Neutral Citation: [2023] UKFTT 750 (TC)

Case Number: TC08930

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/11361

APPLICATION TO BAR HMRC OR STRIKE OUT HMRC'S STATEMENT OF CASE – application made without any prior request for further and better particulars or breach of any case management direction – application wholly disproportionate to underlying issues (if any) – application dismissed – consideration as to an order for wasted costs or costs incurred due to unreasonable acts under Rule 10

Heard on: 23 May 2023
Judgment date: 05 September 2023

Before

TRIBUNAL JUDGE ALEKSANDER

Between

ALPHA REPUBLIC LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Robert Venables KC and Rebecca Sheldon, counsel, instructed by Fladgate LLP

For the Respondents: Georgia Hicks, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The form of the hearing was V (video) using HMCTS video hearing service. The electronic documents to which I was were referred are Alpha Republic's bundle of 211 pages, HMRC's bundle of 32 pages, a bundle of *inter partes* correspondence of 196 pages (this bundle accompanied Alpha Republic's application), skeleton arguments from the Alpha Republic and HMRC, and bundles of authorities.

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

3. The underlying appeal concerns the Disclosure of Tax Avoidance Schemes ("DOTAS"), set out in Part 7 of the Finance Act 2004 ("FA 2004"). Specifically, the Appellant seeks to challenge HMRC's allocation of scheme reference number ("SRN") 67713093 on 18 February 2022 pursuant to s311(3) and (5), to arrangements described in a notice of potential allocation of an SRN (in accordance with s310D), dated 29 October 2021.

4. References in this decision to section numbers are to sections of FA 2004, and references to a Rule are to a rule of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules"), unless the context otherwise requires.

PROCEDURAL HISTORY

5. By way of a Notice of Appeal dated 14 March 2022, Alpha Republic appealed against the allocation of the SRN pursuant to s311B(3) on the following three grounds (in summary):

> (1) That the s310D notice was invalid because: (a) the Commissioners Her Majesty's Revenue and Customs (as defined by s318(1)(c)) had not become aware that a transaction forming part of "arrangements" had been entered into or otherwise as set out in section 310D(1)(a); (b) the "arrangements" relied upon were not actual arrangements; (c) it failed to specify which individual had given it and what was their authority to do so; and (d) it failed to comply with an "implied requirement that it fully and candidly set out" particulars as to why it was claimed that the requirements of s310D had been satisfied and the grounds for suspicion relied upon.
>
> (2) That the issue of the SRN under s311 was invalid because: (a) section 311(3) had not been satisfied as no valid notice had been served under s310D; and (b) the SRN was purportedly issued under s311(3) which of itself confers no power to do so.
>
> (3) That the arrangements were not in fact notifiable arrangements as: (a) they did not involve "tax avoidance"; (b) they neither enabled, nor might be expected to enable a person to obtain "any advantage in relation to tax" (s306(1)(b)); (c) the "arrangements" are not "such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage" (s306(1)(b)); and (d) the "arrangements do not fall within any description prescribed by the Treasury by regulations" (s306(1)(c)).

6. HMRC's statement of case (extending to 29 pages) was filed on 8 August 2022.

7. On 25 August 2022, Alpha Republic applied to the High Court for permission: (1) to bring judicial review proceedings, challenging HMRC's decision to publish its name, its business/registered address, and the name of the arrangements (allocated SRN 67713093); and (2) for urgent interim relief, prohibiting HMRC from publishing that information before (i) the determination of permission in relation to the claim for judicial review, or (ii) if permission is granted, the earlier of (a) the final determination of the judicial review challenge, or (b) the

final determination of the present appeal by the Tribunal. The application for urgent interim relief was considered on the papers by Ellenbogen J on 25 August 2022 who ordered that, "The Claimant's application for interim relief will be considered at the same time as its application for permission to apply for judicial review at which stage the judge considering the applications may determine one or both of the applications on paper; or give directions for further submissions and/or an oral hearing, which may be listed on short notice to the parties."

8. On 8 September 2022, Alpha Republic made an application for the hearing of the appeal before this Tribunal to be expedited and on 16 September 2022 Alpha Republic applied to the Tribunal to extend the disclosure deadline until 27 September 2022.

9. On 27 September 2022 Alpha Republic filed an application for a direction under Rule 5 that:

> (a) HMRC be barred from taking further part in the proceedings on the basis that HMRC have failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly (Rule 8(3)(b) as applied by Rule 8(7)(a) in relation to HMRC);
>
> (b) in the alternative, HMRC having failed to comply with Rule 25, in particular especially Rule 25(2)(b), file within seven days or such other period as the Tribunal may direct and serve on Alpha Republic a new Statement of Case (which may be an amended version of the Statement of Case served on 8 August 2022) which complies with the obligations of HMRC under Rule 25, such Direction to contain a statement that failure by HMRC to comply with the direction could lead to their being barred from taking further part in the proceedings or part of them;
>
> (c) in the alternative, a Direction (a) that HMRC file, within seven days or such other period as the Tribunal may direct, and serve on Alpha Republic the evidence referred to in their Statement of Case of 8 August 2022 or, if HMRC shall have been directed to serve on Alpha Republic a new Statement of Case, in that new Statement of Case.

10. Similar applications were made by the appellants in two other appeals which raised similar issues in relation to s301D notices.

11. On 31 October 2022, the Tribunal wrote to Alpha Republic at the direction of Judge Vos as follows:

> […]
>
> It is apparent that the application of an expedited hearing has been overtaken by the strike out application.
>
> It is not clear whether, prior to issuing the strikeout application, the Appellant has raised the alleged defects in relation to the statement of case with HMRC with a view to remedying any issues without the need for an application to the Tribunal.
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> If not, Judge Vos finds this somewhat surprising and reminds both parties of their obligation under Rule 2(4) of the Tribunal Rules to help further the overriding objective of dealing with cases fairly and justly which of course includes considerations of proportionality and cost. There are of course also implications relating to Tribunal resources where no effort is made to resolve these sorts of issues without the need to make an application to the Tribunal.
>
> With this in mind, Judge Vos has directed that, within 30 days of the date of this letter, the Respondents should provide representations in relation to the strike out application to the Appellant and to the Tribunal.

> The reason that the time limit is longer than might normally be allowed is to give the parties an opportunity to resolve the matters raised by the strike out application without the need for this to be determined by the Tribunal. If agreement is reached, a joint application should be made for any necessary directions within the time limit mentioned above.

12. On 25 November 2022, HMRC filed its response to the application.

13. The application in this appeal and in the two other appeals were considered by Judge Sinfield, the Chamber President. On 7 December 2022, the Tribunal wrote to Alpha Republic as follows:

> Judge Sinfield has reviewed the applications by [Alpha Republic and the two other appellants] for directions that the Respondents be barred from taking any further part in the proceedings or provide new statements of case within seven days or serve the evidence referred to in their Statements of Case on the Appellants within seven days ('the Applications').
>
> […]
>
> In order to ensure that all the points are considered and dealt with at the hearing as efficiently as possible, Judge Sinfield directs that the parties complete the attached schedules in each case. The Appellants are to complete their part of the schedule and serve it on the Respondents by 17:00 on Friday 9 December. The Respondents must fill in their responses and serve the schedule on the Appellants and directly on Judge Sinfield […] by 17:00 on Wednesday 14 December.
>
> In addition, the effect of striking out the Statements of Case in the appeals would be to give summary judgment in favour of the Appellants. Judge Sinfield hopes that it is helpful if he indicates that he would normally give a party another chance in the event of a failure to comply where there was no unless order in relation to the relevant obligation. Judge Sinfield would be grateful if, at the hearing, the Appellants would address not only why they consider the Statements of Case are defective but also, if they are found to be defective, how barring the Respondents at this stage and where no unless order has been made would be consistent with the overriding objective, in particular rule 2(2)(b) and (c) of the Tax Chamber Rules and the Tribunal's duty in rule 7(2) to take such action as it considers just.
>
> In the event that the appeals proceed after the decision on the applications, Judge Sinfield will make case management directions for the appeals to be heard as soon as reasonably possible. Draft case management directions are attached. Without prejudice to any decision on the applications to bar the Respondents, the parties should if possible agree the directions and, in particular to agree dates for the hearing, in advance of the case management hearing on 15 December.

14. Following Judge Sinfield's letter, applications were made by Alpha Republic and HMRC to extend the time limit for service of the schedule. In addition, the request for expedition was withdrawn. Judge Sinfield responded by informing the parties that the hearing listed for 15 December would no longer hear the applications, but would instead be a case management hearing to determine a suitable timetable for dealing with the applications to bar HMRC and to consider case management directions for the conduct of the appeals should the applications be refused.

15. Notwithstanding the suggestion by Judge Vos that Alpha Republic should seek to resolve the issues raised in its strike-out application by agreement with HMRC, it has made no attempt

to do so. Further, it has not filed its schedule of defects in accordance with Judge Sinfield's directions.

16. Because of the illness of HMRC's counsel, the case management hearing listed for 15 December had to be vacated.

17. Alpha Republic's application for judicial review was withdrawn in February 2023.

18. The hearing of the applications made by Alpha Republic and the two other appellants were listed to be heard together before me on 23 and 24 May (for 1½ days). However, shortly before the hearing, I was notified that the other two appellants (not Alpha Republic) had convened creditors meetings with a view to going into voluntary liquidation. In these circumstances, I vacated the hearing as regards those two appellants. The hearing therefore proceeded solely in relation to Alpha Republic's application. At the hearing, I was informed that Alpha Republic had ceased trading, and therefore the need for expedition had ceased.

19. On 15 May 2023 HMRC wrote to Alpha Republic's solicitors requesting an updated index for the proposed hearing bundle. A draft index was provided on Friday 19 May 2023 (with the hearing being listed to commence on the following Tuesday). Because agreement had not been reached in respect of the bundles there are a number of electronic bundles before me: (a) a Correspondence Bundle (submitted with the original application); (b) Alpha Republic's Bundle; (c) HMRC's Bundle; (d) Alpha Republic's Authorities bundle; and (e) HMRC' Authorities bundle. The bundles did not comply with the Chamber's guidance on PDF bundles in a number of respects – and whilst it is not the most serious of failures, it does make the handling of the bundles more difficult.

20. Alpha Republic's skeleton was served on HMRC and the Tribunal on Friday 19 May at 17:24. The Skeleton included the following paragraph:

> Realistically, it is appreciated that the First Tier Tribunal is unlikely at this point to make Direction (a). The most important direction sought is Direction (b). Direction (c) is a minor issue which would vanish if the amended Statement of Case did not (as the present one does) refer at all to evidence.

DISCLOSURE OF TAX AVOIDANCE SCHEMES

21. To place this appeal in context, it is helpful to give an outline of the relevant elements of DOTAS. The legislation relating to these arrangements is intricate, and will need to be analysed and construed in the substantive hearing of this appeal. I therefore make no findings as to the construction of the legislation, as this will be a task for the Tribunal at the substantive hearing of the appeal.

22. Section 310D gives HMRC (in very general terms) power to issue a notice to a person whom they have reasonable grounds to suspect is the promotor of notifiable arrangements and to any person whom they reasonably suspect of being involved in supplying the arrangements. If that person is not able to persuade HMRC that the arrangements are not notifiable, then HMRC have power to allocate an SRN.

23. The person to whom the SRN is notified must then notify its clients of the SRN. The clients must provide their NI number or unique tax reference to the person who gave them the SRN. The clients must also include the SRN in their tax return if they make use of the arrangement.

24. HMRC have power to publish information about arrangements to which an SRN has been allocated and about their promotors and suppliers.

25. HMRC also have power in specified circumstances to issue Stop Notices to promotors, which require the promotor to stop promoting arrangements to which an SRN has been allocated.

26. There is a right of appeal to this Tribunal against the allocation of an SRN and against a decision of the relevant HMRC officer not to withdraw a stop notice. An appeal against a decision not to withdraw a stop notice can include an application to HMRC (not the Tribunal) that the stop notice be suspended pending the determination of the appeal. However, in the case of appeals against the allocation of an SRN, the requirements to comply with DOTAS, and HMRC's publication powers, are not suspended pending the resolution of the appeal.

TRIBUNAL PROCEDURE

27. The Tribunal Rules include the following provisions:

> **2 Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes-
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it-
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must-
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.
>
> **5 Case management powers**
>
> (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-
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management hearing;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started-

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal.

7 Failure to comply with rules etc

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include-

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case);

(d) restricting a party's participation in proceedings; or

(e) exercising its power under paragraph (3).

(3) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 of the 2007 Act (Upper Tribunal to have powers of High Court or Court of Session) in relation to, any failure by a person to comply with a requirement imposed by the Tribunal-

(a) to attend at any place for the purpose of giving evidence;

(b) otherwise to make themselves available to give evidence;

(c) to swear an oath in connection with the giving of evidence;

(d) to give evidence as a witness;

(e) to produce a document; or

(f) to facilitate the inspection of a document or any other thing (including any premises).

25 Respondent's statement of case

(1) A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received-

(a) in a Default Paper case, within 42 days after the Tribunal sent the notice of appeal or a copy of the application notice or notice of reference;

(b) in an MP expenses case, within 28 days after the Tribunal sent the notice of appeal; or

(c) in a Standard or Complex case other than an MP expenses case, within 60 days after the Tribunal sent the notice of appeal or a copy of the application notice or notice of reference.

(2) A statement of case must-

(a) in an appeal, state the legislative provision under which the decision under appeal was made; and

(b) set out the respondent's position in relation to the case.

(3) A statement of case may also contain a request that the case be dealt with at a hearing or without a hearing.

(4) If a respondent provides a statement of case to the Tribunal later than the time required by paragraph (1) or by any extension allowed under rule 5(3)(a) (power to extend time), the statement of case must include a request for an extension of time and the reason why the statement of case was not provided in time.

28. A number of decisions of the tribunals and courts have considered what is required of a Statement of Case filed under Rule 25.

29. Statements of case must plainly set out the party's case so that the other side is able to properly meet the case against it.

30. In *Citibank NA v HMRC* [2014] UKFTT 1063 (TC) Judge Mosedale described the purpose of the statement of case in the following terms (at [11]):

> It goes without saying, although it is enshrined in Rule 2(2) of (Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009), that the object of the Tribunal is to deal with cases fairly and justly. Litigation by ambush is not fair or just: a party must be given time to properly prepare to meet the case against it. For this reason, the Tribunal's rules at Rule 25(2)(b) requires the Statement of Case to:
>
> "set out the respondent's position in relation to the case"
>
> Again with the object of fairness of justice, a failure by the respondent to fully set out its case in its statement of case is not fatal to the respondent putting that case in the hearing of the appeal if it is nevertheless apparent that the appellant has been given the opportunity to properly prepare for the case. For instance, where an allegation which could have been pleaded had not been but was nevertheless clearly made in a witness statement filed in support of the respondent's case, the respondent may be able to pursue that allegation at the hearing: see for instance *Pars Technology* [2011] UKFTT 9 (TC) at [46]."

31. Judge Mosedale's comments in *Citibank* were made in the context of whether "a failure by the respondent to fully set out its case in its statement of case" was "fatal to the respondent putting that case in the hearing of the appeal", which is different to the context of Alpha Republic's application, but I find that the principles set out in Judge Mosedale's decision cited above are of general application.

32. In *Tejani v Fitzroy Place Residential Ltd* [2020] EWHC 1856 (TCC), Pepperall J dismissed as "hopelessly misconceived" a strike out application that argued the Particulars of Claim should have pleaded evidence relied upon (at [22]) and set out the relevant legal principles as to what is required in a statement of case, as follows:

> 22.1 Rule 16.4(1)(a) [of the CPR] provides that Particulars of Claim must include "a concise statement of the facts on which the claimant relies."
>
> 22.2 Lord Woolf MR observed in *McPhilemy v. Times Newspapers Ltd* [1999] 3 All E.R. 775, at page 793A, that statements of case are required to "mark out the parameters of the case that is being advanced by each party." He explained that a statement of case should identify the issues and the extent of the dispute between the parties, making clear the general nature of the case being advanced, but that the exchange of witness statements should avoid the need for extensive detail. Excessive particulars, he warned, risk obscuring rather than clarifying the issues in a case.
>
> 22.3 In *Tchenguiz v. Grant Thornton UK LLP* [2015] EWHC 405 (Comm), [2015] 1 All E.R. (Comm) 961, Leggatt J, as he then was, observed, at [1]:
>
> > "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."
>
> 22.4 It is important that parties properly distinguish between a concise statement of facts and recitation of the evidence upon which they seek to prove such facts. Every bar student is taught that they should plead facts and not evidence, but it is regrettably a distinction that is all too often lost sight of and is increasingly responsible for extraordinary prolixity in pleadings…

33. Saville LJ (with whom Beldam and Neil LLJ both agreed) in *British Airways Pension Trustees Ltd v Sir Robert McAlpine* (1994) 72 BLR 26 (at [4] – [5]) stated that the purpose of pleadings is to enable the opposing party to know the case being made against them in sufficient detail to prepare to answer it:

> The judge described this part of the pleadings as embarrassing, though not sufficiently so on its own to justify striking out the claims. This conclusion is not challenged on this appeal, in the sense that it is accepted that the pleading as it stands is open to a request for further and better particulars which the plaintiffs offered to supply during the course of the hearing. […]
>
> The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows

> perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in the light of its own subject matter and circumstances.

34. *HMRC v Hyrex* and others [2019] UKFTT 175 (TC) concerned an application by HMRC under s324A for an order that arrangements promoted by Hyrex were "notifiable arrangements". Judge Mosedale said the following in relation to the adequacy of HMRC's application:

> 127. Parliament must have intended HMRC to be obliged to give sufficient specificity in order for the respondents to be able to identify the arrangements being referred to. But Parliament must also be taken to know that the promoters of the arrangements must know all there was to know about their arrangements while, at the same time, HMRC might well know very little. The clear purpose of the legislation was for arrangements to be notified to HMRC so that HMRC could investigate them and could consider their legal effect. Its very purpose presupposed that HMRC did not know everything there was to know about the arrangements and certainly would not know for certain their legal effect. Interpreting the legislation as proposed by Mr Venables would mean giving it a reading that would defeat its objective. It is a meaning Parliament cannot have intended. So I consider, contrary to the respondents' case, HMRC are not required in the application to state the legal effect of the arrangements; they are not required what the tax effect of the arrangements is.
>
> 128. I find, on the contrary, that this subsection only requires HMRC to specify the arrangements in sufficient detail for them to be identifiable. HMRC is not required even to state why they think that they are notifiable, although it is obviously helpful to the respondent if the application does so, and HMRC did do so in this case.
>
> 129. Mr Venables' position was that any small inaccuracy in the description of the arrangements would mean that HMRC had specified an arrangement that did not exist and that therefore the application must automatically fail. For the reasons given below, I do not think that HMRC did inaccurately describe the arrangements but I also think such accuracy is not required by the legislation: it is enough that the arrangements are identifiable. Errors in the details would not matter as, once HMRC had done enough to identify the arrangements, they would have fulfilled the terms of subsection (2). Errors would only matter if, objectively speaking, the arrangements were not identifiable from the description given.

35. The FTT in *Libra Graphics International Ltd v HMRC* [2013] UKFTT 180 (TC) addressed references to evidence in statements of case:

> 50. The Tribunal agrees with the thrust of the Appellants' submission that HMRC was required to particularise its case against them. The Tribunal, however, differs from the Appellants about the detail that should be included in the statement of case, In the Tribunal's view, a statement of case is of necessity a summary of the evidence and sets out the essential propositions upon which HMRC relies to establish its case. The Tribunal considers that HMRC is entitled to expand on its case by the exchange of witness statements and opening submissions. In this respect the Tribunal relies on the judgment of Lord Woolf MR in *McPhilemy v. Times Newspapers Ltd* [1999] 3 All ER 775 at 792-3:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.
>
> As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements pleadings frequently become of only historic interest."

ALPHA REPUBLIC'S OBJECTIONS

36. Alpha Republic's objections to HMRC's Statement of Case in this appeal can be summarised as follows:

(1) The appeal arises out of "penal legislation which HMRC persuaded Parliament to enact in the Finance Act 2021". This legislation, submits Mr Venables, "runs contrary to fundamental principles of English law and are obnoxious to the Rule of Law." This is because:

> They permit a Revenue official, acting on mere suspicion and without proper enquiry, to inflict enormous harm on the business of a taxpayer, without any need for an independent judicial determination and even to compel it to cease carrying on its business.

For these reasons, says Mr Venables, not only should the DOTAS legislation be interpreted restrictively, but this Tribunal should ensure that HMRC complies rigorously with its obligations under the Tribunal Rules.

(2) The right of appeal against the allocation of an SRN lies only on the grounds that:

(a) in issuing the notice under section 310D as a result of which the reference number was allocated, HMRC did not act in accordance with that section;

(b) in allocating the reference number, HMRC did not act in accordance with section 311; or

(c) the arrangements are not in fact notifiable arrangements or, in the case of proposed arrangements, that the proposal for the arrangements is not in fact a notifiable proposal.

(3) Mr Venables submits that HMRC are obliged in their Statement of Case not only to set out the facts on which they rely but also their contentions on the law. In particular, Mr Venables submits that HMRC must:

(a) set out their position unambiguously; and

(b) in a way which is consistent with their purported section 310D notice;

He submits that the Statement of Case filed and served by them does not fulfil these requirements and is "not fit for purpose."

(4) Mr Venables notes that the Statement of Case includes quotations from evidence in the possession of HMRC, and referred me to a number of paragraphs in the Statement of Case where this occurs. Some examples of these are the following:

> 6. In this statement of case HMRC refer to the evidence relating to the following two scheme users who entered into the arrangements:
>
> [name redacted] ("JV") who entered into the arrangements on 14 June 2021
>
> [name redacted] ("VD") who entered into the arrangements on 16 June 2021.
>
> […]
>
> 30. The description of the arrangements presented to the Appellant in the Notice was based on evidence given to HMRC by users of the scheme. Because of this HMRC are confident that the description in the Notice is sufficient to enable the Appellant to know to which arrangements the Notice related and any variation between the description and the 'any actual arrangements' would not prevent the Appellant from identifying the arrangements to which the Notice referred.
>
> […]
>
> 35. The evidence held by HMRC confirms that HMRC complied with the requirements of section 310D(1)(a)(i) FA 2004 as HMRC became aware from the evidence that a transaction forming part of the arrangements had been entered into on or after 10 June 2021 (i.e. from the date of Royal Assent to the Finance Act 2021 which inserted section 310D FA 2004).
>
> […]
>
> 47. The evidence relating to the scheme users shows that they enter into arrangements that will provide them with the best return or 'retention' of their income i.e. the tax advantage and concomitant NICs advantage that the arrangements are designed to achieve. So, while the use of an umbrella company might facilitate the invoicing/payroll administration, one of the reasons scheme users decide to participate in these particular arrangements is clearly to obtain a tax advantage. For instance, during the last week of August 2021 JV received two in payments into her bank account from the Appellant; of this £340.35 was received in the form of 'Alpha Salary' and would have been included on a payslip and matches her RTI pay details. The remaining amount received in the form of 'Alpha Republic Pay' (i.e. the "loan") from the Appellant of £684.73 was paid without deductions to income tax and Class 1 NICs and is not expected to be liable to income tax as employment income. There is clearly a tax advantage arising from using these arrangements of at least £247.24 and £99.04 NICs for the 1 month during August 2021.

These paragraphs, submits Mr Venables, have the effect of describing facts by reference to evidence that Alpha Republic has not seen. Mr Venables has two objections to this. The first is that pleadings should plead facts and not evidence, and the second is that copies of this evidence have not been provided to Alpha Republic so that it can evaluate the evidence.

(5) The description of the arrangements given in HMRCs s310D notice is that employees receive loans, and that these loans are repaid out of bonuses that the employees receive no later than seven years after the loans are made. Mr Venables submits that there are inconsistencies in the description of these arrangements between the s310D notice and the Statement of Case, as the Statement of Case suggests that the payments made by the employer in respect of the loans are taxable employment income.

If the payments made by way of (purported) loan were in fact taxable as employment income, then the employees could not have obtained any "tax advantage", and it could not reasonably have been expected that they would do. Hence, there could have been no "notifiable arrangements" within the meaning of section 306(1). Nor could HMRC have had any "reasonable grounds for suspecting that the arrangements are notifiable" for the purposes of s310D.

(6) Mr Venables referred me to a number of paragraphs in the Statement of Case where this inconsistency is apparent:

> 40. The scheme users receive secondary payments by way of loans as part of their remuneration for providing their services

Mr Venables submits that the payments are either by way of loan or they are payments of remuneration. They cannot be both.

> 41. The payments by way of loans, which are referred to as 'Alpha Republic Pay', are made without any deductions for income tax; for example, the evidence relating to JV summarised at paragraphs 9 and 11 above shows that if the gross weekly income of £1,222.50 had been fully subjected to deductions under PAYE, the amount of £247.24 for income tax would have been deducted. JV would thus save around £12,860 in liabilities to income tax during the year.

Mr Venables submits that paragraph 41 is obscure but, it probably means that the payments really were made by way of loan and were not payments of taxable remuneration.

> 42. The arrangements thus lead to a reduced charge to income tax which would have otherwise been payable by or in respect of scheme users.

Mr Venables submits that HMRC appear to be stating in paragraph 42 that the payments were made by way of loan.

> 44. HMRC submit that at the time they issued the notice under section 310D FA 2004 they had reasonable grounds for suspecting that the arrangements enable or might be expected to enable any person to obtain a tax advantage and so for suspecting that section 306(1)(b) FA 2004 applies to the arrangements.
>
> 45. It was HMRC's view as at 7 January 2022 that the tax advantages are one of the main benefits to which the arrangements are expected to give rise. This is because apart from the tax advantages and the concomitant NICs advantages, there are no commercial benefits or other reasons at all for implementing the arrangements.
>
> 46. An individual, who does not participate in these arrangements, would have an unfettered right to an amount of employment income net of income tax and NICs charged on the gross contract value. By entering into these arrangements, scheme users give up this right and in return receive a NMW salary (net of tax and NICs) and additionally much larger amounts which are paid in the form of loans. The aggregate amounts they receive in the form of salary and "loans" are worth more than the income that they would have received net of tax and NICs but only because of the lower amount of income tax and NIC liabilities that are deducted by the Appellant and the lower amount of income tax to which they are expected to be liable.

Mr Venables submits in paragraphs 44 and 45 HMRC again appear to be of the view that the payments were made by way of loan and were not taxable.

(7) Submissions on similar lines were made by Mr Venables in respect of many other paragraphs in the Statement of Case.

(8) Mr Venables submits that HMRC cannot maintain in their Statement of Case a position which is inconsistent (or even ambivalent) whether the inconsistency, or potential inconsistency is internal to the Statement of Case or with the s310D Notice. None of this, he says, is merely technical as it goes to the heart of the appeal.

(9) Further, if HMRC's case is that the loans are "shams", (a) this needs to be pleaded, and (b) DOTAS would not be engaged as there would be no "tax advantage" for DOTAS purposes.

(10) Alpha Republic contends that the reference to "HMRC" in s310D(1) can only refer to the Commissioners of His Majesty's Revenue and Customs themselves, as Parliament clearly intended that the "draconian powers conferred by the Finance Act 2021 amendments" to the DOTAS regime could be exercised only if the Commissioners personally had the relevant state of mind - it would not be enough that one of their employees did. It follows that a s310D notice can only be issued if the Commissioners themselves became aware of the arrangements that are the subject of this appeal. Mr Venables submits that this issue is not addressed in the Statement of Case, even though it had been raised by Alpha Republic in correspondence. Mr Venables referred me to paragraph 25 of the Statement of Case which he describes as "verging on the incoherent":

> It is not disputed that section 318(1) FA 2004 defines, for the purposes of Part 7 FA 2004, that "HMRC" means the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"). Even so, this does not limit the events of "becoming aware" and "reasonably suspecting" within section 310D FA 2004 specifically occurring to the Commissioners personally. Section 13(1) Commissioners of Revenue and Customs Act 2005 ("CRCA 2005") permits Officers of Revenue and Customs to exercise any function of the Commissioners. Furthermore, section 4(1) CRCA 2005 states that "HMRC" incorporates both the Commissioners and Officers of Revenue and Customs. The combination of s318 FA 2004 and section 4(1) CRCA 2005 mean that the terms "HMRC", the Commissioners and Officers of Revenue and Customs are all interchangeable. Any person working for/employed by HMRC is an Officer of Revenue and Customs. They therefore have all powers of the Commissioners delegated to them by virtue of section 13(1) CRCA 2005, including issuing Notices under s310D FA 2004.

Mr Venables submits that this paragraph does not address the position taken by Alpha Republic that while an HMRC officer may exercise certain "functions" of the Commissioners (see s13 CRCA 2005), a state of mind of the Commissioners is clearly not a "function" of the Commissioners. Further, s51 CRCA 2005 defines "function" as meaning "power or duty". Mr Venables submits that the Statement of Case is defective as it fails to address why HMRC contend "becoming aware" is a "power or duty." Further, s4(1) CRCA makes no reference to HMRC and does not contain a definition of the term as it merely states that the Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs (and in any event, the specific definition in s318(1) would override it). Mr Venables describes the last three sentences of this paragraph and the relevance of s4 CRCA to DOTAS as "unintelligible".

(11) Paragraph 26 of the Statement of Case refers to the decision of the Supreme Court in *R (on the application of Haworth) v Commissioners for Her Majesty's Revenue & Customs* [2021] UKSC 25, which considers whether the Commissioners must personally form an opinion in relation to follower notices. However, submits Mr Venables, the Statement of Case does not address the relevance of this decision to s310D, nor Alpha Republic's view as set out in correspondence.

DISCUSSION

37. The question I need to address is whether the deficiencies identified by Alpha Republic in the Statement of Case are deficiencies, and if they are, whether they are such that it should be redrafted to are greater or letter extent, or – alternatively – HMRC should serve on Alpha Republic the evidence to which the Statement of Case refers. Alpha Republic's application is that the revised Statement of Case should be served within seven days and should be subject to an "unless order" – or that the evidence be served within seven days.

38. The application for HMRC to barred is no longer being pursued.

39. I have no doubt that the Statement of Case in this appeal could be better and more concisely expressed[1]. That could be said of many Statements of Case filed with this Tribunal. The fact that the Statement of Case could be better drafted does not of itself make it defective.

40. It is not disputed that a "Statements of Case must be plainly set out the party's case so that the other side is able properly to meet the case against it" (per Judge Mosedale in *Citibank*). Is the drafting of the Statement of Case in this appeal such that Alpha Republic is not able properly to meet the case against it?

41. Considerable time was spent at the hearing on submissions by Mr Venables as to whether the DOTAS regime – and the provisions relating to the allocation of SRNs in circumstances where no DOTAS return had been made – was penal in its nature, and to Ms Hicks response to those submissions. Whilst the penal nature of the legislation might have relevance to its interpretation at the substantive hearing of this appeal, I did not find these submissions (nor Mr Venables use of hyperbole) to be helpful in considering the procedural point as to whether HMRC's Statement of Case was defective.

42. Mr Venables submits that the *dicta* in *Tejani* were given in the context of the CPR in High Court litigation. He submits that the Tribunal Rules go further than the CPR and must be considered in the context of a tax appeal. In the High Court, there will have been Particulars of Claim, whereas in an appeal to the FTT there is a Notice of Appeal. HMRC must as a minimum state what their position is in relation to that Notice of Appeal. And they need to do so in such a way that the appellant can decide what evidence (including documents) to adduce and how to prepare its case on the law. Whilst I agree with Mr Venables that these *dicta* were given in the context of High Court litigation, I disagree that the Tribunal Rules go further than the CPR – not least because it would be strange if Tribunal procedure (which is intended to be less formal than litigation in the Courts, and readily accessible to unrepresented parties or, at least, parties who are not represented by qualified lawyers) went further than that of the Courts. Whilst I can understand why the provision of background facts, reasons, and argument should be avoided in Court pleadings, in the case of Statements of Case, there are sometimes good reasons for their inclusion – particularly if their inclusion would aid an unrepresented party in understanding the case that they must meet at the hearing.

43. In *Libra Graphics* the FTT held that a statement of case necessarily includes a summary of the evidence and the essential propositions on which HMRC rely. I find that references to

[1] 1. The author of the Statement of Case is anonymous. It is "signed" by "HM Revenue and Customs, Solicitor's Office and Legal Services". It was not drafted by Ms Hicks.

evidence in statements of case is permitted, particularly if it helps to elucidate the case (as it does here). In the circumstances of this case (as in many tax appeals) much, if not all, of this evidence will not be new to Alpha Republic. In any event it will have to be included in HMRC's list of documents and provided to Alpha Republic in due course (and before any witness statements are exchanged). I find that to remove references to evidence from the Statement of Case in this appeal would be disproportionate, and would only delay the progress of the appeal.

44. As regards the submission by Mr Venables that there was an inconsistency between the s310D notice and the Statement of Case, Ms Hicks drew my attention to the fact that the original s310D notice of 21 October 2021 was replaced by the notice dated 7 January 2022 in the light of comments received from Alpha Republic. The 7 January 2022 notice makes no mention of a "loan", instead it refers to a "second payment". I find that there is no inconsistency between the s301D notice and the Statement of Case.

45. As regards internal inconsistencies within the Statement of Case, Ms Hicks submits that there are no internal inconsistencies. In paragraphs 40, 41, and 46, the Statement of Case refers to "payments by way of loans". This is a reference to the way in which Alpha Republic itself describes the payments. The point being made is that payments having the character of remuneration are paid to individuals without tax being deducted, and this is clearly apparent from the Statement of Case. Ms Hicks referred me to paragraphs [83] to [84] and [170] of *Hyrex* as illustrating the kind of issue arising in relation to arrangements which incorporate loans where there is no expectation that the loan will ever be repaid:

> 83. Taking into account what I have said at §66, I consider it more likely than not that the position on loan repayment would have been represented to actual and potential Hyrax scheme users by those promoting it to be exactly the same as for K2. And that representation must be accurate as it would be difficult to see that anyone would enter into the arrangements which involved them taking the larger part of what would otherwise be their monthly salary as a loan if there was any real possibility of being asked to repay it. And that expectation would appear justified because, as the creditor rights were assigned to an EFRBS, and the trustees would act in the interests of the beneficiary (being the scheme user and his/her family), there seemed no reason why the EFRBS would ever ask for the loan to be repaid. And after the scheme user's death, as the value of the EFRBS fund would belong to the scheme user's family (likely to be his heirs), it would make no difference whether the loan was written off or repaid: either way his estate would not be diminished by the repayment obligation.
>
> 84. In conclusion, I find that Hyrax was promoted on the basis that the loans, while strictly repayable, were extremely unlikely ever to be required to be repaid. It was clear from logic but also from what was said, including in respect of the scheme's mortgage brokers, that those promoting the arrangements did so on the basis that the loan was in economic terms if not in law equivalent to earnings.
>
> […]
>
> 170. […] Economics looks at practical realities and not legal form. The evidence is that there was no intention or expectation of the loan being repaid in the lifetime of the scheme user and it was in any event owed to a trust of which the scheme user and his/her family were beneficiaries, so repayment was unlikely even to diminish his or her estate after death. While there may be a technical, legal difference between a person who receives cash free of an obligation to repay it in comparison to a person who received the same cash but with an obligation to repay it which will almost certainly never be enforced, there is no real economic difference between those persons. In

> practical, economic terms, they both have the cash to do with as they please. It is economically a part of their wealth.

46. Ms Hicks submits that the labels placed on the aspects of the arrangements under consideration is something of a red herring. The point in issue is that the arrangements under consideration in this appeal involve a secondary payment in respect of which no tax has been paid.

47. Ms Hicks submits, and I agree, that the Statement of Case need only specify the arrangements in sufficient detail for them to be identifiable by the appellant. The appellant's knowledge about the detail of the arrangements will be far greater than that of HMRC (see [127] – [129] of *Hyrex*). Ms Hicks submits that if there is any ambiguity in the description of the arrangements in the Statement of Case, it is reflective of the ambiguity inherent in the arrangements.

48. I find that there are no internal inconsistencies in the Statement of Case that would justify it being redrafted.

49. But, in any event, the issue I need to consider is whether the description of the arrangements in the Statement of Case is sufficient to enable them to be identified by Alpha Republic, and I find that it is.

50. Ms Hicks submits that sham was not pleaded, as there is no contract to which the "sham" description can attach. Whatever the merits of this submission as regards the arrangements, it is a matter for resolution at the substantive hearing, and is not for this application.

51. As regards the Mr Venables submission that the reference in s310D to "HMRC" can only be a reference to the Commissioners themselves – Ms Hicks submits that this was not one of the grounds pleaded in Alpha Republic's Notice of Appeal. Reference is made in the grounds of appeal to "the Commissioners for Her Majesty's Revenue and Customs", but it is not apparent from grounds that Alpha Republic take this to mean the Commissioners themselves – as distinct from an officer of HMRC. Nonetheless, as this issue was raised in correspondence, it has been addressed in the Statement of Case.

52. Whilst I consider that the manner in which this issue is addressed in the Statement of Case could be improved, the drafting is clear enough for Alpha Republic to understand the nature of HMRC's response to Alpha Republic's argument. This particular ground of appeal is an issue of pure law and statutory interpretation, and requires no evidence to be adduced by either Alpha Republic or HMRC. I find that to require HMRC to redraft the Statement of Case to address Mr Venables' submissions would be disproportionate and would only delay the progress of this appeal.

53. Finally, I note that HMRC's response to Alpha Republic's application includes the following statement at paragraph [16]:

> […] the Appellant is seeking to: […] (b) delay the determination of the underlying appeal by submitting a spurious strike out application.

Mr Venables wanted it to be placed on record that he repudiates any allegation of having been a party to the making of a spurious application, and invited Ms Hicks to withdraw it. At the hearing Ms Hicks explained that her reference in the response was to the merits of the application and not to Mr Venables' conduct.

CONCLUSIONS

54. Mr Venables' skeleton argument states that "realistically, it is appreciated that the First Tier Tribunal is unlikely at this point to make Direction (a)" namely the barring order. I have

read this as a rather begrudging withdrawal of Alpha Republic's application to bar HMRC – and Mr Venables did not pursue this part of Alpha Republic's application at the hearing.

55. I find that HMRC's Statement of Case complies with Rule 25, and that there has been no failure by HMRC to comply with the Tribunal Rules or Tribunal directions.

56. Whilst the drafting of the Statement of Case could be improved, I find that it meets the requirements of Rule 25 as it sets out the legislative provisions and HMRC's case in sufficient detail for Alpha Republic to understand the case against it, and for the Tribunal to deal with the case fairly and justly. For HMRC to be required to undertake any revision or redrafting, or draft a new Statement of Case, would be wholly disproportionate and would just delay the progress of this appeal.

57. I find that it is proper for HMRC to refer to evidence in their Statement of Case. As they are relying upon this evidence, it will need to be disclosed to Alpha Republic in HMRC's list of documents. The exchange of lists of documents is the next step in the progress of this appeal, and will occur before any witness statements are exchanged. Alpha Republic will therefore be able to respond to the evidence in their witness statements. I find that there is no need for HMRC to provide copies of their evidence at this stage in the proceedings.

58. If there are specific points that Alpha Republic wants particulars on, that have not been addressed in the Statements of Case, the proportionate course of action would be a request for further and better particulars. No such request has been made to date.

59. Alpha Republic's application is dismissed.

CASE MANAGEMENT DIRECTIONS

60. Case management directions will be required for the future conduct of this appeal. The parties are invited to agree case management directions and to file these with the Tribunal for approval by no later than 31 October 2023. If the parties are unable to reach agreement on draft directions, they are to file their respective drafts by 31 October 2023 and the Tribunal will then issue case management directions that it considers appropriate.

COSTS

61. The Tribunal wrote to Alpha Republic on 31 October 2022 and on 7 December 2022 encouraging the parties to seek to resolve any alleged defects in HMRC's Statement of Case without the need for a hearing, and noting that it would be unusual for the Tribunal to strike-out or bar a party in the absence of a previous "unless order" giving the party at least one other chance to comply with their obligations to the Tribunal.

62. Alpha Republic continued to pursue their application to bar HMRC until only a few days before the hearing. Alpha Republic made no attempt to resolve their concerns about the Statement of Case by agreement with HMRC. In addition, Alpha Republic failed to comply with the Tribunal's directions to file a schedule of defects.

63. In addition, for reasons that are as yet unclear, there was a failure by the parties to co-operate to provide one hearing bundle and one bundle of authorities – in each case complying with the Tribunal's guidance on electronic bundles. The multiplicity of bundles and their failure to comply with the Tribunal's guidance makes the handling of the application by me more difficult and in consequence is a cause of delay. Clearly this failure is of far less importance than the issues identified above – but my reason for raising it is to identify whether this may be an example of a failure by a party to comply with Tribunal Rule 2(4) which requires the parties to help the Tribunal to further the overriding objective and to co-operate with the Tribunal generally.

64. In the light of all of these circumstances, I intend to consider my powers under Tribunal Rule 10 to make an order for costs against Alpha Republic. Rule 10(1)(a) gives me power to make an order under s29(4) Tribunals, Courts and Enforcement Act 2007 in respect of wasted costs, and Rule 10(1)(b) gives me power to make an order for costs if I consider that a party or their representative has acted unreasonably in conducting proceedings.

65. I invite HMRC to file an application under Rule 10. The application should be accompanied by a schedule of the costs claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs if it decides to do so. Notwithstanding the provisions of Rule 10(4), the application should be filed with the Tribunal, and copied to Alpha Republic and any other person against whom costs are claimed by 31 October 2023. Alpha Republic (and any other person against who costs are claimed) must file their response with the Tribunal (and copied to HMRC) no later than four weeks after receipt of the application. HMRC must file any reply no later than two weeks after receiving the response.

66. I propose to deal with the issue of costs "on the papers", but if any of the parties consider that there should be a hearing, I would invite them to include their submissions on the form of the hearing in their written submissions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 05th SEPTEMBER 2023