[2020] UKFTT 00149 (TC)

TC07642

VALUE ADDED TAX - Case Management - Disclosure - Approval of draft order - Extent of disclosure - Keyword searching of Electronically Stored Information

TC/2018/06467

1. BARCLAYS SERVICES CORPORATION
2. BARCLAYS EXECUTION SERVICES LTD

Appellants

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 2 December 2019

Andrew Hitchmough QC, Counsel, and Barbara Belgrano, Counsel, instructed by Simmons & Simmons LLP, for the Appellants

Edward Waldegrave, Counsel, instructed by General Counsel and Solicitors' Office, for the Respondent Commissioners

DECISION

1. This is my decision in relation to an interlocutory case management issue which has arisen in this appeal.

2. The underlying appeal challenges a decision made by HMRC (refusing an application for VAT grouping made on 1 December 2017) which was communicated in a letter dated 2 March 2018 and upheld at departmental review on 5 September 2018.

3. In broad outline, there are two substantive issues in the underlying appeal. The first is whether Barclays Services Corporation ('BSC') was (despite HMRC's refusal) eligible to be treated as a member of the Barclays Execution Services Ltd ('BESL') VAT group because it was established in, or had a fixed establishment in, the UK: see section 43(1) of the VAT Act 1994: 'the Establishment Issue'.

4. If the Establishment Issue falls to be answered in the affirmative, then the second issue is whether HMRC was nonetheless entitled to refuse BSC's application for grouping on the basis that the refusal was "necessary for the protection of the Revenue": section 43B(5)(c) of the VAT Act 1994: 'the Protection Issue'.

5. On 8 August 2019, the Appellants made a disclosure application in relation to the Protection Issue: 'the Disclosure Application'.

6. HMRC objected to the Disclosure Application by way of submissions dated 12 August 2019.

7. There then followed discussions between the parties, each represented by a suite of specialist lawyers, which led to the formulation of a draft consent order, the body of which was signed on behalf of each party, and dated 29 October 2019: 'the Draft Order'.

8. The Draft Order contained a suite of case management directions, including a direction which, on the face of it, compromised the Disclosure Application in the following way:

   (1) Clause 1 of the Draft Order dealt with Disclosure;

   (2) Clause 1.3(B) of the Draft Order provided that, by a certain date, HMRC "was to provide the disclosure set out in item 1.2 of the schedule to this order, using the search parameters as agreed pursuant to directions 1.1(B) and 1.2 above."

   (3) Clause 1.1(B) referred to "details of the search parameters that the Respondents propose to use to produce the disclosure that is set out in item 1.2 of the schedule to this Order."

   (4) Clause 1.2 provided that the Appellants, by a certain date thereafter, were to confirm whether they were content with the search parameters proposed by HMRC, or, alternatively, were to provide any alternative dates, keywords or other search criteria that they consider would assist in provide the disclosure set out in Clause 1.2.

9. The Draft Order was placed before me, on the papers, for approval. However, I declined to approve that draft on the papers, principally because it referred to a schedule which was not signed by both parties and which, in my view, should have been.

10. I ordered the matter to be listed before me for a short hearing, but in anticipation that the parties (being informed of the issue which had given rise to my refusal to approve the consent order as it then stood) would liaise and swiftly rectify the (as it seemed) clerical or ministerial issue which had been identified.

11. That did not happen. Instead, a dispute emerged as to what had actually been agreed:

(1) The Appellants' position, in its email of 8 November 2019, was that the parties had not agreed the manner in which HMRC were to carry out the disclosure exercise, but that the scope of the disclosure was agreed;

(2) HMRC's position in its email of 12 November 2019 was that "the scope of the disclosure exercise remains to be agreed ... To date, the parties remain in discussion as to the scope of that disclosure exercise ... in the event that the parties are unable to agree the scope of disclosure, a CMC will be necessary to determine what the scope of HMRC's disclosure should be."

12. And there matters stood. Before me, in summary, the Appellants' position is this:

(1) The Tribunal should endorse the Draft Order as drawn, because that is what was agreed;

(2) Even if the Tribunal could look at the matter afresh, it nonetheless should make a direction in the terms of the consent order because to do so would further the overriding objective;

(3) Standard disclosure is inappropriate, and the disclosure which should be given in relation to the Protection Issue should be modelled on the more extensive disclosure considered by the Court of Appeal in *HMRC v Smart Price Midlands Ltd and others* [2019] EWCA 841, and see especially Rose LJ (with whom Newey and McCombe LJJ agreed) at Paragraphs [53] et seq;

13. Before me, in summary, the Respondent Commissioners' position is this:

(1) HMRC was not required to make any disclosure as sought in the Disclosure Application, but, in a spirit of pragmatism and by way of co-operation, had entered into the Draft Order;

(2) HMRC has agreed to disclose material relating to the process whereby it reached its decision on the Protection Issue, and, if any policy changes formed part of that process, HMRC will disclose material relating to them;

(3) The Tribunal should direct that HMRC's disclosure obligations as set out in the Draft Order will be satisfied if HMRC provides disclosure as proposed by it on 29 October 2019, as supplemented in its letter of 12 November 2019, and subject to the continuing nature of its disclosure obligations;

(4) Alternatively, that the Tribunal should direct disclosure in accordance with the Draft Order, but without the requirement for HMRC to agree search parameters with the Appellants first.

DISCUSSION

14. Directions, even if agreed by the parties, are always subject to the Tribunal's approval. The Tribunal does not abdicate its case management obligations simply because the parties indicate that they have agreed something. The Tribunal would still have to be satisfied that the parties' directions were lawful, proportionate, furthered the overriding objective, and were consonant with other matters of case management (for example, any hearing date).

15. However, the intensity (for want of a better word) of the Tribunal's role in considering draft directions, and the degree with which the Tribunal will interfere substantively with those directions, is inevitably case specific. Moreover, any agreed directions must be considered in the context (i) that the overriding objective requires the parties to co-operate with each other in the efficient and cost-effective resolution of disputes and (ii) this is an adversarial jurisdiction.

16. In this appeal, it is relevant that both parties are represented by teams of specialist lawyers, and that both sides can therefore each be presumed to have negotiated the draft directions at arms' length, and each acting so as to preserve and advance their respective client's best interests.

17. It is very clear, from the careful way in which Clause 1 of the Draft Order is drawn, that it is the outcome of concerted endeavour by the parties, even in this adversarial context, to co-operate.

18. Moreover, in this appeal, the extent of legal involvement in agreeing the directions is, in my view, a strong indicator (although, of course, not a determinative one) that the directions are likely to be lawful, proportionate, in furtherance of the overriding objective, and are consonant with other matters of case management.

19. The Draft Order for case management directions was signed on behalf of each party, on 29 October 2019. The Schedule to the Case Management Directions was signed on behalf of HMRC on 29 October 2019, and on behalf of the Appellants on 13 November 2019.

20. HMRC signed the Schedule at the same time it signed the draft directions. By its signature to the Draft Order and the Schedule, HMRC unequivocally indicated, as the disclosing party (i.e., the party upon whom the burden was going to fall), that it was going to deal with the Disclosure Application in the way set out in Clause 1.2 of the Schedule, namely that HMRC was going to provide copies of "all documents that relate to or which record the process by which HMRC: (A) reached its decision to refuse the application for BSC to join the Barclays Services Limited (sic) VAT group on the grounds specified in section 43B(5)(c) of the VAT Act 1994; and (B) the factors that HMRC took into account in reaching those decisions, including and in particular the extent to which HMRC took account of both existing and proposed policy guidance."

21. HMRC's position before me does seem to some extent to persuade me to depart from the previously agreed position. But I do not see any good reason why HMRC (as indeed any party) should not be held to its signature to a document as indicating their agreement to it. Second thoughts are not a good reason.

22. I note that the underlying dispute - not fully argued before me - in fact seems to concern the precise search keywords and whether these are now perceived to be too wide and whether these will end up producing an unwieldy mass of documents to be trawled through.

23. However, the process of identification of such keywords is one which HMRC endorsed. Obviously that agreed mode of proceeding does not, in and of itself, afford the Appellants carte blanche. The keyword search parameters, in the absence of agreement, fall within the scope of the Tribunal's case management powers.

24. The present list of keywords appears at Paragraph 2.10 of Simmons and Simmons letter of 5 November 2019. There are 19 keywords. Some ('Barclays Service Corporation'; 'BSC'; 'Barclays Services Limited', 'BSL') are of obvious relevance and likely to be of utility and relevance to *this* appeal by *these* appellants. Others (for example 'VAT Group') are less obviously relevant and less obviously likely to be of utility and relevance to *this* appeal by *these* appellants, as HMRC observed in its letter of 12 November 2019. I have added emphasis by way of italics, to remind myself that the Tribunal will ultimately be called upon to determine the Protection Issue as applicable to these appellants to this appeal, and not to taxpayers generally.

25. I refer the parties to the remarks of Morgan J in *Digicel (St Lucia) c Cable and Wireless PLC* [2008] EWHC 2522 (Ch) (a dispute about key word searching of Electronically Stored Information), especially at Para [80] where he remarked:

> "If one were to adopt the "leave no stone unturned" approach to disclosure then one would be more ready to add key words to those originally used by the Defendants. However, it will usually be wrong in principle to adopt that approach and, in my judgment, it would be wrong to adopt that approach in the circumstances of this case. One therefore has to consider the proportionality of adding an additional key word. For that purpose, one has to form some sort of view as to the possible benefit to the Claimants of adding the key word and the possible burden to the Defendants of doing so. The burden to the Defendants will principally consist of the burden of manually reviewing a large number of irrelevant documents."

26. Practice Direction 31B of the Civil Procedure Rules gives guidance about 'Keyword and other automated searches'. There, Paragraph 26 reminds parties to civil litigation that

> "the injudicious use of keyword searches and other automated search techniques (1) may result in failure to find important documents which ought to be disclosed and/or (2) may find excessive quantities of irrelevant documents, which if disclosed would place an excessive burden in time and cost on the party to whom disclosure is given"

27. I see no good reason why that guidance should not apply to proceedings in this Tribunal.

28. Having ventured those remarks, it seems to me to be better, as matters stand, to let the agreed process unfold as it will, and for the Tribunal to deal with any disputes about particular keywords if and when they arise.

29. Standing back, and as with any disclosure order, if any issues arise (say) as to whether a particular document does or does not fall inside the agreed terms of the Schedule, then that is a matter which, if necessary and in the absence of agreement, can be determined by the Tribunal in an appropriate way (for example, by way of submissions and a paper hearing). Similarly, neither party is debarred from advancing any application should it consider the disclosure inadequate.

30. Taking all of the above into account, I approve the order as placed before me by the parties, without amendment, except for the dates. As for the dates, the date laid down in Clause 1.3 should be extended by five weeks from the date of release of this Decision, and all other dates extended accordingly.

31. Lest my conclusion on the above matter should fall to be reconsidered, I can also express my views, albeit more briefly, on the issue whether, taking the matter de novo, I would have made such an order.

32. I consider that I would have done.

33. The nature of the Tribunal's jurisdiction in the appeal must necessarily have a bearing on the ambit of disclosure. I agree with the Appellants that the nature of the Tribunal's jurisdiction in relation to the Protection Issue is in essence 'an appellate jurisdiction exercised on supervisory principles': see VAT Act 1994 section 84(4A)(a) ("*the Tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for refusing the application*") and *Prudential Assurance Company Ltd v HMRC* (2006) at Para [5] *per* Dr John Avery Jones CBE

34. It is also relevant to examine how the parties have framed the Protection issue.

35. HMRC's decision letter of 2 March 2018 discusses the Protection Issue in this way:

> "PVD Article 11 limits VAT grouping to the territory of the Member State. Whilst the UK applies VAT grouping to include overseas branches and offices of the VAT group members it does not follow that HMRC will necessarily allow a company to VAT group simply because it has created a UK establishment.
>
> Where, in HMRC's view, the UK branch is set up in order to remove substantial supplies provided from outside the U from a charge to UK VAT, whether or not such a branch meets the test for a fixed establishment, HMRC will consider applying its protection of the revenue powers.
>
> Objectively, on the information provided to us, we consider that the UK branch of BSC was set up in order to remove substantial supplies provided from outside the UK from a charge to UK VAT. In our view, this amounts to a revenue loss beyond the normal operation of UK grouping. Despite the claims made by you regarding the commercial reasons behind the UK branch structure, the evidence that has been produced to HMRC does not point to a real commercial function for BSC UK, and that the benefits of any such function are insignificant compared with the VAT benefits of sheltering supplies from the main overseas establishment"

36. It seemed to me at the hearing, and still on reflection seems to me, that this passage (which I have set out in full) appears to be the expression of some underlying (but unarticulated) policy.

37. In terms of policy, HMRC's Internal Manual for VAT Groups, published on 10 April 2016, been placed before me. What is says about Collection of Revenue is brief and does not shed much light on what the policy is. It simply says, "*You may invoke our revenue protection powers where grouping would lead to, or has led to, an enhanced tax risk, or where it would render it less likely that the tax due would be safely collectable."* A small number of examples are given, none of which are obviously relevant here.

38. I do note that the April 2016 guidance was updated (and, in my view, clarified) in November 2019 (i.e., shortly before the hearing before me). That sets out the steps which HMRC considers must be taken - identification of the revenue at risk (with 'a vague assertion that there is revenue at risk in theory almost certainly rendering the decision unsustainable'); the collection of evidence to support the conclusion that the revenue protection powers were needed; and the maintenance of written records of all factors taken into consideration when making the decision and the reasons (with 'failure to be able to produce an audit trail for the decision' potentially leading to the decision being unsustainable).

39. Paragraph 13.11 of the Grounds of Appeal (1 October 2018) argues that HMRC's analysis "draws on an erroneous comparator" by comparing BSC's circumstances to the situation where a UK business imports services from an unconnected foreign service provider or non-established group company, in which case the recipient of those services would be liable to account for UK VAT under the reverse charge mechanism.

40. HMRC's formal response is in Paragraphs 32 and following of its Statement of Case (21 December 2018). Paragraph 35 limits itself to observing, but without any great particularity, that HMRC considered (i) the public interest in collecting the VAT which the arrangements would avoid; and (ii) the burden which would be imposed on the Appellants if BSC is not admitted to the VAT Group. That is suggestive of an evaluative, balancing, exercise.

41. Paragraph 36 acknowledges the nature and extent of the Tribunal's jurisdiction, but contends that "even if the FTT might itself have come to a different view in relation to the

'protection of the Revenue' point, the decision reached by HMRC cannot sensibly be regarded as having been unreasonable. As far as it goes, that is correct, and I agree.

42. It seems to me that Paragraph 36 of HMRC's Statement of Case states a fairly bald conclusion (which the Tribunal at the substantive hearing of the appeal may or may not end up agreeing with) but without vouchsafing the materials which the Tribunal would have to consider as part of that exercise. The conventional public law starting point in assessing whether the decision-maker (for example) took something irrelevant into account, or excluded something relevant from account, or that their decision was otherwise affected by some justiciable want of rationality. That could involve (as, in my view, it does in this case) examination of the materials considered, and applied, by HMRC in reaching its conclusion as to the 'protection of the Revenue' test.

43. I do not consider that I need to make any findings, at this stage, as to what was said by Advocate-General Jääskinen to be the purpose of VAT grouping provisions in *EU v Ireland [2013] STC 2336* at Para [44] et seq, and how (if at all) that was taken into account by the decision-maker here.

44. Finally, it also seems to me that my conclusion on this issue is consistent with the approach of the Court of Appeal in *HMRC v Smart Price Midlands Ltd* and another [2019] 1 WLR 5070. It seems to me that the context, although different, is nonetheless analogous. The Court of Appeal endorsed the remarks of Judge Sinfield (set out at Paragraph 32 of the decision) and in particular "An unsuccessful applicant can only form a view as to whether to challenge the decision on grounds of unreasonableness if the applicant knows what matters were considered by the decision-maker." In my view, the present appeal is such an appeal. The Tribunal will have to know what Judge Sinfield referred to as 'the full picture' in order to determine the issue fairly and justly, albeit subject to the cautionary remarks (above) as to the scope of the keywords and the cautionary remarks of the Court of Appeal in *Smart Price* at [57].

CONCLUSION

45. I approve the Draft Order as it stands, including the Schedule, but I vary the dates in the way set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2020