[2016] UKFTT 54 (TC)

TC04853

Appeal number: TC/2013/03349

PROCEDURE – application for disclosure

FIRST-TIER TRIBUNAL
TAX CHAMBER

TOWER BRIDGE GP LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice on 18 December 2015

Mark Cunningham QC and Michael Jones, instructed by Pinsent Masons, for the Appellant

James Puzey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2016

DECISION

1. This decision relates to applications that the appellant and respondents have made requesting the disclosure of information and documents from each other.

2. No witness evidence was presented at the hearing as the facts relating to the applications for disclosure were largely agreed although the facts relating to the substantive appeal itself are by no means agreed.

Background to the substantive appeal

3. The appellant company is the representative member of a VAT group that includes CantorCO2e Ltd ("CO2e"). The substantive appeal relates to decisions made by Officer Ball of HMRC on 6 December 2012 to refuse the appellant the right to recover input tax incurred on certain purchases of emissions allowances under the European Union Emissions Trading Scheme ("carbon credits") and to issue VAT assessments accordingly. This denial was on two grounds:

(1) That the appellant did not hold valid VAT invoices, as required by Regulation 29 of the Value Added Tax Regulations 1995 (the "VAT Regulations") for certain transactions (the "invalid invoices issue"); and/or

(2) That, in HMRC's view, CO2e knew or ought to have known that the transactions in question were connected with fraudulent evasion of VAT (applying the decision of the CJEU in *Axel Kittel v Belgium* Case C-430/04 (the "Kittel issue").

4. Prior to making the decisions referred to above, HMRC made a number of enquiries relating to CO2e's transactions in carbon credits and sent two specific letters on 31 January 2012 and 25 May 2012 requesting information and setting out HMRC's case for denying input tax recovery. The appellant engaged the services of Pinsent Masons, a leading firm of solicitors, to prepare a report (the "Pinsent Masons Report") to answer these questions. The Pinsent Masons Report was delivered on 21 September 2012 and, to prepare it, Pinsent Masons reviewed a large amount of contemporaneous documentation and conducted interviews with certain then current employees of CO2e's carbon credits business.

5. The appellant requested a statutory review of Officer Ball's decision on three grounds:

(1) That the Commissioners ought to have exercised their discretion under Regulation 29(2) of the VAT Regulations to permit deduction of input tax even though certain of the invoices that the appellant held were not relevant VAT invoices;

(2) That the assessments Officer Ball had made were made outside the time limits provided by s73(6) of the Value Added Tax Act 1994 (the "time limit issue"); and

(3) That HMRC had misconstrued the *Kittel* test and had misapplied it to the relevant facts.

6. On 12 April 2013, a different HMRC officer, Officer Peter Birchfield notified the appellant of the outcome of his review. He varied Officer Ball's decisions in part:

(1) In relation to the invalid invoices issue, he concluded that certain of the invoices were not invalid and that HMRC should have exercised their discretion to accept alternative evidence in some cases. However, he upheld Officer Ball's decision in other cases.

(2) He upheld Officer Ball's conclusion on the *Kittel* issue.

(3) He concluded that the Officer Ball's assessments were not made out of time.

7. The appellant has duly appealed to the Tribunal against the decisions and assessments referred to above.

The issues in this appeal so far as relevant to the disclosure applications

8. It was, of course, agreed that it is only appropriate to direct the disclosure of documents and information that are relevant to the issues in the appeal. Therefore, it is convenient to make some remarks as to the nature of the issues in dispute.

The invalid invoices issue

9. It was common ground that the Tribunal's jurisdiction in relation to the invalid invoices issue is supervisory only. The Tribunal is concerned only with whether HMRC made a reasonable decision (in the public law sense). There are a number of ways in which HMRC's internal policy could be relevant to the Tribunal's determination of that issue. For example, if HMRC had a policy of refusing to accept any evidence of input tax, other than a valid VAT invoice, in any circumstances at all, the refusal to consider exceptions to such a policy might be unreasonable. If the appellant fell within the terms of an HMRC policy, but HMRC capriciously refused to give the appellant the benefit of that policy, that could be relevant to the question of whether HMRC had behaved unreasonably in a *Wednesbury* sense. I will not seek to set out an exhaustive list of circumstances in which HMRC's policy could be relevant to the invalid invoices issue as the parties agree that HMRC's policy is, in principle, relevant to that issue.

The Kittel issue

10. The Tribunal has a general appellate jurisdiction in relation to the *Kittel* issue. Therefore, the Tribunal's task is not to decide whether HMRC's conclusion on that issue is reasonable or not; it has to decide whether HMRC's conclusion was correct or not. It is well established that the *Kittel* test involves answering four questions:

(1) Was there a VAT loss?

(2) If so, did this loss result from fraudulent evasion?

(3) If so, were the appellant's transactions which are the subject of the appeal connected with that evasion?

(4) If such a connection is established, did the appellant know, or should it have known, that its transactions were connected with a fraudulent evasion of VAT?

11. Since the Tribunal has an appellate jurisdiction, an analysis of the policy considerations that resulted in HMRC issuing assessments based on the *Kittel* principle is not relevant.

12. The test at [10(4)] is whether the appellant knew or should have known that the transactions on which HMRC are seeking to deny input tax recovery were connected with fraudulent evasion of VAT. That invites a broad examination of the factual matrix surrounding those transactions. There have been a number of cases before the Tribunal dealing with this issue and, in many cases, the question has been decided by reference to inferences and conclusions that can be drawn from the terms of the transactions in which input tax recovery was denied. However, there is no requirement that evidence on this issue comes solely from the terms of those transactions themselves and in principle, any evidence as to what the appellant "knew or should have known" is of potential relevance to the *Kittel* issue.

The time limit issue

13. The time limit issue arises from s73(6)(b) of VATA 1994 which prevents HMRC from making an assessment after the later of two years after the end of the relevant VAT period and:

> one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

14. This condition was analysed in detail by Dyson J in *Pegasus Birds Ltd v Customs and Excise Commissioners* [1999] STC 95 (and his approach was endorsed when this case came before the Court of Appeal).

15. Dyson J emphasised that s73(6)(b) of VATA 1994 invites a subjective analysis of the facts which, in the opinion of the officer making the assessment, justified the making of the assessment. If that officer reaches an unreasonable conclusion that he has insufficient knowledge to justify making an assessment at a particular point in time, that decision (and hence the officer's decision not to make an earlier assessment) can be challenged under *Wednesbury* principles. Therefore, one question relevant to the time limit issue will be whether Officer Ball acted unreasonably (in the *Wednesbury* sense) in not issuing the relevant assessments before he did. Questions of policy can be relevant to that question. For example, if HMRC had a general policy of always issuing assessments once certain information had been obtained, but Officer Ball did not follow that policy and chose to make his assessment later, that could be relevant to the reasonableness or otherwise of Officer Ball's decision.

16. In this decision, I will deal first with the appellant's application for disclosure, setting out relevant background matters to put that application into context. I will then perform a similar exercise in relation to the issues arising from HMRC's application for disclosure.

The parties' respective applications for disclosure

The appellant's application

17. In an application dated 17 August 2015, the appellant requested disclosure of eight categories of documents and information. Paragraph 18 of that justified the application by stating that the information sought is "plainly relevant to the 'non-*Kittel*' issues in this appeal". Paragraph 25 of Mr Cunningham's skeleton argument prepared for this hearing justified the application on similar grounds stating that, without the information requested, the appellant would not be able to properly challenge HMRC's contentions that the assessments were made "in time" or that their refusal to extend their discretion to permit input tax recovery was reasonable in the circumstances.

HMRC's application

18. On 23 March 2015, HMRC requested disclosure of documents and information from the appellant. By the time of the hearing, the appellant had provided some of the material that HMRC were requesting. Mr Puzey explained that, for the time being he wished to pursue only three matters arising out of HMRC's application (though he reserved the right to raise other matters subsequently if necessary as he maintained that all aspects of HMRC's application were reasonable). I deal with those three issues at [57] to [73] below.

The general approach to be taken in determining applications for disclosure

19. Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Rules") contain a specific power enabling the Tribunal to

> permit or require a party or another person to provide documents, information or submissions to the Tribunal or another party.

20. When exercising any power under the Tribunal Rules (including the power under Rule 5(3)(d)) the Tribunal must take into account the overriding objective set out in Rule 5(1) of dealing with a case fairly and justly. Rule 5(2) contains a list of examples of what it means to deal with a case fairly and justly which 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
>
> …
>
> (e) avoiding delay so far as compatible with proper consideration of the issues.

21. Mr Cunningham referred me to Rule 31 of the Civil Procedure Rules ("CPR") which governs disclosure in the Courts. He acknowledged that the Tribunal operates a more flexible and less technical approach than the Courts to disclosure, but submitted that the approach taken in the Courts is nonetheless of assistance. He pointed out that, in the Courts, there are two types of disclosure, "standard disclosure" under which one party is required to deliver documents which it "self-certifies" as being relevant to the other and "specific disclosure" under which the Court makes an order for the disclosure of specific documents or classes of documents. He submitted that the directions for disclosure that the appellant was seeking should be treated as analogous to an application for "specific disclosure". As such, he submitted that the key questions were (i) whether the documents existed, (ii) whether they were relevant to an issue in the appeal and (iii) whether there was any objection to disclosure (for example on the grounds of privilege). Following the approach set out in *Exeter City AFC Ltd v The Football Conference Ltd and another* [2004] EWHC 831 (Ch), he submitted that a broad test of relevance should be followed with the result that he need only show that the documents may assist the appellant's case, or may lead to a "train of enquiry" that might advance the appellant's case in order to be regarded as "relevant" for these purposes. In addition, he submitted that HMRC should not be entitled to self-certify the relevance or otherwise of material that was disclosed.

22. Mr Puzey did not differ greatly from Mr Cunningham's analysis of the approach adopted in the Courts. He did, however, point out that Practice Direction 31A makes it clear that applications for specific disclosure should be considered in the light of the overriding objection set out in Rule 1 of CPR. He also submitted, in reliance on *Gotha City v Sothebys* [1998] 1 WLR 14, that applications for specific disclosure have to be focused and for documents that actually assist, or be capable of assisting, a party's case.

23. I regarded the analysis of CPR 31 as useful. However, the Tribunal does not generally impose a regime of "standard disclosure" similar to that adopted in the Courts. Rather, the default position set out in Rule 27(2) of the Tribunal Rules is that each party will disclose to the other only those documents on which it proposes to rely. Therefore, I considered that the difference between the "standard disclosure" and "specific disclosure" regimes in the Courts was not of great assistance in deciding whether to make a direction for disclosure in the context of this appeal. I have therefore decided to approach both applications for disclosure as follows:

(1) This is a complicated appeal. It involves a large amount of money and the serious allegation that a major financial institution either knew, or should have known, that transactions with which it was involved were connected with fraud. In those circumstances, there should be a presumption that both parties will disclose relevant material to each other.

(2) Clearly, the Tribunal should not order disclosure of documents and information that does not exist.

(3) 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.

(4) In some cases, it may be necessary to decide which party makes the initial assessment of whether a document is "relevant". There is no reason in principle why that cannot be determined by a process of self-certification. If a party considered that the documents disclosed suggested that there were flaws in any self-certification process, it could always apply for specific additional directions for disclosure. The approach to this question may vary depending on the documents in question. For example, if a document is referred to specifically in a witness statement in terms that suggest that it is highly likely to be relevant, it may be appropriate simply to direct that the document be disclosed, with the party receiving it deciding whether it actually is relevant. By contrast, if a party is requesting disclosure in general terms of a class of documents which are thought to exist, but which are not explicitly referred to in witness statements, it might be appropriate for the party disclosing to "self-certify" relevance with any dispute arising from the process of self-certification being dealt with in a later application.

(5) Both applications for disclosure should be assessed in the light of the overriding objective which includes an assessment of the proportionality of requiring disclosure. The question of proportionality should include an assessment of how focused the request for disclosure is, how difficult or expensive it will be to comply with it, and how relevant the information requested is.

(6) Valid objections to disclosure (on the grounds of privilege for example) should be considered once it has been determined that a document, or class of documents should, in principle, be disclosed.

The appellant's application for disclosure

24. I will not deal with the appellant's application in sequential order because there are overlapping themes between certain categories of application.

Item (a)

25. Under this head, the Appellant requests disclosure of:

> The HMRC policy advice referred to in [Officer Birchfield's review decision] to the extent not already disclosed as an exhibit to [Officer Birchfield's] Witness Statement for this Appeal. For the avoidance of doubt this request includes copies of correspondence passing between [Officer Birchfield] and HMRC's VAT Fraud Policy team alluded to at paragraph 16 of [Officer Birchfield's] witness statement);

26. Officer Birchfield's review letter refers to "policy advice" in two places. Firstly, when considering the "invalid invoices" issue, Officer Birchfield states that:

> The invalid invoices issued by Stratex Alliance Ltd are in a different category to the other invalid invoices for which input tax has been denied in that the trader was not registered for VAT. Officer Ball has decided that, in this case discretion does not apply and he has therefore not exercised it. Following Policy advice, I agree with this approach.

27. The second reference to "policy advice" is made when Officer Birchfield considers the time limit issue in his review letter and records his view that, before Officer Ball had sufficient information to enable the assessment to be made, he needed to have a response to both the "case for denial" of input tax recovery that Officer Ball had put to the appellant in his letter of 25 May 2012 and responses to other queries he had raised in his email of 31 January 2012. Officer Birchfield records his view that it was only receipt of the Pinsent Masons report that addressed these issues and said:

> Until these two responses are received the Officer is not in a position to know what relevance the reply might have and how it might influence any potential decision he might be considering. The questions asked were relevant following Policy advice and this is the last information given to HMRC before the decision is notified.

28. Paragraph 16 of Officer Birchfield's witness statement states that he discussed the interim findings of his review with VAT Fraud Policy both in person and by email.

29. During the hearing, Mr Puzey abandoned objections to this request that HMRC had previously made to the effect that policy advice that Officer Birchfield saw could not be relevant as he was merely reviewing Officer Ball's decision. I think he was right to do so. On the invalid invoices issue, Officer Birchfield had power to uphold, vary or cancel Officer Ball's decision and, therefore, policy advice he received was in principle no different from policy advice that Officer Ball received. As regards the time limit issue, Officer Birchfield clearly could not make a decision that assessments should be issued earlier than they actually were. However, policy advice that Officer Birchfield received on when assessments should be issued could be relevant to the question of whether Officer Ball was reasonable to issue the assessments when he did. For example, if Officer Birchfield was told of a policy as to when assessments should be made that Officer Ball had not taken account of, that could be relevant to the question of whether Officer Ball had taken all relevant factors into account when deciding when he should make his assessments.

30. Mr Puzey said that a search had been made for the policy advice referred to in Officer Birchfield's review decision. That search had uncovered advice relating to the point addressed at [26] (but that was legally privileged) and the policy advice referred to at [27] but that actually dealt with the *Kittel* issue. He therefore objected to disclosing this material. This objection raises the question of "self-certification": Mr Puzey is arguing that the documents should not be disclosed because the appellant does not regard them as relevant, whereas Mr Cunningham is arguing that the appellant should be entitled to make up its own mind on this question. Mr Puzey's approach would risk depriving the appellant of documents that the appellant considers could advance its case; Mr Cunningham's approach could result in HMRC having to disclose information which has no bearing on the issues in this appeal.

31. I have concluded that the documents referred to at [26] and [27] should be disclosed unless a valid objection (such as a claim for privilege) can be made. Given that Officer Birchfield expressly relied on policy advice when making his decision on review of the invalid invoices issue and the time limit issue, I consider that the appellant is entitled to disclosure of this material and to make up its own mind as to whether it does in fact advance its case (rather than to rely on HMRC's "self-certification").

32. Given what I say about the *Kittel* issue at [11] and [12], I do not consider that policy discussions touching on Officer Birchfield's interim conclusions on the *Kittel* issue can be relevant. However, policy discussions relating to his interim conclusions on the invalid invoices issue and the time limit issue are of potential relevance for reasons similar to those set out at [29]. Therefore, the policy advice should in principle be disclosed to the extent it does not relate to the *Kittel* issue and is not covered by legal privilege.

33. I think it is appropriate for HMRC to "self-certify" the extent to which the material referred to in paragraph 16 of Officer Birchfield's witness statement is relevant to the invalid invoices issue or the time limit issue. Officer Birchfield does not appear to be suggesting that this material contributed directly to his decision: just that he discussed interim findings with Policy colleagues. Therefore, the position is different from that set out at [31] and I consider that the balance tips in favour of allowing HMRC to "self-certify" the relevance or otherwise of documents. If the documents disclosed raise questions as to whether HMRC have followed the right approach when "self-certifying", the appellant could always make a further application for disclosure.

34. It follows from [33] that material relating to paragraph 16 of Officer Birchfield's witness statement that HMRC determine relates only to the *Kittel* issue need not be disclosed. However, there remains the question of the approach to be taken with "mixed documents" i.e. documents relating to paragraph 16 of Officer Birchfield's witness statement that include policy discussion on the *Kittel* issue (which is not relevant to the issues in this appeal as discussed at [11]) and policy advice on the invalid invoices issue or the time limit issue (which is relevant as discussed at [9] and [15])). I have decided that such "mixed documents" should be disclosed in their entirety (without redaction). This advice is specifically referred to in Officer Birchfield's witness statement. In those circumstances, I consider that the appellant should have some ability to form their own view on the relevance or otherwise of "mixed documents". Allowing HMRC both to "self-certify" relevance and to redact sections of documents risks giving the appellant insufficient involvement in the determination of "relevance" in the context of documents that are referred to specifically in Officer Birchfield's witness statement.

Item (c)

35. Under this heading, the appellant applies for disclosure of:

> The HMRC policy advice referred to in Mr Ian Edgson's emails of 28 August 2009 and 4 September 2009.

36. Officer Edgson was the appellant's "customer relationship manager" at HMRC. In August and September 2009 he had an email exchange with a "Mark Cooper" at BGC Partners which appeared to relate to the invalid invoices issue. Having been asked for an update on the status of the VAT payment, on 28 August 2009, Officer Edgson wrote:

> I have been advised by policy colleagues that we may repay your claim on a without prejudice basis but we should restrict any input tax on purchase invoices from suppliers who were not VAT registered at the time of the transactions.

On 4 September 2009, Officer Edgson wrote as follows:

> … the advice I received from policy colleagues and conveyed in my email … on 28 August was that we would restrict any input tax on purchases from suppliers who were not VAT registered. You don't appear to have a VAT invoice from Stratex Alliance Limited and David Ball obviously hasn't been able to trace them on the VAT register. As such, it looks likely that we will need to disallow this input tax at least.

37. These emails suggest on their face that the policy advice was connected to Officer Edgson's consideration of the invalid invoices issue. Mr Puzey submitted, however, that this did not of itself make the advice relevant since that policy advice was not evidently provided to Officer Ball or Officer Birchfield (who made the actual decisions under appeal) but rather was provided to a different HMRC officer. I do not agree. Policy advice that Officer Edgson received could lead to a "train of enquiry" that could be relevant to the appellant's case. If the policy advice that Officer Edgson received was different from the policy that Officers Ball or Birchfield followed that would be of potential relevance to the question of whether Officers Ball and Birchfield applied the right policy which in turn could be relevant to the question of whether their decision was reasonable. Given that the appellant's request for disclosure of this material is clear and focused, and it was not suggested that it would be difficult to comply with, I think it is right that it should be provided (unless a valid objection to disclosure can be made).

38. Since this policy advice is referred to specifically in HMRC correspondence, and appears from its context to be relevant to the invalid invoices issue, I consider that HMRC should not "self-certify" the relevance or otherwise of this material (or redact it if they consider it to be a "mixed document").

Item (d)

39. Under this heading the appellant applies for disclosure of:

> Any other HMRC policy advice relied upon by [Officer Ball] and/or [Officer Birchfield] in relation to decisions made about the Appellant (including the decisions to assess and the propriety of assessments).

> For the avoidance of doubt this request excludes the HMRC policy advice exhibited to HMRC's witness statements for this Appeal.

40. Given what I say at [11], policy advice dealing with the *Kittel* issue is not relevant in this appeal. The *Kittel* issue before the Tribunal is concerned simply with the question of whether the appellant is entitled to recover input tax. Whatever the policy that drove HMRC to make the assessments, and whatever the "propriety" of the assessments, the *Kittel* issue is concerned only with whether those assessments are correct. Indeed, as noted at [17], the appellant justified its application for disclosure by reference to its relevance to the time limit issue and the invalid invoices issue.

41. Item (d) is a "sweep up" provision and documents falling with item (d) may or may not exist. Therefore, HMRC have not in their decisions indicated to the appellant that they are placing particular reliance on material falling within category (d). In those circumstances, I think it is appropriate that HMRC should be entitled "self-certify" the relevance or otherwise of these documents to the invalid invoices issue or the time limit issue and to redact "mixed documents". The appellant can make a further application if it has concerns as to how that approach has been applied in practice.

Item (b)

42. Item (b) involves an application for disclosure of:

> All internal HMRC communications between [Officer Ball] and [Officer Birchfield] in relation to the issues which give rise to this Appeal. For the avoidance of doubt, this shall include all notes of discussions, email exchanges, letters and other correspondence. Specifically, but without limitation, paragraph 13 of [Officer Birchfield's] Witness Statement refers to meeting [Officer Ball] and any notes of this meeting are required.

43. Mr Puzey had no objection to this application provided that the request was limited to discussions relating to the invalid invoice issue and the time limit issue. Given that this is the basis on which the appellant justifies its application for disclosure, I consider that to be an appropriate limitation.

44. That then leads to the question of whether HMRC should "self-certify" relevance to the invalid invoices issue or time limit issue, or whether all information should be disclosed with the appellant forming its own view as to relevance. Officer Birchfield states only in his witness statement that he met Officer Ball to clarify the contents of Officer Ball's original decision. Officer Birchfield's witness statement does not, therefore, suggest that Officer Ball conveyed policy advice that was directly taken into account when Officer Birchfield made his review decision. I therefore consider this category of request to be similar to that set out at [39] with the result that HMRC should be entitled to "self-certify" relevance. However, given that Officer Birchfield does refer specifically to a meeting with Officer Ball, I do not consider that "mixed documents" should be redacted for reasons similar to those set out at [34].

Item (e)

45. Under Item (e), the appellant requires disclosure of:

> All internal HMRC communications (i.e. emails, notes of meetings etc) which discuss the impact of HMRC policy on the Appellant in relation to the issues which are the subject of this appeal.

46. As noted, questions of "policy" are not relevant to the *Kittel* issue. Mr Puzey suggested that communications on policy matters addressed to anyone other than Officer Ball and Officer Birchfield could not be relevant. However, for reasons set out at [37], I do not agree with that proposition.

47. However, I do agree with Mr Puzey that, as drafted, this is broad and unfocused and potentially requires HMRC to conduct a detailed search for material that may not exist or may already have been disclosed under other headings. Therefore, I consider that a more proportionate direction would be for HMRC to disclose the names of all HMRC officers (other than Officer Birchfield, Officer Ball and Officer Edgson) (i) who had a material involvement in the consideration of policy matters relevant to the invalid invoices issue or the time limit issue with a brief summary of the nature of their involvement and (ii) communications involving whom have not previously been disclosed to the appellant. Armed with that information, the appellant may be in a better position to make a more focused request.

Item (f)

48. Under Item (f), the appellant requests disclosure of:

> Any notes of discussions, email exchanges or other correspondence between Officer Ball and HMRC colleagues regarding the propriety of issuing assessments to the Appellant in relation to the issues which are the subject of this appeal.

49. Mr Puzey had no objection to disclosure of this category of document provided the request is limited to matters relating to the invalid invoices issue and the time limit issue. I consider that is an appropriate restriction to make. Moreover, since this request is a "sweep up" request (as the appellant has specifically requested disclosure of similar material that they know to be in existence), I think that HMRC should be entitled to "self-certify" relevance and to redact "mixed documents".

Item (g)

50. Under Item (g) the Appellant requests disclosure of:

> internal file notes [contained in an "electronic folder" of documents to which Officer Ball refers in his witness statement] regarding the Appellant in relation to the issues which are the subject of this Appeal. We also request copies of HMRC's Progress Log maintained by [Officer Ball] regarding the enquiry into the Appellant.

51. Mr Puzey submitted that this information should be provided only if it related to the invalid invoices issue or time limit issue. He also submitted that only

correspondence to which Officer Birchfield or Officer Ball were party should be disclosed. He submitted specifically that, in relation to the time limit issue, *Pegasus Birds* makes it clear that it is only necessary to consider matters that had an effect on the decision of the assessing officer.

52. I do not agree with Mr Puzey that only correspondence with Officer Birchfield or Officer Ball should be disclosed. Correspondence involving other officers could be relevant. For example, that correspondence could reveal a policy (of which Officer Ball was unaware) to issue assessments once HMRC had obtained a certain amount of information. Such correspondence could be relevant to the determination of whether Officer Ball acted reasonably in not issuing assessments earlier than he did.

53. However, I agree that this information request should be limited to information relating to the invalid invoice issue or the time limit issue. Since Officer Ball's witness statement does not make specific reference to these documents (beyond noting that they exist), so that it is not obvious that they contain specific policy advice relating to these issues, I consider that it is appropriate for HMRC, at least in the first instance, to "self-certify" relevance. Applying an approach consistent with that set out at [34], however, I do not consider that HMRC should redact "mixed documents".

Item (h)

54. Under Item (h), the Appellant requests disclosure of:

> Any notes of discussions or email exchanges between [Officer Ball] and Mr Rod Stone OBE of HMRC in connection with the enquiry into the Appellant in relation to the issues which are the subject of this Appeal. For the avoidance of doubt, Mr Stone has provided a witness statement in this appeal and communicated that assessments would be forthcoming in advance of them being issued.

55. Mr Puzey did not object to this aspect of the appellant's application.

HMRC's application for disclosure

56. As noted at [18], only three aspects of this application were addressed during the hearing, although Mr Puzey reserved the right to raise other aspects in the future if necessary.

Issue 1 – communications between traders and various counterparties

57. HMRC are requesting the disclosure of:

> All recorded communications, whether that be by recorded telephone calls, traders' notes of calls made, messenger chats, email, text or letter between [certain named traders] and [14 named counterparties] between 9 March 2009 and 30 July 2009.

58. The appellant is prepared (subject to "Issue 2" considered at [67] to [70] below) to provide the documents and information requested in relation to five counterparties

from whom CO2e purchased carbon credits that resulted in a disallowance of input tax ("restricted counterparties"). However, the appellant objects to providing the information in relation to the remaining 9 counterparties ("other counterparties") stating that, since input tax on purchases from these 9 counterparties was not denied applying the *Kittel* principle, the information requested is not relevant to the appeal.

59. Mr Puzey argued that the request for disclosure was justified since communications with all 14 counterparties could provide relevant information on the state of CO2e's knowledge of VAT fraud and the approach it took to due diligence. He also submitted that the request was proportionate, since it was focused on communications between named traders of CO2e and named counterparties over the short period from 9 March 2009 to 30 July 2009.

60. Mr Cunningham argued that the request was neither proportionate nor relevant. He submitted that HMRC had ample opportunity to request disclosure of this information when they were making their enquiries that culminated in the appellant's claim for input tax being restricted and that they are now seeking retrospectively to bolster their case. He said that communications between CO2e traders and the restricted counterparties had been gathered together as part of the Pinsent Masons Report. The Pinsent Masons Report had involved a consideration of some 400,000 documents and the index of the communications considered alone ran to some 50 pages. He argued that extending this exercise to the other counterparties would involve an extensive and onerous exercise. He suggested that this exercise would not be worthwhile since HMRC's pleaded case was that it was only from 8 June 2009, when the "Bluenext" market was suspended, that there was any general awareness of VAT fraud taking place in the carbon credit market. Therefore, he argued that, in this case, by contrast with a normal "MTIC" appeal that involves a consideration of the *Kittel* issue, HMRC are not seeking to make inferences as to the state of CO2e's knowledge from the way in which it transacted with counterparties.

61. I do not agree with Mr Cunningham that HMRC's case is based on what he described as a "lightbulb moment" on 8 June 2009. HMRC's statement of case makes it clear that one of their arguments is that the sudden leap in the extent of carbon credit trading in 2009 should have prompted CO2e to perform more extensive background checks on its counterparties and that, if it had done so, it would have discovered that some of its counterparties were without financial substance or had no trading history.

62. I also consider that, conceptually, discussions between CO2e traders and the other counterparties could, at the very least, establish a "train of enquiry" relating to CO2e's state of knowledge as regards transactions with the restricted counterparties. For example, CO2e could have gleaned specific information on the other counterparties from the restricted counterparties. CO2e might have performed background checks on the other counterparties that it did not perform on the restricted counterparties which could lead to a train of enquiry as to why it did not perform the same checks on all counterparties and what knowledge it would have obtained if it had.

63. Therefore, the material requested passes the threshold of relevance. It is, therefore, necessary to consider Mr Cunningham's arguments that it should nevertheless not be disclosed either because HMRC could and should have requested this material when they were pursuing their original enquiries into the appellant's VAT position or because disclosure would be disproportionate in the circumstances.

64. While Mr Puzey did not appear to be disputing that HMRC had not asked for this information while they were enquiring into the appellant's VAT position, there was no evidence before me as to why this was the case. Therefore, while there can be no doubt that HMRC could have requested information from the appellant if they had wished to, if necessary by using their formal powers in Schedule 36 of Finance Act 2008, I could not be satisfied that they should have done so. Moreover, the Upper Tribunal have made it clear in *HMRC v Ingenious Games LLP and others* [2014] UKUT 0062 (TCC) that the mere fact that HMRC have formal powers to obtain information during an investigation does not of itself prevent them from making applications for disclosure of documents in the course of an appeal before the Tribunal. Therefore, I did not consider that the fact that HMRC could have exercised their formal powers was a good reason to refuse HMRC's application for disclosure.

65. That leaves the question of proportionality. Strictly, while Mr Cunningham made submissions to the effect that complying with this application for disclosure would involve considerable work, he did not put forward evidence of the precise amount of work involved. However, I am prepared to accept that the work involved would be significant not least because it would be necessary to listen to tape recordings of traders' calls, work out who that trader was speaking to, transcribe the telephone calls and index them in a meaningful way.

66. For reasons set out at [23(5)], questions of proportionality are relevant. Following the approach set out at [23(5)], I have concluded that the material requested is relevant, the request for disclosure is focused but that the costs of complying are high. I have concluded that the various competing constraints are best dealt with by directing that the appellant must disclose the information requested in relation to five of the nine "other counterparties". Such an approach will mean that HMRC have full information on discussions with 10 out of 14 counterparties with whom CO2e transacted in the relevant period (including full information on discussions with all restricted counterparties). That should be sufficient to enable them to draw conclusions as to CO2e's knowledge or means of knowledge generally. Moreover, they will have information on discussions with five restricted counterparties and five other counterparties, so will be able to consider whether the approach that CO2e took with restricted counterparties was significantly different from that taken with other counterparties.

Issue 2 – Whether the appellant need only disclose material collated for the purposes of the Pinsent Masons Report

67. HMRC argue that they should be provided with full information on discussions between the appellant's traders and its counterparties. The appellant argues that it has taken HMRC's enquiries seriously right from the beginning and has been through a

time-consuming and expensive exercise in 2012 to gather together all relevant information for the purposes of the Pinsent Masons Report. Mr Cunningham submitted that it was in the appellant's interests to maximise its efforts in this regard since it hoped that the Pinsent Masons Report would dissuade HMRC from making assessments in relation to the *Kittel* issue. Moreover, he said, his instructions were that all relevant and non-privileged material that has, to the appellant's knowledge, come to light since the Pinsent Masons Report was prepared has been provided to HMRC in witness statements. Therefore, Mr Cunningham submitted that the appellant should be required to disclose only information that was gathered during the review process that the appellant conducted for the purposes of the Pinsent Masons Report.

68. I have decided not to restrict HMRC's application for disclosure in the way the appellant is requesting. While the *Kittel* issue between the parties is no doubt the same as it was in 2012, much has changed since then. HMRC have issued formal assessments, pleadings and witness statements have been exchanged and HMRC have questions, and potential "trains of enquiry" arising out of those pleadings and witness statements. Material that was collated in 2012 could not, by definition, have been collated with a view to addressing those questions or "trains of enquiry". Moreover, while it is likely that an even-handed approach was applied in 2012, when the Pinsent Masons Report was prepared, that report was prepared, as Mr Cunningham acknowledged, to seek to persuade HMRC not to make assessments. The purpose of disclosure now is different: it is to assist the Tribunal in deciding, and the parties in making arguments on, the question of whether the assessments that have been made should stand.

69. As I have noted, this is a significant and complicated appeal. The fact that a large number of documents were reviewed and disclosed in 2012 cannot prevent HMRC from requesting further information now. To give an obvious example, if a document disclosed in 2012 referred to another document that had not been disclosed, I can see no reason why the appellant should not be obliged to provide the "missing" document if relevant to the issues in the appeal even if it was not collated in 2012.

70. I therefore consider it is appropriate for the appellant to undertake a further search for relevant material. However, I note that HMRC's application for disclosure requires disclosure of every communication between the specified traders and the specified counterparties. If I made a direction in those terms, I can see a risk that, in order to comply with it, the appellant would need to repeat large parts of the exercise that it performed in 2012. Moreover the application makes no obvious allowance for documents that have already been supplied. Therefore, in order to make the task more manageable, it is right that the appellant should only be obliged to disclose information that is relevant to the *Kittel* issue and may, initially at least, "self-certify" relevance and need not provide documents that have already been provided.

Issue 3 – Howard Lutnick's witness evidence

71. Laurence Rose has provided a witness statement on behalf of the appellant. In that witness statement, he referred to certain statements Howard Lutnick, the chairman

and CEO of the Cantor Fitzgerald group, is said to have made in wrongful dismissal proceedings involving a former employee of the group to the effect that the UK carbon credits brokerage business was a "money losing failure with business projections based on dreams".

72. HMRC have requested a transcript of Mr Lutnick's evidence. The appellant objects saying that Mr Lutnick's comments are not relevant to this appeal and, in any event, he was referring to a different part of the Cantor Fitzgerald carbon credit business from the one at issue in this appeal.

73. Mr Lutnick's statement is mentioned on the face of Mr Rose's witness statement. HMRC's request for disclosure is specific and focused. While, having read Mr Rose's witness statement I consider it unlikely that his statements are relevant to any of the issues in this appeal, without having seen those statements in full, I cannot exclude the possibility that they are relevant. In those circumstances, I have concluded that the text of Mr Lutnick's statements should be disclosed unless a valid objection can be made on the grounds of privilege or otherwise.

Conclusion

74. My conclusion is that both the appellant and HMRC should provide some disclosure to each other in line with my decision set out above. I have today sent the parties a draft direction implementing my decisions and will consider any further observations they have on that before making a formal direction.

75. 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: 2 FEBRUARY 2016