



Neutral Citation: [2024] UKFTT 1101 (TC)

Case Number: TC09375

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/04587  
TC/2022/14148

*Procedure – Whether jurisdiction in relation to applications under the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 – No – Applications struck out*

**Heard on:** 12 November 2024 (with further written submissions received from the parties in relation to Rules 11 and 21 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 28 November 2024)

**Judgment date:** 6 December 2024

**Before**

**TRIBUNAL JUDGE BROOKS**

**Between**

**CASTLET HOLDINGS LIMITED**

**Applicant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Applicant: Tristan Thornton of Chancery Court Tax Chambers

For the Respondents: Shkar Kider litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was video using Microsoft Teams which, in the circumstances, was more convenient than a face to face hearing. I was referred to a Hearing/Authorities Bundle comprising 434 pages together with four additional authorities. Subsequent to the hearing, on 13 November 2024, I requested further written submissions from the parties in relation to Rules 11 and 21 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. These were received on 28 November 2024.

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.

### BACKGROUND

3. Third Party Information Notices, issued by HM Revenue and Customs (“HMRC”) pursuant to paragraph 2 of schedule 36 to the Finance Act 2008, and having been approved by the Tribunal, were served on Nicholas & Co Solicitors Limited (“Nicholas”) and Circleplane Limited (“Circleplane”) on 21 September 2020. These Information Notices required the production, by Nicholas and Circleplane, of documents relating to Castlet Holdings Limited (“Castlet”). Although, on 5 November 2020, Nicholas and Circleplane did provide some documents to HMRC they also provided HMRC with schedules of 165 documents over which they claimed legal professional privilege (“LPP”). The claim for LPP was rejected by HMRC on 27 November 2020.

4. A second Third Party Information Notice, also issued by HMRC under paragraph 2 of schedule 36 to the Finance Act 2008, was served on Nicholas on 14 September 2022. A claim for LPP by Nicholas on 14 October 2022 in respect of a schedule of 14 documents was rejected by HMRC on 9 November 2022.

5. On 11 December 2020 and 28 November 2022, Castlet applied under Regulation 5(5) of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009, for the Tribunal to consider and resolve the dispute as to whether the documents requested in the Third Party Information Notices issued to Nicholas and Circleplane are subject to LPP.

6. HMRC contends that Castlet did not have standing to make these application and, as such, calls into question the jurisdiction of the Tribunal in relation to them.

7. In June 2023, Chancery Court Tax Chambers, which represented Castlet, as well as Nicholas and Circleplane, became aware that Castlet had been struck off the British Virgin Islands (“BVI”) register of companies, a process understood to be akin to dissolution in the UK, such that Castlet has ceased to exist as an entity. Accordingly, on 23 February 2024, an application was made to the Tribunal for Castlet to be substituted by Nicholas and Circleplane in the proceedings under the Regulations.

8. Before any further progress can be made in relation to these applications, and as recognised by HMRC’s cross application of 4 March 2024, it is necessary to determine:

(1) Whether the Tribunal has the jurisdiction to consider the applications, originally made by Castlet, under the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009; and if so,

(2) Whether, following its removal from the BVI register of companies, Castlet can be substituted by Nicholas and Circleplane in those applications.

9. Given the change in circumstances since the applications were made by Castlet (ie its removal from the BVI register), it is accepted that if the Tribunal has jurisdiction, a substitution has become necessary and that the Tribunal may direct accordingly under Rule 9(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, (Substitution and addition of parties).

10. As such, the real dispute between the parties is in relation to the jurisdiction of the Tribunal, in particular whether Castlet is a ‘person acting on behalf’ of Nicholas and Circleplane for the purposes of Regulation 5(5) of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (which is set out below).

#### LAW

11. All subsequent references in this decision to:

(1) Paragraphs are, unless otherwise stated, are to paragraphs of Schedule 36 to the Finance Act 2008;

(2) Regulations are, unless otherwise stated, to those contained in the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (the “Regulations”); and

(3) Rules are, unless otherwise stated, to the those contained in Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

12. Under paragraph 2, HMRC may issue an Information Notice (with the approval of the Tribunal) to a third party to provide information or produce a document if the information or document is “reasonably required” for the purpose of checking the tax position of another person (“the taxpayer”) whose identity is known to the HMRC.

13. However, paragraph 23 provides that an Information Notice does not require a person to provide privileged information or part of a document that is privileged.

14. Paragraphs 23(2) and (3) provide:

(2) For the purposes of this Schedule information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.

(3) The Commissioners may by regulations make provision for the resolution by the tribunal of disputes as to whether any information or document is privileged.

15. The Regulations were made by HMRC under the power granted by paragraph 23(3). They apply where there is a dispute between HMRC and a person to whom an Information Notice has been given during the course of correspondence as to whether a document is privileged (see Regulation 3(a)).

16. Regulation 2 includes the following definitions:

a “**person acting on behalf of**” a taxpayer or a third party means any person who is acting on behalf of a taxpayer or third party in relation to an information notice;

“**Schedule 36**” means Schedule 36 to the Finance Act 2008;

“**taxpayer**” means a person who is given a notice under paragraph 1 of Schedule 36;

“**third party**” means a person who is given a notice under paragraph 2 or paragraph 5 of Schedule 36;

17. Regulation 5(1) sets out the procedure to be followed where there is a dispute as to whether a document or information is privileged which arises, as in this case, during the course of correspondence. Regulation 5 continues:

(2) On receipt of the information notice, the taxpayer, third party or person acting on their behalf shall—

(a) by the date given in the notice for providing information or producing documents, specify in a list each document, required under the information notice, which is in dispute, with a description of the nature and contents of that document;

(b) serve that list on HMRC.

(3) But no description of a document or type of document is required where such description would itself give rise to a dispute over privilege.

(4) Within twenty working days of receiving the list referred to in subparagraph (2), HMRC must notify the person who served the list of any documents on the list that it requires to be produced and which it considers are not privileged.

(5) On receipt of notification under paragraph (4), the taxpayer, third party or person acting on their behalf must make an application to the First-tier Tribunal to consider and resolve the dispute and must include copies of the documents which remain in dispute with that application.

(6) The taxpayer, third party or person acting on their behalf shall provide HMRC with proof of service under paragraph (2)(b).

(7) Service for the purposes of paragraph (2)(b) must take place within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days after the date given in the notice for providing information or producing documents.

(8) An application under paragraph (5) must be made within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days of the date of the notification required under paragraph (4).

18. Where the Tribunal receives a valid application under Regulation 5 it must, under Regulation 8, resolve the dispute by confirming whether and to what extent the document, is or is not privileged and, if not privileged, direct which part or parts of a document (if any) shall be disclosed.

19. The Tribunal must, pursuant to Regulation 9, also ensure that any document in dispute, or any copy of such document, is not inappropriately disclosed to any person pending its consideration of the status of that document.

20. Given the existence of this statutory procedure for resolving disputes about LPP, the Tribunal is precluded, by Rule 5, which applies subject to the provisions of Tribunals, Courts and Enforcement Act 2007 and “any other enactment”, from exercising its case management powers to direct a hearing to determine the LPP dispute without reference to the Regulations (see *Draffan & Ors v HMRC* [2022] UKFTT 92 (TC) at [68]).

21. However, there is no such limitation on Rules 11 and 21 which, insofar as applicable, provide:

## **Representatives**

11.—(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.

(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

...

(7) In this rule “legal representative” means a person who, for the purposes of the Legal Services Act 2007 is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act, ...

## **Starting proceedings by originating application or reference**

21.—(1) Where an enactment provides for a person or persons to make an originating application or reference to the Tribunal, the appellant must start proceedings by providing an application notice or notice of reference to the Tribunal within any time limit imposed by that enactment.

(2) The application notice or notice of reference must state—

(a) the name and address of the appellant;

(b) the name and address of the appellant's representative (if any);

(c) an address where documents for the appellant may be sent or delivered;

(d) the name and address of each respondent (if any);

(e) the facts relevant to the originating application or reference;

(f) the result the appellant is seeking (if any); and

(g) the grounds for making the originating application or reference. ...

22. It is clear from the decision of the Upper Tribunal in *HMRC v HOK Limited* [2012] UKUT 363 (TCC) at [50], that the jurisdiction of the First-tier Tribunal is limited to those functions conferred on it by statute and that:

“It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct.”

23. If the Tribunal does not have jurisdiction in relation to the proceedings it must strike out those proceedings under Rule 8(2)(a).

## DISCUSSION AND CONCLUSION

24. In the present proceedings there is clearly a dispute that has arisen during the course of correspondence in relation to whether documents are privileged. It is also clear, from paragraph 23(3) that the purpose of the Regulations is to provide a procedure for the resolution by the Tribunal of such disputes.

25. It is common ground that, having received Information Notices under paragraph 2, both Nicholas and Circleplane are “third parties” as defined by Regulation 2 and that each would, in that capacity, have been entitled to make an application under the Regulations although neither did so within the Regulations strict time limits.

26. As a result, there is an issue between the parties in relation to the scope of Regulation 5(5), in particular what is meant by a “person acting on their behalf”, and whether it entitles Castlet to make an application to the Tribunal on behalf of Nicholas and Circleplane in this case.

27. Although the expression “acting on their behalf” has not been judicially considered in the context of the Regulations, it was considered by the Upper Tribunal in *HMRC v Hicks* [2020] UKUT 12 (TCC) in relation to s 29(4) of the Taxes Management Act 1970 in the context of whether an insufficiency of tax “was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.”

28. The Upper Tribunal noted:

“122. There is an issue in the present case as to the application of the phrase ‘a person acting on his behalf’ in section 29. The FTT considered the decisions in *Bessie Taube Discretionary Settlement Trust (Trustees of)* [2010] TC 00735 (Judge Berner and Mrs Stalker) and *Atherton* [2017] TC 05556 (Judge Mosedale and Mr Barrett). Earlier in our decision, we have described the approach of the FTT in relation to these two cases. We agree with the FTT that the legal test to be applied is the test stated in *Bessie Taube* at [93]:

‘... In our view, the expression “person acting on ... behalf” is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer’s behalf. In our judgment the expression connotes a person who takes steps that the taxpayer himself could take, or would otherwise be responsible for taking. Such steps will commonly include steps involving third parties, but will not necessarily do so. Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer.’

123. Mr Gordon [counsel for the taxpayer] cited *Gaspert Ltd (formerly Saga Petroleum (UK) Ltd) v Elliss* [1985] BTC 450 (Peter Gibson J) and [1987] BTC 218 (Court of Appeal) for the proposition that ‘on behalf of’ is narrower than ‘for the benefit of’ or ‘in the interest of’. We agree with that proposition. A similar conclusion was reached in *R (on the application of S) v Social Security Commissioner* [2009] EWHC 2221 (Admin); [2010] PTSR 1785, approved by the Court of Appeal in *Rochdale MBC v Dixon* [2011] EWCA Civ 1173; [2012] PTSR 1336. These last two cases were not cited to us but as they are in line with the authority of *Gaspert Ltd v Elliss*, which was cited, it was not necessary to invite submissions in relation to them.”

29. For Castlet, Mr Thornton contends that the construction of the expression “acting on behalf” by the Upper Tribunal in *Hicks* was too wide. He referred to the authorities cited in *Hicks*, in particular *Rochdale Borough Council v Dixon* where Rix LJ (with whom Rimer and Elias LJ agreed) referred, at [49] to *R (on the application of S) v Social Security Commissioner*, in which:

“... Sir Thyne Forbes held that “on behalf of” in para 4(10) of Sch 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 was to be given the meaning of “in its place” or “instead of” rather than “for the benefit of” or “in the interests of” or as expressive of agency. At para 27 he referred to a wealth of authority in this country and in Australia as to the possible meanings of the phrase, and at para 28 wrote in seeming approval of the parties’ common ground conclusions, based on those authorities, to the effect that –

‘the key principles to be derived from the various cases in which the words ‘on behalf of’ have been considered are as follows: (i) the phrase ‘on behalf of’ does not have a fixed meaning, it is not a term of art; (ii) the phrase is capable of bearing a wide range of meanings; and (iii) it will take its meaning in any particular case from its statutory context.’”

30. Rix LJ continued, at [50]:

“Those conclusions seem correct to me. Indeed, I would include the simple preposition “for” as one of the possible meanings. ...”

31. Mr Kider, for HMRC, contends that in addition to taking steps that a third party themselves could take, as identified in *Hicks*, for a person to be acting “on behalf of another”, it is also necessary for there to have been some sort of relationship between them, such that the person was acting on the authority or in accordance with the instructions of the other party.

32. He says that in this case, it is only Chancery Court Tax Chambers that is in that position and that this is clear from the applications dated 11 December 2020 and 28 November 2022. In particular he refers to paragraph 5 of the December 2020 application. This states that the application was “submitted on behalf” of Castlet, “in order for it to have its LPP rights over documents held by Nicholas & Co Solicitors and Circleplane Ltd confirmed.” I note that paragraph 3 of the November 2022 application is in almost identical terms, save that it refers only to documents held by Nicholas.

33. However, as Mr Thornton correctly points out, both applications ask that the Tribunal “recognises and confirms the Applicant’s [ie Castlet’s] LPP rights in the material provided and confirms the Applicant’s and its lawyers’ understanding that provision of this material is not required under the information notices.”

34. It is accepted that the applications were submitted to the Tribunal by Chancery Court Tax Chambers as representative agents of Castlet. As it is trite law that anything done by an agent on behalf of their principal is considered as done by the principal, Mr Thornton contends that by seeking confirmation that Nicholas and Circleplane need not disclose the documents to HMRC under the Information Notices it was also implied that Castlet was submitting the applications on their behalf and, as such, Castlet is brought within the definition of “any persons acting on their behalf”.

35. Having carefully considered the submissions of the parties, including those provided at my request subsequent to the hearing, in relation to Rules 11 and 21, I have come to the conclusion that, for the purposes of the Regulations, the legal test should, in addition to taking

steps that a taxpayer or third party could themselves take (as in *Hicks/Bessie Taube*) it is necessary for the person “acting on their behalf” to establish they have the authority to do so.

36. I find support for such a construction of Regulation 5(5) in the Tribunal Procedure Rules, particularly Rule 11(2), which requires a party (or legal representative) to notify the Tribunal and each party of the name and address of any representative that party has appointed, and Rule 21(2)(b), which requires an originating application made under an enactment to state the name and address of the applicants.

37. In both cases, compliance with the Procedure Rules would have effectively established that a representative was not only acting on behalf of a party but was doing so with that party’s authority.

38. However, in the present proceedings neither the Tribunal nor HMRC have been notified of any appointment of Castlet by either Nicholas and/or Circleplane as their representative as required by Rule 11. Also, there is nothing in the applications of 11 December 2020 and 28 November 2022 to suggest that Castlet, through its representative Chancery Court Tax Chambers, is the representative of Nicholas and/or Circleplane in these proceedings contrary to Rule 21(2).

39. Although a failure to comply with the Tribunal Procedure Rules “does not of itself render void the proceedings or any step taken in them (see Rule 7), in the absence of evidence that Castlet had the authority to act as the representative of Nicholas and/or Circleplane, which would not have been the case had there been compliance with Rules, I am unable to find that it was acting on their behalf when making the applications under Regulation 5(5).

40. It therefore follows that as the applications were not made by a the taxpayer, third party or someone acting on their behalf, as defined by the Regulations, the Tribunal does not have the jurisdiction to determine the application. Given the absence of jurisdiction Rule 8(2)(a) gives me no choice other than to strike out the applications.

41. Therefore, for the reasons above, the applications are STRUCK OUT.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

42. 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.

**Release date: 06<sup>th</sup> DECEMBER 2024**