



[2022] UKFTT 00075 (TC)

TC 08406/V

Appeal number: TC/2020/01360

CAPITAL GAINS TAX – Information notice issued under Schedule 36 to the Finance Act 2008 – objection to disclosure on grounds of legal professional privilege – application under the Information Notice: Resolution of Disputes as to Privileges Communications Regulations 2009 SI 2009/1916

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COLIN WISEMAN

Applicant

- and -

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

Respondents

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 6 August 2020 on the basis of written representations and without a hearing, with the consent of the parties.

DECISION

Introduction

1. This application is made under Regulation 5 of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/1916) (the “Regulations”) for the resolution of a dispute as to whether certain documents sought from the applicant by HMRC (under Paragraph 1 of Schedule 36 to the Finance Act 2008) are privileged from disclosure by virtue of Paragraph 23 of that Schedule.

2. Both the applicant and HMRC have expressed themselves content for the application to be determined without a hearing on the basis of written submissions made by both parties.

Background

3. It is unnecessary to provide a detailed factual background to the substantive dispute between the parties. The background to this application is that, on 21 November 2019, HMRC issued the Applicant with a Notice under Paragraph 1 of Schedule 36 requiring disclosure of certain documents in order that HMRC could check the Applicant’s tax position for the tax year 2002/03. In a covering letter HMRC set out the procedure for resolution of a dispute concerning the application of privilege.

4. On 23 December 2019, Mazars (on behalf of the Applicant) appealed against the Notice and notified HMRC of its belief that some of the documents were legally privileged. Those documents related to communications between the Applicant and Turcan Connell, an Edinburgh based firm of solicitors which acted for the Applicant. HMRC acknowledged receipt of the appeal.

5. By letter dated 29 January 2020, Mazars listed the eleven documents which they considered to be privileged. HMRC responded by email on 20 February 2020, enclosing a copy of a letter dated 21 February 2020 which was sent to be the Applicant. In that letter, HMRC did not accept that the eleven documents (or a twelfth document which either does not exist or is not in the Applicant’s possession) were privileged. HMRC accepted that Turcan Connell provided legal advice to the Applicant but did not accept that the documents listed by the Applicant related only to communications that were privileged. HMRC expressed their concern that timetables, flowcharts, step by step plans, accountancy advice and financial records would not normally be privileged, and that implementation advice would not be privileged simply by reason of being provided by Turcan Connell.

6. On 20 March 2020, the Applicant applied to the Tribunal for resolution of the dispute as to the scope of the privilege applying to the correspondence being sought. In the covering letter, copied to HMRC, the Applicant noted that HMRC’s assumption that timetables, flowcharts, and step by step plans had been provided to the Applicant was inaccurate.

7. On 30 April 2020, both parties made written representations to the Tribunal. The Tribunal issued Directions on 26 May 2020 to provide both parties with the opportunity to make any further representations. In accordance with the Tribunal directions, HMRC filed a Statement of Case on 19 June 2020, setting out their case in response to the Applicant's application. On 17 July 2020, Mazars made further written representations on behalf of the Applicant. HMRC chose to rely on their representations of 30 April 2020 and their Statement of Case, and filed no further submissions.

8. On 26 May 2020, the Tribunal consented to the application being determined without an oral hearing.

The relevant part of the Regulations

9. Regulation 3 of the Regulations provides:

3. These Regulations apply where there is a dispute between HMRC and a person to whom an information notice has been given either—

- (a) during the course of correspondence, or
- (b) during the course of an inspection of premises under Schedule 36,

as to whether a document is privileged.

10. Regulation 5 sets out the procedure to be followed to bring a dispute over whether a document is privileged to the resolution by the Tribunal. That procedure has been correctly followed by the parties.

11. Regulation 8 provides:

8. When an application is made under regulation 5(5) ..., the First-tier Tribunal shall—

- (a) resolve the dispute by confirming whether and to what extent the document, is or is not privileged;
- (b) direct which part or parts of a document (if any) shall be disclosed.

12. Regulation 7 provides that a person who has received an information notice and complied with the procedure under Regulation 5 shall be treated as having complied with the information notice in respect of any document in dispute until the First tier Tribunal has determined the status of that document.

13. The role of the Tribunal in this application is to determine which of the disputed documents (or which parts of the disputed documents, as privilege will not necessarily apply to the whole of any document) are subject to privilege. The Tribunal should then provide directions for the disclosure of any documents (or part documents) not subject to privilege.

14. Before turning to the relevant case law and the parties' submissions, I note that the documents in dispute were created, sent and received in Scotland. For the purposes of this application, I do not consider that there is a distinction to be made between the

concept of confidentiality of communications, applicable in Scotland and the concept of legal professional privilege, applicable in England and Wales (and I do not understand either party to disagree with that). During this course of this decision I shall refer to “privilege”, reflecting the wording in the Regulations.

The general law as to privilege and the parties’ submissions

15. I understand the parties to be agreed that communications between lawyers, acting in their professional capacity, and their clients are privileged. Acting in their professional capacity means the provision of advice concerning rights and liabilities under private or public law and “what should prudently and sensibly be done in the relevant legal context” (per Taylor L.J. in *Balabel v Air India* [1988] Ch 317 at page 330G).

16. I also understand the parties to be agreed that it is necessary to consider the context of the communication in order to understand whether the communications in question are part of the necessary exchange of information, what Taylor L.J. described (at page 330F) as the “continuum of communication and meetings between the solicitor and the client”.

17. I agree with both of those propositions.

Dominant purpose

18. The parties differ on whether it is necessary, when legal advice privilege is claimed, to consider the dominant purpose of the communication in order to determine whether a document is privileged. HMRC argue that such consideration is necessary. The Applicant disagrees and also argues that, in any event, the nature of the communications was entirely bilateral (by which I understand the Applicant to be stating that each communication was between a lawyer and client only).

19. In light of the recent decision of the Court of Appeal in *CAA v R (oao Jet2.com Limited)* [2020] EWCA Civ 35 read as a whole (but in particular paragraph 96), I agree with HMRC that, when considering whether legal advice privilege applies to a document, it is relevant to ask for what purpose or purposes the communication was made, and whether the dominant purpose was the giving or seeking of legal advice.

20. However, as the Applicant noted, *CAA v R (oao Jet2.com Limited)* concerned a dispute where the documents in dispute were emails sent to multiple recipients, not all of whom were lawyers. So, while I consider that the question of whether the dominant purpose of a communication is to seek or receive legal advice, can still arise when that communication is between only a lawyer and a client, I consider it is significantly less likely that such a communication will have a purpose other than the seeking or receiving legal advice. I note the comments of Hickinbottom L.J. (at paragraph 100(iii) of *CAA v R (oao Jet2.com Limited)*) that:

The response from the lawyer, if it contains legal advice, will almost certainly be privileged, even if it is copied to more than one addressee.

Whose perspective?

21. Although neither party specifically addressed the point, I consider that the dominant purpose is ordinarily to be viewed from the perspective of the author of the document or the person under whose direction the document was created. I reach that conclusion on the basis of dicta in *Grant v Downs* 135 CLR 674 at 677 and (more recently and within this jurisdiction) the decision in *Property Alliance Group v RBS* [2015] EWHC 3341. Although both of those decisions are concerned with litigation privilege, it would be illogical for the dominant purpose test to apply both to litigation privilege and legal advice privilege, and yet for that test to be applied from a different perspective depending on whether litigation privilege or legal advice privilege is claimed.

Redaction

22. The parties also differ on whether redaction should be directed in this case. I agree with HMRC that redaction is, in principle, possible and should be directed in an appropriate case. Such an approach was adopted in *Behague v HMRC* [2013] UKFTT 596, where Judge Mosedale concluded that an engagement letter did not contain legal advice but that the parts of the letter which revealed the scope of the matters on which legal advice was sought should be redacted. As Judge Mosedale said at paragraph 26 of *Behague*:

LPP must extend not only to the content of the legal advice but the fact that a person sought legal advice on any particular matter. Therefore, to the extent that an engagement letter sets out what the advice will cover it must be subject to LPP.

23. Similarly, in respect of meetings, it was said (at paragraph 100(viii) of *CAA v R (oao Jet2.com Limited)*):

If the dominant purpose of the meeting is to obtain legal advice ... unless anything is said outside that legal context the contents of the meeting will be privileged. If the dominant purpose of the discussions is commercial or otherwise non legal then the meeting and its contents will not generally be privileged; although any legal advice sought or given within the meeting may be. It is likely that, where not inextricably intermingled, the non-privileged part will be severable and (on disclosure, redactable).

24. However, I also agree with the Applicant that there may be practical difficulties in separating the parts of a document so that the privileged parts can be redacted. The dicta quoted in the preceding paragraph suggests that in a document relating to communications with a non-legal dominant purpose, that also contains or evidences privileged communications then, to the extent that the two types of communications cannot be separated, the inextricably intermingled privileged communications should also be disclosed.

My conclusion as to the relevant principles to be applied

25. The onus of proof is upon the Applicant. Therefore, it is for the Applicant to establish that privilege attaches to each communication for which privilege is claimed.

26. In respect of each document, it is necessary to consider whether the communication contained within (or the communication it evidences) is a communication between a client and a lawyer in which legal advice is sought or given or is part of the continuum of keeping solicitor and client informed. Legal advice is the application of the law, a person's rights and responsibilities and what should prudently and sensibly be done in the legal context.

27. Each document should be considered separately but viewed in the context of the communications which precede and follow it.

28. Where there may be more than one purpose for the communication it is necessary to consider whether the dominant purpose is the seeking or giving of legal advice. If the dominant purpose of a communication is to seek or give legal advice then the document containing or evidencing that communication will be privileged. If the dominant purpose of the communication was non-legal, then the document will not be privileged.

29. Legal advice in that document which can be separated should be redacted before the document is disclosed.

Applying those principles to the documents in dispute

30. There are said to be eleven documents in dispute: seven letters, two notes of telephone calls and what is said to be two other documents. As I explain below, I have formed the conclusion that one of those two other documents is actually two documents, so there are 12 documents in total.

31. Applying the principles set out above to those 12 documents:

The letters

32. I am satisfied that each of the seven letters records communications from Turcan Connell for the purpose of providing the Applicant with legal advice or as part of the continuum of keeping client and solicitor informed so that advice may be sought and provided. I conclude that each letter is privileged from disclosure.

The notes of telephone calls

33. I am satisfied that both of the two telephone calls record communications from the Applicant to Turcan Connell for the purpose of seeking legal advice or as part of the continuum of keeping client and solicitor informed so that advice may be sought and provided. I conclude that each telephone note is privileged from disclosure.

The remaining documents

34. The remaining material is described as by the Applicant in correspondence as a “Tenon meeting” on 31 July 2002, and a “Mtg with [Turcan Connell]” on 3 September 2002. I understand that Turcan Connell and the Applicant were the only people present at the 3 September 2002 meeting; other people were also present at the meeting on 31 July 2002.

35. Although it does not make a difference to the disposition of this application, as noted above I have concluded that there are, in fact, three documents in this category: two documents relating to the 31 July 2002 meeting, and one document relating to the 3 September meeting. I reach this conclusion about what has been described as a single document relating to the 31 July meeting on the basis of the document reference (at the foot of each page) – the reference on the first page does not match the reference on subsequent pages – and on the basis of the content of the pages.

36. It is also relevant to record my conclusion, on the balance of probabilities, that these three meeting documents were all prepared by Turcan Connell. Therefore, when I consider the dominant purpose of the communications, I consider that from the perspective of Turcan Connell.

The 3 September 2002 meeting

37. Taking the meetings in reverse order, I look first at the document relating to the 3 September 2002 meeting.

38. My starting point, in accordance with paragraph 100(viii) of *CAA v R (oao Jet2.com Limited)* (set out above), is to consider the “dominant purpose of the discussions” which took place.

39. When the 3 September meeting is viewed in the context of the communications before and after, I am satisfied that – from the perspective of Turcan Connell – the dominant purpose of the discussions which took place on 3 September 2002 was for the Applicant to seek legal advice, for Turcan Connell to provide the Applicant with legal advice or as part of the continuum of keeping solicitor and client informed so that advice may be sought and provided. Therefore, I conclude that the document relating to the 3 September 2002 meeting is privileged from disclosure.

The 31 July 2002 meeting

40. Next I consider the documents relating to the meeting on 31 July 2002, and the dominant purpose of the discussions which took place at that meeting. While I accept that part of the purpose of the communications at this meeting was the continuum of keeping client and solicitor informed, I have concluded – in light of the privileged communications before and after the meeting – that – from the perspective of Turcan Connell – the dominant purpose of the communications at the 31 July 2002 meeting was for Tenon to present information to the Applicant.

41. Having concluded that the dominant purpose of the communications at the meeting on 31 July was not the provision of legal advice, it follows that the two documents relating to the 31 July 2002 meeting are not privileged from disclosure.

42. Insofar as either document would reveal what appears to be the giving or seeking of legal advice or the scope of that advice, and insofar as that material is not inextricably intermingled, then those parts should be redacted. However, where it is not possible to separate legal advice or the scope of the legal advice, then the privileged parts cannot be redacted.

43. I have given this aspect very careful consideration. I have eventually decided that it is not possible to extricate privileged communications from these two documents. Therefore, no part of the documents relating to the meeting of 31 July 2002 meeting should be withheld from disclosure.

The date by which disclosure should be made

44. HMRC have requested that any documents to be disclosed be provided within 30 days of the date of this decision. If I make such a direction then, if the Applicant wishes to challenge this decision, he will be obliged to make an application for permission to appeal significantly in advance of the statutory 56 day deadline for making such an application. While I understand HMRC's desire to see the two documents which I have decided should be disclosed, I do not consider it would be appropriate to shorten the time available to the Applicant to challenge this decision if he so wishes. That is particularly the case given that HMRC would still be able to wait until the 56th day if they wished to challenge this decision. It would be unfair to create that disparity between the parties.

Conclusion

45. I direct that ten of the documents are privileged and should not be disclosed. I direct that the two documents relating to the meeting of 31 July 2002 are to be disclosed by the Applicant to HMRC no later than 56 days after the date of release of this decision. If, no later than that date, an application is made to the Tribunal for permission to appeal against this decision, then the time limit for disclosure is automatically extended until 14 days after the final resolution of such an appeal.

46. 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.

JANE BAILEY

TRIBUNAL JUDGE

RELEASE DATE: 25 AUGUST 2020