Appeal number: TC/12/10421 and TC/2013/7957

PROCEDURE – disclosure of relevant documents – costs of successful party in complex case

FIRST-TIER TRIBUNAL
TAX CHAMBER

B&M RETAIL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, London on 18 and 26 October 2017

Mr B Elliot, counsel, for the Appellant

Mr S Charles, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Relevant disclosure

1. The appellant sought relevant disclosure and HMRC agreed that they should provide disclosure of relevant documents. They did not agree on the exact wording of the direction.

2. Everyone appeared agreed on the test of relevance: relevant documents are those which might advance the other party's case or hinder that of the party making disclosure, and included those documents which might lead to a train of enquiry which might have either of those outcomes.

Should the directions list the types of documents likely to be relevant?

3. Mr Elliot was very keen to persuade me that I should give HMRC examples of the sorts of documents that would fall into 'relevant' disclosure. I was not persuaded for a number of reasons.

4. Firstly, simple directions are better. Relevant disclosure means relevant disclosure. Cluttering up this simple direction with examples risks diverting attention to the narrowness of the examples rather than the breadth of the direction. *All* documents relevant to the three issues as set out above should be disclosed, of whatever type, and whether or not they fall into the types of documents listed by Mr Elliot.

5. Secondly, including lists within disclosure directions would also set a bad precedent, suggesting that, in future, directions for disclosure should contain long lists of the types of documents that might fall within it. Parties' attention will be diverted into entirely pointless arguments about what types of documents should be included on the list, or worse, into arguments about whether, if a document was of a type not on the list, it needed to be disclosed, or whether disclosure was required for all documents of the type listed even if they were not relevant.

6. Thirdly, such a direction would be quite unnecessary. The appellant has in effect already specified the sorts of documents it expects to see disclosed. If they do not receive such documents, then no doubt the appellant will pursue the matter. Mr Elliot suggested that listing types of documents in the direction will pre-empt the need to do so: but I do not agree. Either way HMRC is self-certifying relevance: if they do not consider documents of a particular class relevant, then they will not disclose them. If the appellant is unhappy, it will have to challenge that failure to disclose.

7. Fourthly, Mr Elliot went so far as to suggest that listing the types of documents to be disclosed would be advisable because HMRC's history of compliance indicated (to him at least) that HMRC needed guidance on how to comply. This seemed quite unmerited. Mr Elliot did not point to any history of non-compliance with directions by HMRC in this appeal. What Mr Elliot was actually complaining of was HMRC's

objections to his application for disclosure: but making genuine, if unsuccessful, objections to disclosure is very far from being a failure to comply with any disclosure order that is made. On the contrary, HMRC's attempt to narrow the scope of the disclosure ordered by the Tribunal indicates (if anything) that they intend to comply: if they didn't intend to comply, the scope of the disclosure order would not matter to them.

8. In conclusion, I will not clutter up the directions with examples of the types of documents the appellant expects will be relevant. I refuse the appellant's application on this.

Specific disclosure

9. Having originally opposed giving any specific disclosure, taking the view that requests for specific disclosure should follow disclosure of relevant material, HMRC conceded when the hearing resumed that they would disclose 9 out of the 12 items of specific disclosure requested. In fact, to a large extent what the appellant requested by way of specific disclosure were items mentioned in witness statements relied on by HMRC.

10. I deal with the three remaining items disclosure of which HMRC resisted:

Item (f)

11. HMRC's objection to this item of disclosure was that it was too general and potentially applied to all deliveries to Secure Park Ltd by anyone on any date. While they considered a specific disclosure direction unnecessary as relevant documents would be disclosed under the general disclosure direction, they accepted item (f) if qualified by the words 'to the extent such documents relate to the goods the subject of these assessments'.

12. I agree that such a qualification is necessary to limit disclosure to relevant documents and item (f) is therefore so qualified.

Item (k)

13. HMRC's objection to this item of disclosure was that it was too general: they were prepared to make such disclosure (even though they considered it unnecessary as would be covered by the general disclosure of relevant material) as long as it was limited to material obtained during supply chain investigations undertaken for these assessments.

14. I agree that such a qualification is necessary to limit disclosure to relevant documents and item (f) is therefore so qualified.

Item (i)

15. HMRC objected to this on the basis that X-99 was a document which set out HMRC's policy on when a duty point occurred and it could not be relevant to issues (1), (2) or (3).

16. The appellant relied on *Tower Bridge GP Ltd* [2016] UKFTT 54(TC) at §§§24-29 where the Tribunal ordered that a policy document be disclosed. Mr Charles pointed out that the issue in that case was one where the Tribunal had supervisory jurisdiction and so policy documents would be relevant.

17. Mr Elliot's case was that X-99 was potentially relevant to issue (1) (whether the assessment was in time). While accepting it was policy document on when a duty point arose, he considered the policy could affect the reasonableness of any decision to assess/not to assess and therefore the question of whether the assessment was in time under s 12A.

18. I accept that X-99 is potentially relevant to that issue and for that reason order disclosure.

Whether proof of earlier identifiable duty points relevant to these proceedings?

19. One major dispute between the party is whether proof of earlier identifiable duty points in respect of the excise goods the subject of this appeal is relevant to whether the appeal against the assessments should be allowed. Both parties appear agreed that that depends on how the Upper Tribunal decision in *B&M Retail Ltd* [2016] UKUT 429 (TCC) should properly be understood.

20. HMRC accepted that I did not need to resolve this issue if they disclosed all documents relevant to question of whether there were prior identifiable duty points. That way, if the appellant won on this legal point, the Tribunal hearing the substantive appeal would have all the necessary evidence to rule on whether there were in fact earlier identifiable duty points.

21. HMRC accepted, therefore, that they should make such disclosure. It was *potentially* relevant material although it was their submission it would ultimately prove irrelevant.

22. The appellant conceded that it was not seeking to make out a case in this Tribunal that HMRC's decision to assess the appellant was ultra vires as a matter of public law and was therefore not seeking disclosure of material concerning HMRC's policy of assessing where there was more than one possible duty point.

23. The appellant withdrew its application that I make a ruling on whether proof of an earlier identifiable duty point would lead to the appeal being allowed by this tribunal: I considered this a wise concession. The meaning of the Upper Tribunal decision was clearly a hotly contested issue, and a ruling now, either way, was likely to be appealed, thus yet further delaying final resolution of these appeals, already 5 years'

old. It was in everyone's interests for all legal and factual disputes between the parties to be resolved in a single hearing.

Costs

24. A half day hearing turned into a one-and-a half day hearing: while HMRC opposed much of what the appellant asked for, by the end they had conceded most of it, so the Tribunal was left with very little to resolve. This was a complex case and the appellant asked for its costs on the basis that (1) its application had been largely successful and in any event (2) it considered HMRC had acted unreasonably in initially refusing to concede what they later conceded.

25. HMRC considered that I should order costs in the cause.

26. The history to the hearing was that the appellant had made an application earlier in 2017 for a stay which was opposed; they withdrew the application shortly before the hearing on the basis that the Tribunal had taken so long to list the hearing that the appellant had in effect had the stay it required. It had utilised that stay to seek to persuade HMRC that they should withdraw the assessments because, the appellant sought to demonstrate, all or most of the goods assessed had had identifiable prior duty points. HMRC would not be persuaded so there was no point in the appellant pursuing its application for a stay. Seven days before the hearing, it replaced that application with an application for disclosure.

27. I did not consider that HMRC had acted unreasonably in opposing the application because I found that they had had little time to consider the application before the hearing: a hearing had been listed for another application which had been withdrawn; both parties had agreed to use the then redundant hearing for a resolution of the disclosure issue. Doing so meant that the parties had not had time in advance to properly understand each other's position and negotiate a resolution. Indeed, there seemed to have been misunderstanding on both sides' of each other's position in the appeals.

28. The appellant pointed out that the disclosure application was largely the same as one made in 2013 and renewed in January 2017. While this was true, as HMRC pointed out, the 2013 disclosure application had been overtaken by the decision in 2013 to order a preliminary ruling on assumed facts which had had the potential to resolve the dispute thus rendering disclosure unnecessary. That preliminary issue had taken a few years to resolve. Having been unsuccessful in the preliminary issue, the disclosure application had been renewed by the appellant in early 2017; and while I find HMRC's response to it was negative, they also clearly put the ball back in the appellant's court to justify its application. The appellant had not followed this up: it had instructed new solicitors and applied instead for the stay referred to above. So I agree with HMRC that the renewal of the application just seven days before the hearing set down to consider the stay did reasonably take them by surprise and they were reasonably not prepared for it.

29. So I do not consider HMRC behaved unreasonably in modifying their position during the course of the hearing: they had been deprived of the normal opportunity to seek to understand the other party's case before the matter reached the hearing room. The negotiating one would expect to take place in advance took place during the hearing.

30. Nevertheless, this is a complex case and costs in interim applications would normally follow the outcome and here the appellant was largely successful. However, for the same reason as explained in §27 I consider an order for costs in the cause to be more appropriate. While I do not seek to criticise either party for using a redundant hearing slot to resolve the disclosure application, in retrospect the hearing would have been much shorter had the parties had longer to prepare for it.

31. Mr Elliot suggested that HMRC's attitude to the application to the disclosure would have been the same however much advance notice they got of it: but that is pure speculation as it didn't happen. And HMRC's preparedness to compromise during the hearing indicates the opposite.

32. In all the circumstances, I refuse the application for costs, and order that the costs of this hearing be costs in the cause.

Directions

I make the directions in the form annexed to this decision.

33. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 2 NOVEMBER 2017