



Neutral Citation: [2022] UKFTT 00347 (TC)

Case Number: TC08603

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[in private]

Appeal reference: TC/2018/04699

PROCEDURE – Disclosure – whether Tribunal should exercise discretion to order disclosure – Tribunal Rules, Rules 27, 16, 5 and 2 – limited disclosure directed

**Heard on: 27 June 2022
Judgment date: 26 September 2022**

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

R D UTILITIES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

**Sitting in Chambers at Edinburgh with a Summary Decision, together with Directions,
having been issued on 27 June 2022**

DECISION

INTRODUCTION

1. There was a Case Management Hearing in this matter before me on 26 February 2021. The outcome was that parties made various concessions and retired to negotiate a possible way forward.

2. Thereafter, HMRC wrote to the Tribunal on 24 March 2021 stating that the parties had settled the appellant's appeal against HMRC's decisions issued on 14 February 2013. Those decisions had been issued under Section 8 Social Security Contributions (Transfer of Functions etc) Act 1999 ("Section 8 decisions") regarding the earnings of each of A Dugdale and A Roe in relation to the period 6 April 2011 to 5 April 2012. On the same day, the appellant also emailed the Tribunal confirming the position.

3. On 9 April 2021, in response to a query from the Tribunal, the appellant's agent wrote to the Tribunal stating that the appeal had not been withdrawn and the appellant was proceeding with the remainder of the appeal. Furthermore, the appellant had notified HMRC and the Tribunal that they intended to apply to the Tribunal for costs in respect of the issues arising from the Section 8 decisions.

4. Nothing seemed to happen thereafter in regard to any matter, and if there was an application for costs, I have not seen it.

5. In November 2021, I issued Directions asking the parties to agree Directions in order to progress this appeal. The parties entered further negotiations but it proved impossible to agree Case Management Directions. They requested that the matter be decided on the available papers including the various versions of draft directions with tracked changes.

6. I issued a summary decision with Directions on 27 June 2022.

7. There has now been compliance with some of those Directions so, to an extent, the summary decision has been overtaken by events, but HMRC have requested full written findings and reasons in this matter. In the interests of transparency, I indicate where there has been compliance with Directions.

8. Most of the issues at the 2021 Case Management Hearing had ultimately been agreed and the routine Case Management Directions are not in dispute.

9. It was also agreed that:-

(a) As the appellant is abandoning one of its grounds of appeal it should be permitted to update its grounds of appeal. The Re-amended Notice of Appeal was filed and served on 11 July 2022.

(b) HMRC's Statement of Case should be amended since the Section 8 decisions are not being pursued. On 18 July 2022, HMRC filed and served their Re-amended Statement of Case and an amended List of Documents.

10. At the hearing the appellant had agreed to take "all reasonable steps to respond to paragraphs 1-5 and 14-15 of HMRC's document 'HMRC 3'" that was attached to HMRC's application for disclosure.

The outstanding issues

11. The appellant still argues that HMRC has not established the relevance of those issues (or indeed any others in HMRC 3) or why disclosure would be proportionate.

12. What is very much in dispute are primarily issues arising from HMRC 3; those issues are:

- (a) If the appellant is to produce a further witness statement from Anthony Dugdale, which both parties agree is desirable,
- (i) Should that only address paragraphs 1-5 and 14-15?
 - (ii) Why are paragraphs 6-13 not included?
 - (iii) Would such a witness statement, alone, suffice to answer HMRC's application in regard to paragraphs 1-5 and 14-15?
- (b) Whether documentation should be redacted?
- (c) To what extent can HMRC update their pleadings; it being agreed that they require to do so in relation to the settlement agreed as of 24 March 2021?

The Tribunal Rules

13. Rule 2(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") makes clear that the Tribunal's powers under the Rules must be exercised in accordance with the overriding objective of dealing with cases justly and fairly. This is expressed to include, amongst other things: dealing with the case in ways which are proportionate to the importance of the case and the anticipated costs and the resources of the parties; ensuring, so far as possible, that parties are able to participate fully in the proceedings; and avoiding delay so far as compatible with proper consideration of the issues.

14. Rule 5 of the FTT Rules relevantly provides:-

“(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(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; ...”.

15. Rule 27 of the FTT Rules relevantly provides:-

“(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).”

16. Rule 16 of the FTT Rules permits the Tribunal to make an order for disclosure that goes beyond Rule 27 but Rule 16 must be read in the context of Rule 2(3) so any decision on disclosure must be proportionate.

Discussion

17. For the avoidance of doubt, since it was raised in the email correspondence, I have had regard not only to the Skeleton Arguments for both parties but also to the arguments advanced at the Case Management Hearing and the arguments in the email correspondence.

18. Rule 27 is the provision in the FTT Rules for disclosure in standard and complex cases. That is the disclosure regime that applies in this case, unless and until, and except to the extent that, the Tribunal directs otherwise.

19. The Tribunal has the power pursuant to Rule 5(3)(d) to direct otherwise, and to impose broader disclosure obligations. The Tribunal does also have powers pursuant to other provisions of the Rules (for instance, under the more general provisions in Rule 5(1) and (2) and Rule 16) to expand or restrict the disclosure obligations of a party. However, in order for the Tribunal to exercise its power to direct disclosure going beyond the requirements of Rule 27, the Tribunal must be persuaded that it is appropriate to depart from the default rule in Rule 27.

20. I describe it as the default rule, not least because Sales J, as he then was, at paragraph 24 of *HMRC v Ingenious Games* [2014] UKUT 62 (TCC) stated that Rule 27 was “the usual default rule which applies in tax tribunals”. It is.

21. However, in *HMRC v Smart Price Midlands Limited* [2017] UKUT 465 (TCC), the Upper Tribunal dismissed an appeal against a decision of Judge Sinfield in the First-tier Tribunal (“FTT”) and quoted from that FTT decision as follows:-

“[22] While the disclosure provided for by rule 27(2) may be appropriate in many appeals, there is no presumption that it must apply in all Standard and Complex cases. Whether the rule is varied in any particular appeal, as the opening words of rule 27(2) make clear it can be, is a matter for the discretion of the FTT in that case. Any such direction is made under rule 5 of FTT Rules which provides that the FTT may, among other things, make directions in relation to the conduct of proceedings and the provision of information and documents. The use of the word “may” in Rule 5 means that it is also a matter of judicial discretion whether to make such directions. The power of the FTT to make directions under rule 5 of the FTT Rules is a case management power which must be exercised in accordance with the overriding objective in rule 2 of the FTT Rules which is to enable the tribunal to deal with cases fairly and justly.”

22. The general principle is that where a party makes an application for Directions seeking disclosure from another party, the burden is on the party making the application to persuade the Tribunal that there are sufficient reasons for granting it. It is not for the other party to persuade the Tribunal that the application should not be granted.

23. The Upper Tribunal, at paragraphs 25 and 38 in *McCabe v HMRC* [2020] UKUT 266 (TCC), cited the decision of the Court of Appeal in *HMRC v Smart Price* and others at paragraph 40 as being of broad application. That reads:

“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."

24. HMRC 3 was described by HMRC as being "an information and document request". HMRC had argued that the basis for HMRC 3 was that the witness statement of Anthony Dugdale includes "significant new information, refers to 'agreements', 'figures' and 'investments' without providing particulars of the matters positively relied upon."

25. It is not in dispute that the burden of proof lies with the appellant. Mr Dugdale's evidence will be tested in court in due course. Given the disputed application for disclosure the appellant must be aware of the potential risks that it faces if such evidence were indeed necessary.

26. HMRC rely on paragraphs 63 and 65 of *Addo v HMRC* [2018] UKFTT 530 (TC) ("Addo") arguing that it would only be fair and just to allow the disclosure sought. Firstly, that case deals specifically with disclosure of documents referenced in a witness statement.

27. Paragraph 6 of HMRC 3 simply asks for information about the appellant's intentions and thinking in relation to investments. In regard to paragraph 6 of HMRC 3, if Mr Dugdale chooses to include the information sought in his supplementary witness statement, that might save time, but, I agree with the appellant that it is an obvious matter for cross-examination or a further witness statement. I do not direct disclosure on that point.

28. In regard to the remaining 14 paragraphs of HMRC 3, my starting point is to agree with Judge Greenbank in *Addo* at paragraph 57 where he states that in terms of Rule 27 of the FTT Rules:

"Under FTR r 27, it is open to a party to decide the documents on which it intends to rely or to produce at the hearing whether to support its own case or to disprove the case as put by the other party. If the relevant party chooses not to produce a particular document to which a witness refers that may well reduce the value of the evidence given by the witness and affect the strength of that party's case overall. That is a matter for the Tribunal to assess and is a risk that the relevant party takes. While I accept Mr Ramsden's point that, if it is read in this way, the effect of the rule is that the level of disclosure under r 27 is left largely in the hands of the disclosing party, in my view, on its terms, r 27 does not require a party to disclose any other documents."

29. He then goes on to consider the extent of the Tribunal's discretion in relation to wider disclosure under Rule 5(3)(d) or Rule 16.

30. I have already pointed out that he was dealing with documents referenced in a witness statement. As far as paragraphs 7-13 of HMRC 3 are concerned, the matters referenced there are not documents to which Mr Dugdale has referred. He simply narrates a list of fees and fiduciary receipts invested on behalf of the Trust. There may, or may not be, documentary evidence available.

31. What HMRC have not quoted, and I consider relevant, is that Judge Greenbank in *Addo* went on to say at paragraph 66:

"That having been said, it does not follow that just because a document may be relevant or may be referred to in a witness statement served on behalf of one party that the other party is entitled as of right to review it. The Tribunal retains discretion in the exercise of its powers in accordance with the overriding objective."

32. As an example of what HMRC were seeking, paragraphs 7 and 8 of HMRC 3 reference paragraph 59 of Mr Dugdale's witness statement. That paragraph simply narrates that "The fiduciary receipts paid to me Anthony Dugdale and Andrew Roe were invested on behalf of the Trust and are valued as follows:" and has five entries such as "investment property" and "investment land" with a composite value opposite the entry.

33. Paragraph 7 of HMRC 3 asks 12 questions about "each property included in the 'investment property'" and paragraph 8 of HMRC 3 asks 11 questions about "each piece of land included in the 'investment land'".

34. Although not so many questions are posed in paragraphs 9-13 of HMRC 3, HMRC seek disclosure of documents such as invoices and or bank statements giving the "amounts, nature and dates of all costs" included in other composite totals in paragraphs 58-60 of the witness statement.

35. I have already addressed the question of burden of proof and I have difficulty in seeing how it would be proportionate to direct such extensive disclosure in that context. Further, it would be a not inconsiderable exercise, and presumably expensive, for the appellant were I to make such a direction. Certainly, the appellant cogently argues that that would be the case.

36. The exercise of the Tribunal's discretion is always a balancing exercise and I have weighed in the balance all of the factors that have been brought to my attention. I do not propose to direct disclosure in relation to paragraphs 7-13 of HMRC 3.

37. In summary, at this juncture, the appropriate and proportionate course of action is to issue the following Directions:-

"Not later than 42 days from the date of these Directions, the Appellant shall take all reasonable steps to provide a further witness statement of Anthony Dugdale to address the following points:-

(1) Confirmation of the position in relation to the issues raised at paragraphs 1, 2, 3, 4 and 5 of HMRC 3 and provision of any documents requested provided that such documents are

(i) in existence;

(ii) in the power, possession or control of the Appellant;

(iii) are not subject to legal professional privilege;

(iv) or alternatively confirm that no such document exists (to the best of the belief and knowledge of the witness),

(2) Confirmation of the position so far as it is within the knowledge of Anthony Dugdale in relation to paragraph 14 of HMRC 3 and provision of the document requested unless it is not in existence or not in the power, possession or control of the Appellant; and

(3) Confirmation of the position so far as it is within the knowledge of Anthony Dugdale in relation to paragraph 15 of HMRC 3.

In the event that, in the preparation of that Supplementary Witness Statement, it transpires that Anthony Dugdale is in a position to address the issues raised at paragraphs 6 to 13 of HMRC 3 then the Appellant is at liberty to have him address any or all of those issues together with supporting documentation but is not directed to do so.

38. If the Supplementary Witness Statement does not comply with those Directions, then an appropriate application can be made to the Tribunal.

39. In any event, those Directions formed part of the more comprehensive Case Management Directions which included a Direction that any party was at liberty to apply for the Directions to be amended, suspended or set aside or to seek further Directions.

40. The Supplementary Witness Statement was filed and served on 8 August 2022.

41. It may very well be that HMRC will wish to amend, or as they put it, update, their pleadings in light of the Supplementary Witness Statement. However, there is extensive jurisprudence on amendment to pleadings and the proper course would be for an application to be made in that regard, if HMRC seek to amend.

42. The appellant would then have the right to object, or not and/or to respond. Since the outcome of any such application cannot be known at this stage, or indeed when I issued the Summary Decision, I made no provision for that in the Directions that were issued.

43. HMRC also have the right to seek further and or different disclosure, if so advised, once they have had sight of the Supplementary Witness Statement and the appellant's Re-amended Notice of Appeal.

44. In summary, the applicability of Rule 27(2) of the FTT Rules turns on the facts of each case.

45. As Judge Walters made clear in *Ebuyer v HMRC* [2014] UKFTT 921 (TC):-

“Litigation in this tribunal is intended to conform to a different model from litigation in the High Court and the Rules establish the framework within which litigation in this tribunal is to be carried on. Rule 27 provides for the normal disclosure in a standard or complex case and I consider it would not be appropriate for me, at this stage in this litigation, to require wider disclosure than that required by rule 27.”

I agree.

46. In *HMRC v Citibank and others* [2017] EWCA 1416 (Civ), Sir Geoffrey Vos C, in upholding Judge Walters and overturning the Upper Tribunal's finding that if a reasoned case for wider proportionate disclosure was made the FTT should not be “troubled by the limited terms of rule 27”, stated:

“It is true that this is an important issue, but the 2009 Rules were made for important cases as well as simple ones. The plain fact is that the procedure is different in the FTT. If fraud or dishonesty had been alleged it would have been different.”

47. There are no pleadings of fraud or dishonesty.

48. The burden of proof is undeniably on the appellant. As HMRC state in their Statement of Case, both in the original and as Re-amended, if the Appellant wishes to challenge any of the facts as pleaded by HMRC...it is required to prove it.”

Disposition

49. For all these reasons, save as directed in relation to the Supplementary Witness Statement, I refuse the application for disclosure.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 26TH SEPTEMBER 2022