[2021] UKFTT 0055 (TC)

TC08041

Procedure – Application for disclosure – Disclosure sought 'potentially relevant' to issue(s) in the case – Whether disclosure precluded by s 18 Commissioners for Revenue and Customs Act 2005 and GDPR – No – Application allowed – Directions made for progression of appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02484

BETWEEN

LUCKY TECHNOLOGY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BROOKS

The hearing took place on 17 February 2021. With the consent of the parties, the hearing was on the Tribunal video platform. A face to face hearing was not held because of the restrictions imposed as a result of the coronavirus pandemic

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public

Michael Firth, counsel, instructed by Morgan Rose Solicitors, for the Appellant

Sharon Spence, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the rejection, by HM Revenue and Customs ("HMRC"), of a claim for input tax by Lucky Technology Limited ("LTL"), totalling £396,469.87, in relation to its 05/16 to 09/16, 10/16 and 11/16 VAT accounting periods on its purchases of face-value gift vouchers from Harrods that could be redeemed on the "Steam" online platform.

2. On 17 January 2020 LTL applied for an order, under Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, requiring the disclosure of certain information and documents from HMRC. The information and documents sought includes, unredacted copies of emails, details of participants within transaction chains and unredacted copies of agreements.

3. HMRC, which accepts that the information and documents sought by LTL are "potentially relevant" to the issues in the case and that "relevance" is the test for disclosure, opposes the application on the basis of their duty of confidentiality under the Commissioners for Revenue and Customs Act 2005 ("CRCA") and the protection of personal data under the General Data Protection Regulation ("GDPR") which is precluded from disclosure by the Freedom of Information Act 2000 ("FOIA").

4. During the hearing, in view of their usual practice in proceedings before the Tribunal not to redact the names of HMRC officers from correspondence, it was agreed that an unredacted copy of an email between HMRC officers would be disclosed by HMRC. However, they maintained their position in regard to the other documents and information.

5. Michael Firth appeared for LTL. HMRC was represented by Sharon Spence, a litigator of their Solicitor's Office.

LAW

6. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 contains the following provisions, in relation to the disclosure of documents:

> **5 Case management powers**
>
> (1) …
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party.
>
> …
>
> **16 Summoning or citation of witnesses and orders to answer questions or produce documents**
>
> (1) On the application of a party or on its own initiative, the Tribunal may—
>
> …

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

…

27 Further steps in a Standard or Complex case

(1) This rule applies to Standard and Complex cases.

(2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—

(a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings.

(3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged).

7. In exercising its power under its Procedure Rules the Tribunal "must" seek to give effect to the overriding objective of the Procedure Rules to deal with cases "fairly and justly". Rule 2(2) provides that dealing with a case "fairly and justly" includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

8. The issue of disclosure was considered by the Upper Tribunal in *McCabe v HMRC* [2020] STC 2148. It observed:

"[22] First, … the starting proposition was that HMRC should disclose relevant documents to Mr McCabe unless there was a good reason not to. The parties would also appear to agree, up to this point.

[23] Second, the FTT must exercise its discretion to order additional disclosure under r 16 so as to give effect to the overriding objective: r 2(3)(a). That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate.

[24] Third, the approach of the FTT to disclosure is not determined by the Civil Procedure Rules 1998 (SI 1998/3132) ('CPR'). Rule 27 of the FTT Rules states that a party must (amongst other things) produce a list of documents, which the other party may inspect, which that party intends to rely upon or produce in the proceedings. Importantly, that rule applies to both standard and complex cases: r 27(1). We have already observed that r 16 gives the FTT power to order the production of any document in a person's possession or control which relates to an issue in the proceedings.

> In *E Buyer UK Ltd v Revenue and Customs Comrs, Revenue and Customs Comrs v Citibank NA* [2017] EWCA Civ 1416, [2018] 1 WLR 1524, one of the issues was whether it was an error of law by the FTT not to have displaced r 27 with what the Court of Appeal called the broader 'CPR-style disclosure'. In determining that the FTT had not so erred, Sir Geoffrey Vos C stated, at [94]:
>
> > 'It is true that this is an important case, but the 2009 Rules were made for important as well as simple cases. The plain fact is that the procedure is different in the F-tT.'
>
> [25] Fourth, relevance is to be assessed by reference to the issues in the case and the positions of the parties. As the Court of Appeal succinctly observed in *Revenue and Customs Comrs v Smart Price Midlands Ltd, Revenue and Customs Comrs v Gardner Shaw UK Ltd* [2019] EWCA Civ 841, [2019] 1 WLR 5070, at [40]:
>
> > 'Disclosure of documents is not an end in itself but a 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. It is only one step in the overall management of the case which should, as the appeal progresses towards a substantive hearing, identify and if possible narrow the issues between the parties. The scope of the issues in contention at the trial depends in part on the legal test to be applied by the tribunal and in part on the parties' respective positions as to which elements of that test are in contention.'

The Upper Tribunal continued at [33] saying that:

> "… in considering an application for disclosure the test of whether a document is potentially probative of one of the issues is a sensible approach. As the Court of Appeal observed in *Smart Price Midlands*, the test must be applied by reference to the issues in the case. This does not mean the issues in some abstract or generalised sense, but the issues and asserted facts as identified from each party's pleaded case. Those will be the issues which must be determined by the FTT.

9. In *Hancock v Promontoria (Chestnut) Limited* [2020] EWCA Civ 907 the Court of Appeal considered the issue of the disclosure of part of a document (which applies equally if a part of a documents is redacted). Henderson LJ (with whom Floyd and Flaux LJJ agreed) said:

> "[89] … There is in my judgment a clear distinction between the rules which apply when a party is giving disclosure of documents, in the ordinary course of litigation, and the process of construction which a court has to embark upon when considering the meaning or legal effect of a document. Since the process of construction requires the document as a whole to be considered, the starting point must always be that the entire document should be made available to the court, and any redactions to it on grounds of irrelevance should either be forbidden or, if permitted at all, convincingly justified and kept to an absolute minimum. Except in the clearest of cases, the question of relevance to the process of construction is one that the court should be left to decide for itself. Certification by a solicitor provides an important safeguard, but where the question is one of the correct interpretation of a written document, it is not normally appropriate for a solicitor, however experienced, to pre-judge which parts of the document the court may find

> useful in performing its task, except perhaps in relation to material that on no reasonable view could have any bearing on the exercise. In all normal cases, the entire document should be placed before the court; and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the court to be able to rule on the need for the redaction if it is challenged.
>
> [90] I have so far spoken only of redaction for irrelevance. Redaction on the grounds of confidentiality alone is a very different matter, and as at present advised I find it hard to see how it could ever be justified where the confidential material forms a relevant part of the document which the court is asked to construe. As I have already said, there are other ways of dealing with problems of confidentiality, such as the use of confidentiality rings which have become a familiar feature of competition and intellectual property cases."

10. The duty of confidentiality, on which HMRC rely to oppose the disclosure application in this case, is contained in s 18 CRCA, the material parts of which provide:

> **18 Confidentiality**
>
> (1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.
>
> (2) But subsection (1) does not apply to a disclosure—
>
> (a) which—
>
> (i) is made for the purposes of a function of the Revenue and Customs, and
>
> (ii) does not contravene any restriction imposed by the Commissioners,
>
> (b) … which is made in accordance with section 20 or 21,
>
> (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
>
> (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
>
> (e) which is made in pursuance of an order of a court,
>
> …

11. It is an offence, under s 19 CRCA, to disclose "revenue and customs information relating to a person whose identity" is either specified in the disclosure, or can be deduced from it.

12. The Supreme Court considered the duty of confidentiality, both under common law and in relation to s 18 CRCA, in *R (on the application of Ingenious Media Holdings plc and another v HMRC* [2016] 1 WLR 4164 ("*Ingenious*"). In relation to the interpretation of s 18 CRCA, Lord Toulson (with whom Lady Hale, Lord Mance, Lord Kerr and Lord Reed agreed) having, at [17] referred to the "common law of confidentiality" continued, saying:

> "… The duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter. It is a well established principle of the law of confidentiality that where

> information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. The principle is sometimes referred to as the *Marcel* principle, after *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225. In relation to taxpayers, HMRC's entitlement to receive and hold confidential information about a person or a company's financial affairs is for the purpose of enabling it to assess and collect (or pay) what is properly due from (or to) the tax payer. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 633, Lord Wilberforce said that "the whole system … involves that … matters relating to income tax are between the commissioners and the taxpayer concerned", and that the "total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system". See also *Conway v Rimmer* [1968] AC 910, 946 (Lord Reid); and R v Inland Revenue Comrs, Ex p Preston [1985] AC 835, 864F (Lord Templeman)."

13. However, Lord Toulson recognised, at [18], that the *Marcel* principle could be "overridden" by explicit statutory provision citing Lord Browne-Wilkinson in *In re Arrows Ltd (No 4)* [1995] 2 AC 75, 102 who had said:

> "In my view, where information has been obtained under statutory powers the duty of confidence owed on the *Marcel* principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure."

14. Turning to the construction of s 18(2)(a)(i) CRCA Lord Toulson said, at [19]:

> "Subsections (2)(b) et seq of section 18 contain specific provisions permitting the disclosure of taxpayer information for various purposes other than HMRC's primary function of revenue collection and management. What then is the proper interpretation of the far broader words of subsection (2)(a)(i) "disclosure … made for the purposes of a function" of HMRC? On HMRC's interpretation, it would be hard to conceive a wider expression. By taking sections 5, 9 and 51(2) in combination, it is said to include anything which in the view of HMRC is necessary or expedient or incidental or conducive to or in connection with the exercise of the functions of the collection and management of revenue. **If that is the right interpretation of subsection (2)(a)(i), it means that a number of the subsequently listed specific exceptions are otiose, including (c) and (d), which deal with disclosure for the purposes of civil or criminal proceedings** relating to matters connected with customs and excise." [my emphasis added]

15. Although the Supreme Court in *Ingenious* held that s 18(2)(a) CRCA required a narrow interpretation it did not consider the subsequent specific exceptions contained in subsections 2(b) et seq of s 18 CRCA. However, these were considered by Judge Mosedale in *Mitchell and Bell v HMRC* [2020] UKFTT 102 (TC) ("*Mitchell*"). The issue before Judge Mosedale in that case was whether HMRC could disclose and rely on documents relating to one appellant, Mr Bell, to the other, Mr Mitchell, against the wishes of Mr Bell. She noted, at [20], that:

> "HMRC's position was that they had no power to disclose the documents to Mr Bell without an order from the tribunal because Mr Mitchell had refused to consent to the disclosure and they were documents which were affected by s 18 Commissioners for Revenue and Customs Act 2005 …"

Having set out s 18 CRCA, Judge Mosedale continued, at [22]:

> "In my view, in ordinary tax litigation, HMRC neither obtain nor need to obtain an order from this Tribunal before they are able to rely in the proceedings on documents to which s 18(1) CRCA applies. They may rely on them because defending appeals against assessments (and similar litigation) is a function of HMRC and such disclosure (in the sense of relying on the documents in open court) is permitted under s 18(2)(a). Such disclosure is also covered by s 18(2)(c) as long as it is for the purpose of the civil proceedings, which would include proceedings in the tax tribunal."

16. Section 23(1) CRCA provides that information relating to a person for which disclosure is prohibited by s 18(1) CRCA is "exempt information" under s 44(1)(a) FOIA if it would specify the identity of the person to whom the information relates or enable the identity of such a person to be deduced.

17. Although s 23(1A) CRCA provides that s 18(2) CRCA is to be "disregarded" in determining whether information under s 23(1) CRCA is prohibited from disclosure by s 18(1) CRCA, paragraph 5 of schedule 2 to the Data Protection Act 2018 (which implemented the GDPR into UK law) provides:

> **Information required to be disclosed by law etc or in connection with legal proceedings**
>
> (1) The listed GDPR provisions do not apply to personal data consisting of information that the controller is obliged by an enactment to make available to the public, to the extent that the application of those provisions would prevent the controller from complying with that obligation.
>
> (2) The listed GDPR provisions do not apply to personal data where disclosure of the data is required by an enactment, a rule of law or an order of a court or tribunal, to the extent that the application of those provisions would prevent the controller from making the disclosure.
>
> (3) The listed GDPR provisions do not apply to personal data where disclosure of the data—
>
> > (a) is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings), …

DISCUSSION AND CONCLUSION

18. Mr Firth explained that the requests for disclosure had been "carefully targeted" at documents and information arising directly out of HMRC's own statement of case, witness statement and exhibits. He referred to the "voluminous disclosure" in relation to transactions chains produced and relied on by HMRC, eg in MTIC cases, which, without the consent of those concerned, has included not only the identities of all participants in a supply chain but also information about their tax positions and any communications to/from individuals within those suppliers. As such, he submits that the application should be allowed

19. Ms Spence, who confirmed that HMRC intended to rely on the redacted contracts, accepted that the information and documents for which disclosure was sought was potentially relevant to the issues in the appeal but contended that it could not be disclosed because of the duty of confidentiality on HMRC. She explained that HMRC were not seeking to obfuscate and had gone as far as they could but were "simply bound by the primary legislation". HMRC's position was not, she said, that the documents should be redacted but that the redactions had been made out of necessity to prevent a wrongful disclosure under s 19 CRCA as the third parties concerned, particularly Harrods, had only consented to the provision of documents and information to LTL on the basis that it was redacted.

20. Although she accepts that HMRC could and would disclose the documents and information sought if ordered by a court to do so, under s 18(2)(e) CRCA, Ms Spence contends that the Tribunal is not a "court" for these purposes. Additionally she contends that because of its different circumstances, ie an application by HMRC for an order to permit disclosure and reliance on documents, *Mitchell* can be distinguished from the present case.

21. However, I do not agree that *Mitchell* can be distinguished. In *Mitchell* HMRC's position was that, absent an order to do so, as s 18 CRCA applied they did not have the power to disclose the documents concerned without the consent of Mr Bell. In the present case, other than it being an appellant, LTL, seeking disclosure, HMRC's position is, in essence, identical.

22. Judge Mosedale, in my judgment correctly, concluded in *Mitchell* that an order was not necessary in "ordinary tax litigation" as disclosure of such documents was covered by the exceptions in s 18(2) CRCA to the general prohibition on disclosure in s 18(1) CRCA, particularly s 18(2)(c) CRCA so long as it was for the purpose of "civil proceedings" and that "civil proceedings" included proceedings in this Tribunal such as the present case.

23. It therefore follows that HMRC are not precluded by s 18 CRCA from making the disclosure sought by LTL. Neither, in the light of paragraph 5 of schedule 2 to the Data Protection Act 2018, are they precluded from doing so by the GDPR as the disclosure sought is clearly "for the purpose of, or in connection with, legal proceedings".

24. It is accepted by HMRC that "relevance" is the test for disclosure and that the disclosure sought by LTL in its application is potentially relevant to the issues in this case. Therefore, as HMRC are not precluded by their duty of confidentiality under s 18 CRCA or the GDPR from making that disclosure, the application is allowed.

25. As such, I make the following directions not only in respect of the disclosure but also for the further progression of this matter.

DIRECTIONS

26. It is directed that:

(1) Not later than 28 days from the date hereof the Respondents shall provide the Appellant with the documents and information detailed in its application dated 17 January 2020 and shall notify the Tribunal that they have done so.

(2) Not later than 8 weeks from the provision of documents and information by the Respondents in accordance with direction 1 above, the Appellant shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be ("witness statements") and shall notify the Tribunal that they have done so.

LISTING INFORMATION

(3) Not later than 2 weeks after the Appellant has provide its witness statements, in accordance with direction 2, above, both parties shall provide to the Tribunal and each other a statement providing the following information to enable the Tribunal to list the appeal for hearing:

(a) the number of participants for that party;

(b) the name and role of each participant in the hearing for that party;

(c) where a participant is a witness, whether the witness will attend the entire hearing or only attend to give his or her evidence;

(d) the telephone number and email address of each participant (such information may be redacted from the copy sent to the other party);

(e) confirmation that each participant possesses the necessary IT equipment to participate in the hearing, ie at a minimum, a reliable broadband connection and the ability to access the electronic bundle while simultaneously attending the hearing by video;

(f) confirmation that each participant has access to a quiet room for the duration of the hearing so that the hearing will not be disturbed by noise made by other persons in the vicinity of the participant;

(g) confirmation that each participant understands that they should act and dress as if in a court room and that it is contempt of court to record proceedings without the consent of the Tribunal;

(h) how each party intends to communicate with their representatives (if any) and any other participants during the hearing (eg text messages/email/social media apps);

(i) how long the hearing is expected to last;

(j) two sets of alternative dates when they, counsel and witnesses **are available** for a video hearing holding those dates open until the Tribunal confirms the case has been listed which it will endeavour to do as soon as reasonably practicable.

BUNDLES FOR HEARING

(4) Not later than 28 days before the hearing the Appellant shall provide to the Respondents and the Tribunal by email or electronic transfer an electronic bundle of documents which complies with the Tribunal's guidance at https://www.judiciary.uk/wp-content/uploads/2020/07/200623-FTT-Tax-Chamber-PDF-bundle-guidance.pdf ("the PDF Bundle").

(5) The PDF Bundle shall include all documents on the Lists of Documents provided by the parties and, if not already included, the following:

(a) the Notice of Appeal;

(b) the Statement of Case;

(c) copies of any witness statements;

(d) any notices or decisions under appeal;

(e) copies of any correspondence relating to the matter under appeal;

(f) copies of any applications made to the Tribunal; and

(g) copies of any directions issued by the Tribunal.

OUTLINE OF CASE

(6) Not later than 21 days before the hearing both parties shall send or deliver to each other and the Tribunal an outline of their case ("skeleton arguments") including the details of any legislation and case law authorities to which they intend to refer at the hearing.

AUTHORITIES BUNDLES

(7) Not later than 14 days before the hearing the Appellant shall send or deliver to the Respondents and the Tribunal by email or electronic transfer an electronic bundle of

authorities (comprising the authorities mentioned in both parties' skeleton arguments) prepared in accordance with the Tribunal's guidance above in relation to the PDF Bundle.

WITNESS ATTENDANCE AT HEARING

(8) At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

RIGHT TO REQUEST NEW DIRECTIONS

(9) 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

27. 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: 23 FEBRUARY 2021