[2018] UKFTT 584 (TC)

TC06748

Appeal number: TC/2017/02434

PROCEDURE – application by appellant for HMRC to disclose documents - application allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

STAYSURE.CO.UK LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House on 19 September 2018

Valentina Sloane for the Appellant

Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. This is my decision on HMRC's application for amended directions. HMRC's application centres on a request that the Tribunal remove, from directions it endorsed, a requirement on HMRC to disclose certain documents and information (the "Disclosure Directions"). By the time of the hearing, it was common ground that the Tribunal had made the Disclosure Directions on the basis of a mistaken belief that the parties had agreed them. In fact, the Disclosure Directions are not agreed and so, with the parties' agreement, I treated the hearing as involving an application by the Appellant for the Disclosure Directions to which HMRC responded.

Background

The substantive dispute between the parties

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.

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[1].

(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 s67 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.

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):

(1) The appellant argues that HMRC are out of time to issue the assessment by virtue of s73(6) of VATA 1994[2].

(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.

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[1] The formal notification of the backdating of the appellant's VAT registration may not have occurred until 19 December 2016 but nothing turns on this.

[2] HMRC initially argued that the appellant was not, by virtue of s83(1)(p) of VATA 1994, entitled to appeal against the assessment because it had not submitted a VAT return for the period(s) covered by the assessment. However, that issue has now been resolved as the appellant has submitted a nil return for the period (or periods) up to 31 March 2015.

The application for disclosure

10. The appellant is applying for a direction for disclosure of documents and information 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:
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> (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.

11. The day prior to the hearing, HMRC disclosed to the appellants the manuscript notes that HMRC officers during the meetings of 10 May 2014, 10 September 2014 and 2 June 2016 as well as type-written notes of those meetings. However, HMRC have not disclosed, and resist the disclosure of, any other internal documentation.

Relevant statutory provisions relevant to the Disclosure Application

12. Section 67 of VATA 1994 deals with belated notification penalties and provides relevantly as follows:

> **67 Failure to notify and unauthorised issue of invoices**
>
> (1) In any case where—
>
> (a) a person fails to comply with any of paragraphs 5, 6… of Schedule 1...
>
> he shall be liable, subject to subsections (8) and (9) below, to a penalty equal to the specified percentage of the relevant VAT or, if it is greater or the circumstances are such that there is no relevant VAT, to a penalty of £50….
>
> (3) In subsection (1) above "relevant VAT" means (subject to subsections (5) and (6) below)—
>
> (a) in relation to a person's failure to comply with paragraph 5, 6 of Schedule 1… the VAT (if any) for which he is liable for the period beginning on the date with effect from which he is, in accordance with

that paragraph, required to be registered and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of, his liability to be registered…

(4) For the purposes of subsection (1) above the specified percentage is—

(a) 5 per cent where the relevant VAT is given by subsection (3)(a) or (b) above and the period referred to in that paragraph does not exceed 9 months or where the relevant VAT is given by subsection (3)(c) above and the failure in question did not continue for more than 3 months;

(b) 10 per cent where that VAT is given by subsection (3)(a) or (b) above and the period so referred to exceeds 9 months but does not exceed 18 months or where that VAT is given by subsection (3)(c) and the failure in question continued for more than 3 months but did not continue for more than 6 months; and

(c) 15 per cent in any other case….

(8) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for his conduct.

13. Section 70 of VATA 1994 sets out the powers of HMRC and the Tribunal to mitigate a penalty charged under s67 as follows:

70 Mitigation of penalties under sections 60, 63, 64, 67, 69A and 69C

(1) Where a person is liable to a penalty under section … 67…, the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

(3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are—

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.

14. Section 73(6) of VATA 1994 deals with HMRC's powers to make assessments, and the time limits for doing so as follows:

73 Failure to make returns etc

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

…

(6) An assessment under subsection (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,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

Discussion

The Tribunal's power to direct HMRC to disclose documents to the Appellant

15. The default position on inter-party disclosure of documents in appeals to this Tribunal is set out in Rule 27(2) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "FTT Rules") as follows:

> (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.

Therefore, the default position is that both parties need disclose only documents on which they rely. However, Rule 27(2) of the FTT Rules recognises that the Tribunal may make directions to the contrary and it was common ground between the parties that the Tribunal therefore had the power to require HMRC to disclose documents other than those on which they rely. The question, therefore, is whether the Tribunal should exercise the power in this particular case.

16. Both parties referred me to the decision of Sales J (as he then was) in *Revenue and Customs Commissioners v Ingenious Games LLP and others* [2014] UKUT 62

(TCC). It is clear from that decision that the Tribunal should consider any application for disclosure in the light of the overriding objective, of dealing with cases fairly and justly, set out in Rule 2 of the FTT Rules. That 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. The relevance or otherwise of the material requested will be at the heart of the Tribunal's assessment but it does not follow that merely because material is relevant, the Tribunal will inevitably direct that it be disclosed. An assessment of proportionality may involve an examination of the costs and effort that would be involved if a party is directed to disclose documents (with a party wishing to argue that a request for disclosure is unduly burdensome being expected to provide some evidence of the burden involved). The terms of the disclosure direction sought will also be relevant in the sense that a broadly drafted direction is likely to be more burdensome to comply with than a more focused direction and may be more likely to require irrelevant material to be disclosed.

17. Ms Mitrophanous urged me to read the decision in *Ingenious Games* in the context of its relevant background facts: in particular the fact, as recorded at [12] to [16], that throughout HMRC's enquiries in that appeal, HMRC and the taxpayer had been proceeding on the basis that the taxpayer would provide documents and information in relation to sample films, but that this would not limit the evidence to be provided in any appeal to the Tribunal. I agree that this was background that the Upper Tribunal in *Ingenious Games* considered to be highly relevant (see for example paragraph [50] of the decision). However, I do not consider that the presence of that background in any way limits the principles which I summarise at [16] above which are of general application irrespective of whether HMRC and a taxpayer have reached an agreement as to how enquiries are to be conducted before Tribunal litigation commences.

Relevance

18. The parties had very different perspectives on the relevance or otherwise of the material requested.

19. Ms Sloane submitted that the material requested was relevant for the following broad reasons:

(1) It is relevant to the question of whether the VAT assessment was made within the time limit specified in s73(6)(b) of VATA 1994.

(2) It is relevant to whether HMRC have correctly charged the belated notification penalty since it helps to identify the "date on which the Commissioners received notification of, or otherwise became fully aware of" the appellant's liability to be registered for VAT which is, by virtue of s67(3)(a) of VATA 1994, a key element in the calculation of the penalty.

(3) It is relevant to the question of whether the appellant had a "reasonable excuse" for any failure to register. For example, if HMRC internal documents showed that HMRC regarded the question of whether the appellant was making

taxable supplies (pursuant to the reverse charge in s8 of VATA 1994) as difficult or finely balanced, that might support an argument that it was reasonable for the appellant to conclude that it was not making taxable supplies which might excuse any failure to apply for registration.

(4) In her skeleton argument, Ms Sloane also suggested that internal HMRC documents might be relevant to the extent to which the penalty should be mitigated: for example if those documents suggested that the appellant had been co-operating fully with HMRC in their enquiries, that might justify a mitigation of the penalty under s70 of VATA 1994.

20. Ms Mitrophanous disputed the relevance of the material requested for the following broad reasons:

(1) The time limit set out in s73(6)(b) of VATA 1994 is not relevant. Section 73(6) permits an assessment to be made by the **later** of the two dates set out in s73(6)(a) and s73(6)(b). HMRC's case was that the assessment was in time by virtue of s73(6)(a) as it was an assessment, made on 26 January 2017 for a single VAT accounting period that ended on 31 March 2015. She said that HMRC "are not relying on s73(6)(b) in the alternative". She emphasised that this was not an undertaking never to rely on s73(6)(b) (as circumstances can always change and no party to litigation would ever bind its hands for the future) but made it clear that s73(6)(b) is no part of HMRC's current case.

(2) The belated notification penalty has been charged on the basis that HMRC obtained the requisite "full awareness" on 31 March 2015. Therefore, in the appeal against the penalty, the Tribunal would need to consider whether HMRC's "full awareness" came before that date. HMRC's review letter of 23 February 2017 made it clear that HMRC did not receive important documents (such as insurance contracts from the appellant until 2016). In those circumstances, the documents requested could not establish that "full awareness" came before 31 March 2015. Moreover, the appellant's disclosure application covered the entire period from December 2013 to 28 October 2016. Anything after 31 March 2015 simply could not be relevant and it was inconceivable that "full awareness" could have come in the months after HMRC started their enquiry so, even if some of the material was relevant, much of it was irrelevant.

(3) The belated notification penalty is due only if the appellant was making taxable supplies (by virtue of the reverse charge in s8 of VATA 1994). If it was making such supplies, it was doing so from 2009 and should have applied to be VAT registered in 2009. In that case, the question of "reasonable excuse" will centre on why the appellant did not register for VAT in 2009. Whether or not HMRC regarded the position as difficult between 2013 and 2016 cannot be relevant to that question. Moreover, if the appellant wishes to argue that its penalty should be mitigated because it co-operated with HMRC's enquiries, it does not need HMRC's internal notes and records to make that argument.

21. I paused slightly at Ms Mitrophanous's assurance that HMRC "are not relying" on s73(6)(b). Since I consider that the appellant would have the burden of asserting that the assessment is made late, in a sense HMRC are not "relying" on either s73(6)(a) or

(b). Rather, in order to establish that the assessment was made late, the appellant would need to establish that the assessment was made after the expiry of both the time limit set out in s73(6)(a) and that set out in s73(6)(b). However, given the context in which Ms Mitrophanous made her statement, I have taken HMRC's position on s73(6)(b) of VATA 1994 to be that, as matters stand, they accept that whether the assessment was in-time stands or falls by reference to s73(6)(a) alone. Put another way, I have taken HMRC to accept that, as matters stand, if the assessment was not made within the time limit set out in s73(6)(a) of VATA 1994, it was not made in time at all. I agree with Ms Mitrophanous that this statement cannot bind HMRC for ever. Circumstances may change, and they may choose to change their position in the future. However, given HMRC's position, I do not think that s73(6)(b) can justify the relevance of the documents sought and I think that during the hearing Ms Sloane came to accept that too.

22. I agree with Ms Mitrophanous that, in relation to the belated notification penalty, the question is whether there was a "reasonable excuse" for the failure to register under paragraph 5 or 6 of Schedule 1 VATA 1994 (which is the "conduct" that gives rise to a penalty under s67(1)). Therefore, if the Tribunal ultimately concludes that the appellant was making sufficient taxable supplies from 2009, the question will be what its excuse is for not registering for VAT in 2009 and whether that excuse was reasonable. I note that in *Dean Jason Butler v HMRC* [2016] UKFTT 0666 (TC), Judge Falk reached a similar conclusion.

23. I am not satisfied that documents that HMRC generate between 2013 and 2016 are of much direct relevance to the question of "reasonable excuse". In her submissions, Ms Sloane gave the (hypothetical) example of an HMRC internal memorandum generated between 2013 and 2016 that suggested that, in their view, the VAT treatment of supplies that the appellant was receiving from abroad was very uncertain and that it was not at all clear that they triggered a requirement to be registered. I agree that such a document might be of some relevance: it is not completely irrelevant as a Tribunal might infer that, if HMRC found the position difficult between 2013 and 2016, it was reasonable for the appellant to find the position difficult in 2009. However, even if such a document existed, I find it difficult to see that it would be of much material relevance to the question of reasonable excuse. If the appellant wishes to argue that it is significant that the legal and factual position was unclear, it will not need HMRC's views to establish that: it can refer to the totality of the evidence before the Tribunal and the parties' competing submissions on the effect of that evidence. Moreover, an assertion that the position was difficult or unclear will not of itself establish the defence of "reasonable excuse": it will be necessary for the appellant to produce its own evidence as to how it responded to any such difficulty or lack of clarity and why, in all the circumstances, it was reasonable to take the position that it was not required to be VAT registered.

24. Ms Sloane referred briefly to a decision of the VAT Tribunal in *Catholic Care Consortium Ltd* (Decision 17315) but I do not consider the decision in that case to be inconsistent with my conclusion at [23]. In that case, any discussion of the penalty was obiter (since the VAT Tribunal decided that the taxpayer was not making taxable supplies). In any event, in that case, the taxpayer was making submissions as to the

complexity of the issues by reference to correspondence and discussions with HMRC and the fact that HMRC had sought specialist advice (though not to the contents of that advice). To make those submissions, the appellant did not evidently need access to HMRC internal documents. Therefore, *Catholic Care Consortium Ltd* is not authority for the proposition that internal HMRC documents of the kind the appellant is requesting are necessarily of significant relevance to the question of "reasonable excuse" in this appeal.

25. I accept Ms Sloane's submissions that at least some of the material requested is of direct relevance to the calculation of the belated notification penalty. Central to the calculation of the penalty is the date on which HMRC have "full awareness" of the appellant's "liability to be registered". Ms Mitrophanous has submitted that any disclosure of documents by HMRC could not advance the appellant's case as, to reduce the penalty charged, the appellant would need to establish that HMRC had "full awareness" prior to 31 March 2015 but HMRC did not obtain important documents until 2016. I do not accept that submission. Section 67 is not asking when HMRC obtained all documents that they wanted, or all documents that the appellant wanted HMRC to consider. The question is when HMRC had "full awareness". I agree with Ms Sloane that it would be quite wrong for me to determine, at an interlocutory hearing, whether "full awareness" could be achieved before a particular document or class of documents had been provided. Moreover, I see no reason why the appellant should be precluded from advancing a case that, even though HMRC continued to receive documents and information after 31 March 2015, those documents added nothing to HMRC's knowledge and it had the requisite "full awareness" before 31 March 2015. Nor do I consider that HMRC's disclosure of records and notes of meetings (referred to at [11] has necessarily provided the appellant with all relevant material). Those notes record HMRC's view of what happened at the meetings, but will not explain the conclusions that HMRC drew from those meetings (which are of potential relevance to s67 of VATA 1994).

26. I reject Ms Mitrophanous's submission that it necessarily follows that no internal HMRC document generated after 31 March 2015 can be relevant. For example, conceptually, HMRC could have written an internal memorandum in June 2015 that indicated they had "full awareness" in December 2014.

27. I do, however, agree with Ms Mitrophanous that the material requested is of little, if any, relevance to the question whether the Tribunal should exercise its powers under s70 of VATA 1994 to mitigate the penalty. If the appellant wishes to argue that its co-operation with HMRC's enquiries justifies a reduction in penalty, it has access to all the evidence it needs to demonstrate how it co-operated. The Tribunal is not, under s70, reviewing the reasonableness or otherwise of HMRC's decision on mitigation; it has a full appellate jurisdiction to make its own determination and I do not consider that internal HMRC documents are of much, if any, relevance to that exercise.

28. My conclusion on relevance, therefore, is as follows:

(1) Given HMRC's disavowal of the relevance of s73(6)(b) of VATA 1994 referred to at [21], none of the material requested is currently relevant to the

question whether HMRC's assessment was in time. The position would be different if HMRC change their position in the future and require the appellant to demonstrate that the assessment was made after the time limit in s73(6)(b) of VATA 1994 expired.

(2) Some of the material requested may (depending on its contents) be of some, though limited, relevance to the question of "reasonable excuse".

(3) The material requested may (depending on its contents) be of significant relevance to the question of when HMRC had "full awareness" of the appellant's liability to be registered for VAT and so to the calculation of any penalty due.

(4) The material is of little, if any, relevance to the question whether the belated notification penalty should be mitigated under s70 of VATA 1994.

Proportionality, fairness and other issues

29. As I have noted, the question of whether material is relevant or not will not conclusively determine whether it should be disclosed. The Tribunal must also have regard to the wider questions of fairness and proportionality set out at [16] above.

30. I consider that questions of fairness point firmly in the direction of requiring HMRC to disclose material relevant to the question of the date of their "full awareness" for the purposes of the belated notification penalty. That date is right at the heart of the calculation of the penalty and it is quite possible that HMRC will hold relevant material, to which the appellant does not have ready access, which is relevant to the determination of that date.

31. Considerations of fairness point less firmly in favour of directing disclosure of internal HMRC documentation relevant to the appellant's "reasonable excuse" argument. As I have noted, HMRC internal documentation will be at the most of modest relevance to that argument. Moreover, there are good grounds for expecting that the appellant can make its argument on reasonable excuse by reference to its own documents and witness recollections.

32. In principle, I would regard it as proportionate to make a direction for disclosure that goes beyond Rule 27(2). Ms Sloane is correct to observe that this appeal involves a significant amount of money. Ms Mitrophanous submitted in her skeleton argument that "…it would be extremely time-consuming and disproportionate for HMRC generally to have to disclose their internal notes without good reason". However, no evidence has been given to the effect that the disclosure request that the appellant has made would be difficult or time-consuming to comply with. Moreover, there is a "good reason" to direct disclosure, at least of material relevant to the date of HMRC's "full awareness", for reasons I have given.

33. However, there are elements of the disclosure request that seem disproportionate. Specifically:

(1) As drafted, the request is for all documents generated between 17 December 2013 and 28 October 2016 which are "relevant to HMRC's liability

decision and assessment" **including** the specific categories of documents set out at (i) to (vi) of the disclosure request. That is a broad and unfocused request. By no means every internal HMRC document that is relevant to the liability decision is one that the appellant has a legitimate interest in seeing in order to establish either the date of HMRC's "full awareness" or its case on "reasonable excuse".

(2) Privileged advice falls within the scope of the request as drafted. Ms Sloane rightly accepted at the hearing, HMRC should not be required to disclose any such privileged advice.

(3) Points (iv), (v) and (vi) of the request are broad and uncertain in their scope. It is not clear what it means for a document to "relate to the evidence considered by HMRC to be relevant to" the various decisions that they made.

I tend to agree with Ms Mitrophanous that the deficiencies outlined above stem from the fact that the request for disclosure is drawn from similar requests made in correspondence prior to Tribunal proceedings that were focused on the appellant's attempts to persuade HMRC to change their mind or on the appellant's complaints about HMRC's conduct.

Overall conclusion on disclosure

34. My overall conclusion is:

(1) It is both fair and proportionate to direct HMRC to disclose documents that are relevant to the question of when they were "fully aware" of any liability of the appellant to be registered for VAT.

(2) On balance, I do not consider that it is proportionate to require HMRC to disclose material that might be of relevance to the appellant's "reasonable excuse" argument as I consider that any such relevance would be limited and the appellant has other means at its disposal of making its case on "reasonable excuse".

(3) I do not consider that it is proportionate to direct HMRC to disclose material to enable the appellant to make a case on mitigation of the penalty under s70 of VATA 1994 since the material requested is of little, if any, relevance to that question.

(4) Material relating to the time limit for making an assessment under s73(6)(b) is not currently relevant given HMRC's position on disclosure outlined at [21]. It is not, therefore, appropriate to direct disclosure of this material at this stage, though if HMRC's position on s73(6)(b) of VATA 1994 changes, in all likelihood I would regard it as both fair and proportionate to direct disclosure of such material.

35. I consider that a fair and proportionate balance can be struck by making a direction for disclosure in the following terms:

(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.

36. The parties must seek to agree between themselves:

(1) the appropriate dates for compliance with the proposed direction;

(2) whether minor amendments to the proposed direction set out [35] are desirable to ensure that the direction properly gives effect to the principles underpinning this decision, to make the direction more focused, or to make the direction easier to comply with;

(3) what, if any, other case management directions are needed to set this appeal back on a path towards hearing.

Within 21 days they must write to the Tribunal with either an agreed position or their perspectives on the issues set out above.

37. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 05 October 2018