefore has a defence to the belated notification penalty.
> >
> > (3) The appellant argues that HMRC have calculated the penalty wrongly as HMRC were "fully aware" of the appellant's liability to be VAT registered prior to 1 April 2015.

6. The application before Judge Richards was that of Staysure for a direction in the following terms:

> The Respondent discloses all documents, including electronically generated and stored emails, notes, records and reports, which were generated by HMRC during the period from 17 December 2013 (when HMRC first raised inquiries by letter to the Appellant) and 28 October 2016 (the date of the contested liability decision) which relates to HMRC's liability decision and assessment including in particular:
>
> > (i) Any notes from the visit of HMRC officer Cliff Wicker relating to his visit of 10 May 2014.
> >
> > (ii) Any notes from the visit of HMRC officers Forsyth and Wicker relating to their visit of 10 September 2014.
> >
> > (iii) Any notes from the visit of HMRC Officer Forsyth relating to her visit on 2 June 2016.
> >
> > (iv) Any internal documents which relate to the evidence considered by HMRC to be relevant to the decision on 30 November 2015.
> >
> > (v) Any internal documents which relate to the evidence considered by HMRC to be relevant to the decision of 28 October 2016.
> >
> > (vi) Any internal emails reports or notes which relate to the delay until 26 January 2017 in raising an assessment.

7. Although HMRC disclosed the manuscript notes taken by HMRC officers during the meetings of 10 May 2014, 10 September 2014 and 2 June 2016 in addition to the type-written

notes of those meetings the day before the hearing before Judge Richards, no further disclosure was made and HMRC resisted the disclosure of any other internal documentation. Having heard counsel for both parties Judge Richards made the directions set out in paragraph 1, above.

8. On 8 November 2018 HMRC provided Staysure with documents, many of which were highly redacted, "as per the Order of Tribunal Judge Richards dated 5 October 2018". However, in response, on 21 November 2018, Staysure's representative, Brian White Limited, complained that, "HMRC have manifestly failed to comply [with] that order" warning that unless disclosure was made within 14 days Staysure would be applying for an "unless order" barring HMRC from defending the proceedings.

9. On receipt of this letter, Mr Ian Painter of HMRC's solicitors VAT Litigation Team, undertook a review of the relevant documents and, other than the addition of a further document, the Enforcement & Compliance Disputes Resolution Board – Notification of Board's decision (which he partially redacted), he considered that there had been compliance with the Disclosure Directions. Mr Painter also reviewed the redacted documents already provided to Staysure and removed "a lot" of the redactions to assist Staysure in understanding the context to which the previously disclosed material referred notwithstanding that he considered that he could have justified maintaining the level of redactions. The additional documents and those with the removed redactions were sent to Staysure on 14 December 2018.

10. Although HMRC considered this sufficient to comply with the Disclosure Directions Staysure did not and made the application for the unless order requiring compliance with those directions.

11. As in the hearing, it is first necessary to consider HMRC's application for clarification of the Disclosure Direction. If HMRC are right, and there has been compliance, the question of a direction requiring them to do so falls away. I shall then consider Staysure's applications for an unless order, for further information and for an extension of time to file and serve its witness statements as well as an application, made by Ms Prince, for HMRC's costs of this hearing.

CLARIFICATION OF DISCLOSURE DIRECTION

12. In a letter, dated 3 May 2019, to Brian White Limited Mr Painter explained:

> "HMRC's understanding of the FTT's direction on disclosure [the Disclosure Direction] is that it is required to identify the 'relevant officers' who had 'material involvement' in HMRC's decision of 28 October 2016 and to disclose all written communications and notes of meetings between any relevant officer and any other officer or employee relevant to the question of when HMRC as an institution became fully aware that the Appellant was liable to be registered (see paragraph 35 of Judge Jonathan Richard's (sic) decision).
>
> The evident purpose of the disclosure is to enable the Appellant to contend that HMRC became "fully aware" of the Appellant's liability to be registered within section 67 VATA at a date earlier than 31 March 2015 – which is the end date HMRC applied in determining the 'relevant VAT' within section 67(3) VATA. …
>
> Our approach to disclosure is as follows: A document recording an initial or provisional view on liability, or a view of an officer which is subject to further consideration by another officer(s) is not one relevant to when HMRC as an institution became 'fully aware' of the liability to be registered. Thus, by way of example, as you know Officer Forsyth issued the final decision on liability but her provisional view of liability was referred for policy input in February 2015 (as Officer Forsyth informed Mr Savelli of the Appellant by email of 18

> February 2015) and (after further information from the Appellant was received) again in July 2016 (as Officer Forsyth informed Mr Kearney of the Appellant by letter on 29 June 2016) and also had input from the Dispute Resolution Board in August 2016 (as shown in documentation already disclosed to you). We do not consider that there was full awareness until after policy and DRB input had been received and note that both these periods are beyond the March 2015 date HMRC used in calculating the relevant penalty…"

13. There is no doubt that HMRC considers that it has complied with the Disclosure Direction. However, Mr Macnab contends that HMRC's interpretation of the Disclosure Direction is flawed in that it confuses the issue of disclosure with the ultimate resolution of the issue to which the disclosure is directed, namely, when HMRC were fully aware of Staysure's putative liability to register for VAT. As Ms Prince put it, the crux of the dispute between the parties is whether the Disclosure Direction requires every expression of view on liability by any HMRC Officer to be disclosed (as Staysure contends) or only those documents which record a "settled" view of HMRC as an institution (as argued by HMRC).

14. To determine which is correct, it is necessary to consider precisely what information Judge Richards directed HMRC to provide. Ms Prince focussed on the use of the words "full awareness", "HMRC as an institution" and "when" in the Disclosure Directions in support of HMRC's case that it applied to only those documents which record a "settled" view. However, the Disclosure Direction required those documents which were "relevant" to the question of when HMRC as an institution became fully aware etc.

15. Although Judge Richards did not explain what he meant by "relevant" in making the Disclosure Direction he had, in *Tower Bridge GP Limited v HMRC* [2016] UKFTT 54 (TC) at [23(3)] observed that:

> "The test of "relevance" should not set an unduly high bar. Documents and information that might advance or hinder a party's case, or which might lead to a "train of inquiry" that might advance or hinder a party's case are in principle relevant."

16. While I do not consider it appropriate to determine when HMRC became "fully aware" of Staysure's liability to register for VAT at an interlocutory stage of these proceedings, it seems to me that becoming fully aware involves a process of increasing awareness and, contrary to HMRC's approach, any document recording an initial or provisional view on liability, or a view of an officer which is subject to further consideration by another officer is, in my judgment, relevant to that process and should therefore be disclosed.

17. This appears to have been the position of Judge Richards who, at [25] of his decision leading to the Disclosure Directions, referred to the conclusions drawn by HMRC from meetings with Staysure as being "potentially relevant" to the "fully aware" issue. I also find some support in the observation of Dyson J (as he then was) in *Pegasus Birds v Customs and Excise Commissioners* [1999] STC 95 at 102 (although it concerned a different statutory provision, s 73(6)(b) rather than s 67 VATA 1994) that:

> "The knowledge of all officers who are authorised to receive information which is relevant to the decision to make an assessment is imputed to the commissioners."

18. Given my conclusion, although it acted in good faith and understood it had complied with the Disclosure Directions, it is clear that HMRC are required to disclose further documents to Staysure in compliance with it. At this stage, and without sight of the documents in HMRC's possession, it is not possible to specify what documents should be disclosed as this will involve

another review by Mr Painter of HMRC's material to identify relevant documents which include those recording initial and/or provisional views and those subject to further consideration by other officers. Sufficient time should be allowed for this and I would hope that the parties can agree a realistic timetable between themselves within the next 28 days but with liberty to apply if this is not possible.

UNLESS ORDER

19. As I indicated at the hearing, I do not consider an unless order to be appropriate. There has been no knowing failure to comply with directions by HMRC. Although, following clarification of the Disclosure Directions, further disclosure is required, HMRC have acted in good faith throughout and fully complied with its understanding of what was required by those directions.

FURTHER INFORMATION

20. In addition to the unless order Staysure also sought a direction that HMRC provide further information stating:

(1) when it became "fully aware" of Staysure's alleged liability to register for VAT;

(2) the basis upon which that date was identified; and

(3) provide a list of documents provided by Staysure which were necessary for HMRC to be fully aware of its liability to register.

Mr Macnab contends that such information is required to enable Staysure understand the case it has to meet. However, Ms Prince says information in relation to the first and second request has already been provided to Staysure and that the third is attempt to obtain further information going beyond that which was required by the Disclosure Directions.

21. Having clarified the Disclosure Directions, it is likely that further documents/information should be disclosed under the third request following the further review by Mr Painter. Also, notwithstanding Ms Prince's submission that they have been answered, I consider that, for the avoidance of doubt and as it would assist Staysure (and the Tribunal), HMRC should respond to the first two requests also.

EXTENSION OF TIME

22. It was accepted that it was appropriate for Staysure to file and serve its witness statements after it had received the documents in accordance with the Disclosure Directions. It was also common ground that HMRC should be allowed time to file and serve its witnesses statements in response following receipt of Staysure's witness statements. Given the position with regard to further disclosure, rather than specify dates for the provision of witness evidence I propose to leave this for the parties to resolve leaving open the possibility of reverting to the Tribunal if they cannot do so.

COSTS

23. This appeal was allocated to the "complex" category. In accordance with Rule 10(1)(c)(ii) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, by letter of 18 October 2018, Staysure opted out of the costs shifting regime applying to such cases. However this does not prevent an application for costs being made under Rule 10(1)(b) if a party has acted unreasonably in "bringing, defending or conducting the proceedings". HMRC has applied for its costs for this hearing on the basis of the "unreasonable manner" in which Staysure has conducted these proceedings.

24. However, notwithstanding my comments in relation to Brian White Limited (at paragraph 4, above) there has been no delay caused as a result of the conduct of Staysure or its

representative. In the circumstances, at this stage of the proceedings, I do not consider it appropriate to make any order for costs.

DIRECTIONS

25. For the reasons above it is directed:

(1) The parties shall liaise and, not later than 28 days after the release of this decision provide the Tribunal with their joint proposals for directions for the further progress of this appeal or if agreement is not possible each party shall within the same time provide the Tribunal and the other party with its proposals for directions for the further progress of the appeal.

(2) Either party may apply at any time for these directions to be amended, suspended or set aside, or for further directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

26. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 09 August 2019