



Case Number: UT/2024/000060

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Remote video hearing

JUDICIAL REVIEW – DISCLOSURE – Claimant’s interlocutory application for disclosure of documents (internal discussions and communication in run- up to issue of HMRC decision letter to refuse out of time claim) - documents not necessary for fair and just resolution of issues in case – application dismissed

Heard on: 6 September 2024
Judgment date: 7 October 2024

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Between

THE KING (on the application of)
RETTIG HEATING GROUP UK LIMITED
(IN LIQUIDATION)

Claimant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Defendants

Representation:

For the Claimant: Michael Firth KC, counsel, instructed by Joseph Hage Aaronson LLP

For the Defendants: Malcolm Birdling and Laura Ruxandu, counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

DECISION

INTRODUCTION

1. This decision concerns the claimant's application for disclosure of documents from HMRC, the defendants to the claimant's judicial review claim. The judicial review challenges HMRC's refusal to exercise their discretion under s460 Corporation Tax Act 2009 to extend a time limit for the claimant to make a set-off claim in respect of profits relating to overseas dividends. The claimant's grounds of challenge include that HMRC failed to take relevant considerations into account and that they made various errors of law in interpreting their own Statement of Practice (5/01) ("**the SP**") which dealt with HMRC's approach to similar such time extension applications.

2. The claimant's current application seeks disclosure of the internal discussions and considerations undertaken by HMRC in the run-up to HMRC's issue of a decision letter 5 January 2024 refusing the exercise of its discretion, arguing the disclosure is required for the fair and just determination of its judicial review grounds. Central to the claimant's case is its submission that HMRC misunderstood the duty of candour under which it is argued HMRC should have disclosed everything relevant to HMRC's decision making process. HMRC object to disclosure on the basis the disclosure is not necessary to determine the issues raised in the judicial review. Their position is that the 5 January 2024 letter sets out the entirety of HMRC's decision and the success of the judicial review claim will stand or fall by reference to the reasoning in that letter and the interpretation of the SP and that they have complied with their duty of candour.

BACKGROUND

3. The underlying judicial review claim is brought with the permission of the Administrative Court, and was transferred to the Upper Tribunal on 14 May 2024. The substantive hearing is due to take place in February 2025. There is much legal and procedural history to the claim. The long-running litigation in relation to the taxation of foreign dividends (the Franked Investment Income cases (*FII litigation*) before the CJEU and in the UK courts forms part of the backdrop to the claimant's time extension request. There were also multiple exchanges between the parties in the run up to and post-dating the claimant's commencement of the judicial review claim on 8 June 2023. I do not attempt to reflect that detail here but in the following paragraph merely outline, in the broadest way, the background to the dispute as explained in the claimant's grounds in order to put the submissions and issues regarding the disclosure application before me in context.

4. During the accounting period ended 31 December 2002, the claimant received dividends from a foreign subsidiary. It filled in its tax return for that period on the basis the foreign dividends were exempt. Not having profit of its own, it surrendered a non-trading loan relationship deficit ("**NTRLRD**") it had to another group company amending its own return accordingly. HMRC later opened a statutory enquiry into the claimant's return. As regards the claimant's treatment of overseas dividends, it was later established as a result of court decisions, that the UK was *not* required to *exempt* overseas dividends from UK tax but instead had to provide a credit for foreign tax at the foreign nominal rate. Applied to the claimant's case, it turned out that foreign tax credit did not extinguish the UK tax the claimant was liable for on the foreign dividends (the foreign nominal credit rate of 10% being below the UK corporation tax rate). The claimant therefore asked HMRC, in a letter of 11 March 2021, to reduce (by £822,928) the NTRLRD sum which the claimant had previously surrendered to its group company, and instead use the sum to set off against the amount which the claimant was now taxable for.

5. HMRC refused the claim to set-off the NTLRD on the basis the claim had not been made within two years of the relevant period (i.e. by 31 December 2004). It also refused to exercise its discretion to extend the time limit. Its reasons included that the claimant's case did not fall within the SP¹. The SP contained a section on HMRC's approach to extending time limits for claims in which HMRC recognise that "there may be exceptional reasons why a claim is not made within the time specified". The SP goes on to specify that applications to HMRC should be considered with the assistance of various criteria and that in general HMRC's approach will be (as set out in paragraph 10):

"...to admit claims which could not have been made within the statutory time limits for reasons beyond the company's control. This would include, for example, cases where:

- at the date of the expiry of the time limit, the company or its agents were unaware of profits against which the company could claim relief
- the amount of a profit or loss depended on discussions with an inspector which were not complete when the time limit expired, and the delay in agreeing figures is not substantially the fault of the company or its agents

In such cases the Commissioners for HMRC's approach will be to admit late claims up to the amount of the profit or loss in question."

6. HMRC's decision letter of 5 January 2024, written by Sinead Murphy, tax specialist, responded explaining why it considered the circumstances in the various SP paragraphs were not met. In relation to paragraph 10 of the SP, Ms Murphy stated:

"In its original company tax return filed on 31 March 2004, [the claimant] treated its overseas dividends as taxable. Later, on 22 December 2004, it amended its tax return to treat the overseas dividends as non-taxable. That change indicates that [the claimant] had some doubt as to the treatment of the overseas dividends when the time limit expired (31 December 2004). That means that paragraph 10 of SP5/01 is not met, because [the claimant] was aware that there could have been profits against which [the claimant] could claim relief.

23. [The claimant] did not make a claim for double tax relief ("DTR") in its amended return, contrary to the assertion in your letter dated 13 November 2023. On 31 March 2010, and to protect its position. [The claimant] made a DTR claim under separate cover. This indicates that they were aware of the dividend income that should be brought into charge following the outcome of the ongoing legislation."

7. In the letter Ms Murphy also explained HMRC's view that paragraph 13 of the SP did not apply. That paragraph provided that an application should be made as soon as possible and mentioned that delay after the circumstances which had caused the claim to be late ceased could result in rejection of the claim. HMRC noted judicial decisions had confirmed in October 2013 and July 2018 that foreign dividends were taxable (respectively *Prudential Assurance Company Limited v HMRC* [2013] EWHC 3249 (Ch) and *Prudential Assurance Company Limited v HMRC* [2018] UKSC 39 July 2018).

¹ HMRC point out that SP concerns to the making of amendment of claims to carry back losses claims for capital allowances and claims for group relief rather than claims to set off NTLRD but acknowledge that the statutory provisions in respect of time limits are similar and the approach in the SP is instructive.

CLAIMANT’S GROUNDS OF JUDICIAL REVIEW AND HMRC’S DEFENCE

8. For present purposes it is relevant to note the following issues raised by the claimant’s detailed statement of grounds of 9 April 2024 and HMRC’s response to those in their grounds of resistance of 30 April 2024. HMRC’s response identifies, at the outset, that the reasons for its decision not to extend time are set out in its decision letter of 5 January 2024.

Ground 1

9. Under this ground, the claimant submits that HMRC misinterpreted the reference to a company being “unaware of profits against which the company could claim relief” at the expiry of the time limit (in paragraph 10 of the SP). A company was not aware of such profits in circumstances where it considered that a sum was not a profit that was required to be brought into *the charge* to tax. That was true even if the company was not certain about such chargeability under law because of ongoing litigation or was aware HMRC might disagree. HMRC’s view that the claimant was aware that there “could have been profits against which [the claimant] could claim relief” given the claimant’s doubts as to the treatment of overseas dividends misinterpreted the unawareness requirement. HMRC submit there was no misinterpretation as paragraph 10 addresses the factual awareness of profits being in existence rather than the “conviction” of the taxpayer in the legal treatment of profits. HMRC argue the SP is only assessing the first step of taking the amount of company’s profits for the period on which corporation tax is chargeable rather than the second step of giving reliefs or set-offs available, for example double tax relief. The claimant had always known the amount of dividends and by 2018 was aware of the exact amount of profits falling within the first step of the calculation.

10. As usefully highlighted by the submissions of Mr Firth KC, who appeared for the claimant, the complaint of misinterpretation effectively incorporates two elements: 1) What test was actually applied (an issue of fact) 2) What was the correct test? HMRC’s response focusses on disputing 2) and does not elaborate on 1). (As the claimant’s pleaded reply in its claim notes, HMRC do not appear to defend the decision’s reliance on the claimant’s awareness that there “could” have been profits against which the claimant could claim relief.)

Ground 2

11. Here, the claimant submits HMRC failed to apply (or failed to apply correctly) the alternative condition in paragraph 10 of the SP that the amount of profit depended on discussions with an inspector which were not complete when the time limit had expired. The decision of 5 January 2024 failed to apply this. The alternative condition envisaged the situation here where both HMRC and claimant were awaiting the outcome of the *FII litigation* to understand what the correct taxation position for foreign dividends was. HMRC’s defence is that the claimant has misconstrued the alternative condition; the legal challenge to the tax treatment of dividends could not be described as “discussions with an inspector”. The claimant knew the amount of dividends/profits it had, that HMRC considered them taxable and the amount of profits when the question was settled by the *FII litigation* in 2018.

Grounds 3-5

12. In brief, Grounds 3 and 5 challenge the rationality of HMRC’s conclusion that the claimant’s circumstances did not fall within the SP. Ground 4 alleges various errors of law in HMRC’s analysis that the claim should have been made earlier. It also alleges that HMRC failed to take account of various considerations. I will address the further relevant detail of these grounds, and HMRC’s response to them, in the discussion section below.

HMRC OFFICER MS MURPHY’S 23 AUGUST 2024 WITNESS STATEMENT

13. In response to the claimant’s disclosure application, HMRC filed a witness statement from Ms Murphy dated 23 August 2024. Amongst other matters this addressed arguments from

the claimant that the test Ms Murphy had set out in her decision in relation to paragraph 10 of the SP was inconsistent with the “factual” awareness test HMRC had said was the correct one in its grounds of resistance. Ms Murphy’s statement explained:

“22...I do not consider...there is any inconsistency between what I have set out in the decision and HMRC’s grounds of resistance...My view was that (having considered all of the material...the claimant had provided) the claimant was aware there could have been profits against which [the claimant] could have claimed relief, as set out in the decision letter...What this means is that [the claimant] knew exactly the amount of profits it had arising from foreign dividends, meaning they had an awareness of profits being in existence.”

14. Ms Murphy also responded to the claimant’s argument that HMRC had not addressed the alternative condition in paragraph 10, maintaining that she did consider it and explaining her reasons for its rejection as follows:

“23. ...but I concluded that the company was aware of the overseas dividends as they had been included in the original tax return...Their amount did not depend on discussions...the amount of overseas dividends and thus of the profits was fixed and clear when the time limit for the claim expired.”

15. Mr Firth’s case for disclosure seizes on inconsistencies between this evidence and HMRC’s advancement of the 5 January 2024 letter as a complete and accurate record of HMRC’s decision to refuse. These inconsistencies, in his submission, justify the disclosure sought. In particular Mr Firth points out the test Ms Murphy considered she adopted (which could be described as bare factual awareness of profits existing) was inconsistent with the terms of the letter which indicated that it was awareness in relation to the *chargeability* of profits that was considered relevant. (Mr Firth highlights various references in the extract at [6] above, for instance to the dividends being “taxable”, the claimant’s doubts “as to treatment” and to such doubts meaning paragraph 10 was not met as “there could have been profits against which [the claimant] could claim relief”.) He also submits her evidence that the alternative condition *was* considered was inconsistent with the terms of the decision which did not refer at all to the alternative condition. Mr Firth made clear he took issue with the evidence but did not apply to cross-examine Ms Murphy at the disclosure application hearing on the understanding HMRC were not going to then suggest that by failing to do so the claimant would be taken to be accepting the evidence. On behalf of HMRC, Mr Birdling confirmed HMRC did not seek to suggest the evidence was admissible to supplement HMRC’s reasons in the 5 January 2024 letter; their position remained that HMRC’s case would stand or fall on the basis of the reasons set out in that letter. Mr Birdling clarified the statement would nevertheless be evidence in the judicial review proceedings, which the claimant could rely on or make such submissions on as it wished.

LEGAL PRINCIPLES

16. Mr Firth rightly points out, consistent with the explanation given *R v Secretary of State for the Home Department ex p Fayed* [1998] 1 WLR 763 at 775 C, that the acknowledged exceptionality of disclosure in judicial review proceedings arises because of the duty of candour on public authority defendants. Neither party disputes the statement of the core principles underpinning the circumstances in which a court or tribunal will grant disclosure in judicial proceedings or the content of the duty of candour (although as will be seen there is a difference of view on the precise interpretation of those principles and their application here).

17. The test for disclosure is whether in the given case, “disclosure appears to be necessary in order to resolve the matter fairly and justly” *Tweed v Northern Ireland Parades Commission* [2007] (HL(NI)) 1 AC 650 at [3].

18. The duty of candour as explained by the Court of Appeal in *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 (at [50]) is:

“... a very high duty on public authority respondents... to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.”

19. In *R (oao IAB) v Secretary of State for the Home Department* [2023] EWHC 2930 (Admin) case the Administrative Court (whose judgment was subsequently upheld by the Court of Appeal noted at [12]:

“...it is well-established that the duty of candour is an obligation of explanation rather than simply an obligation of disclosure. The substance of the obligation is well put by Sir Clive Lewis in his “Judicial Remedies in Public Law” 6th edition 2021, at paragraph 9-098. The obligation exists to ensure that a defendant explains, whether by witness statements, or the provision of documents, or a combination of both, the reasoning process underlying the decision under challenge.”

20. The duty is expressed in the relevant procedural rules and guidance applicable to judicial review proceedings in the Administrative Court, (which will have applied when the current claim proceeded there, and in relation to which I can see no obvious reason to suppose would not serve at least as guidance in the proceedings before the tribunal) are:

21. CPR 54.16 on Evidence provides:

“11.1 In accordance with the duty of candour, the defendant should, in its Detailed Grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted. [*The duty of candour is similarly described in the Administrative Court Guide (at 15.3.4)*].

11.2 Disclosure is not required unless the court orders otherwise.”

22. In *R (Refinitiv Ltd and others) v HMRC* (published as an annex to decision [2023] UKUT 187(TCC), the Upper Tribunal suggested, upon analysis of the various authorities it was referred to there, that the particular extent of the duty of candour, and the necessity in any given case for disclosure would be “sensitive to the particular public law issues raised”.

THE DISCLOSURE SOUGHT AND OUTLINE OF PARTIES’ SUBMISSIONS

23. Mr Firth’s essential submission is that HMRC have misunderstood the nature of their obligation under the duty of candour and that the disclosure sought simply seeks what HMRC should have provided under that duty. He says HMRC’s answer, that the decision is the decision letter is wrong. Decisions are made by persons and although the letter may be evidence, what is key is the factual matter of what was in the decision-makers mind. Moreover, here the inconsistencies between Ms Murphy’s evidence and the letter and her evidence that the alternative condition was considered when that was not apparent from the letter mean the position that 5 January 2024 letter was a complete record of HMRC’s decision breaks down. Disclosure of the material sought in respect of HMRC’s decision making process is, he submits, accordingly justified. The material was clearly necessary to fairly and justly dispose of the issue material sought as it will equip the tribunal with the best contemporaneous evidence to make the required findings of fact. Those facts include for instance the test which the decision maker used and whether the decision maker in fact considered the alternative condition.

24. As regards the scope of the disclosure sought, this was originally framed as follows in the claimant’s written application.

“notes and correspondence (including emails) recording the internal discussions and considerations undertaken by HMRC prior to communicating HMRC’s decision of 5 January 2024 refusing the Claimant’s claim concerning the interpretation and proposed application of legislation, case law (including *R (oao) GMGRM North Limited v Ritchie* [2013] EWHC 4114 (Admin); [2014] EWCA Civ 844) and HMRC published guidance and internal manuals (including Statement of Practice 5/01).”

25. At the hearing Mr Firth clarified, that in line with his oral submissions, the essential focus of the disclosure was on documents, whether internal correspondence, notes of meetings or phones calls, which showed the discussions or inputs informing Ms Murphy’s decision making process. These could be from or amongst Ms Murphy’s team or other internal HMRC teams (such as the BAI (Business, Assets and International) policy team and FIIGLO (Franked Investment Income group litigation) team Ms Murphy’s statement had mentioned communications with. Mr Firth also confirmed, in response to the concern I expressed as to the breadth of potential disclosure sought in the original application, that the relevant start point to the time period was from 8 June 2023 (when the claimant issued its judicial review claim). HMRC’s position remained that they had complied with their duty of candour: they had identified in their defence that the letter contained the reasons for the decision. When each of the judicial review grounds were analysed, it was plain the disclosure sought was irrelevant and that the disclosure sought was clearly not necessary to fairly and justly determine any of the issues.

DISCUSSION

Nature of the decision and compliance with duty of candour

26. The first issue between the parties to resolve is the different starting points they each adopt to defining the nature of the decision in respect of which the judicial review is brought. Mr Firth emphasises that a decision is taken by a person. It was the actual reasons in the decision maker’s mind that were significant. What was written in a letter might be evidence of what was in the decision maker’s mind but the letter was not the decision. By contrast, the starting point for HMRC’s submissions was that the decision was the decision letter and the lawfulness of the decision stood or fell by it. It did not therefore matter what an internal colleague may have said in an e-mail or memo to the decision-maker; what mattered was what was actually concluded as ultimately recorded in the decision letter. In support, and by way of example of the centrality of the decision letter, HMRC referred to *Friends of the Earth Limited v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 3255 (KB) a decision of the Administrative Court (Sir Duncan Ouseley). The background facts concerned judicial review proceedings against a grant of planning permission in relation to a planning matter the Secretary of State had called in. The Secretary of State had issued a 15 page Decision Letter in which he had accepted the recommendations of a planning inspector who had prepared a more detailed report. The claimant sought disclosure of policy advice given to the Secretary of State in a ministerial submission. The court’s decision refused the application emphasising the Secretary of State “must stand or fall by his reasoning” and rejected the suggestion the submission might have illuminated the mind of the Secretary of State explaining that “If the illumination were important, it would be in the Decision Letter” ([34]).

27. In agreement with Mr Firth, it is important to recognise the pre-eminence accorded to the Decision Letter and inspector’s report there was however rooted in the particular statutory duty that arose in that planning context for the decision letter and inspector’s report to provide the complete reasoning (see [6]). Mr Birdling argued that did not restrict the ambit of the principles to be drawn from the case as, although there was no statutory duty to give reasons, HMRC accepted they were under a common law duty to give reasons. But if that were right it does not seem to me the court would have gone to the trouble of mentioning on the specific duty to give

reasons in the way it did. The court also mentioned (at [7]) that “the planning statutory duty to provide reasons, as developed by well-known judicial authority, encompasses and embodies the duty of candour”. Mr Birdling also suggested such authority applied equally to adequacy of reasons more generally. However, again it is difficult to see why the court would have specifically mentioned the statutory duty to encapsulate reasons in certain documents. It does not appear to me the court was not suggesting that the common law duty to give reasons was necessarily exhaustive of the duty of candour generally.

28. I do not therefore take from *Friends of the Earth* that decision letters have some special significance as an embodiment of reasons. The specific statutory planning context is also why certain later statements that it was hard to see how the ministerial submission in that case would be useful let alone necessary, and warning of the “risk of collateral distractions” when interpreting critical documents indirectly ([10] –[12]) were not laying down general propositions that documents extraneous to the written decision should be seen as inherently irrelevant. It is clear, even in the planning context relevant in *Friends of the Earth*, that disclosure will depend on the particular facts and circumstances and what is in issue in the case. I therefore do not rule out, in principle, the need to consider what reasons were in the decision makers mind, but consider that as Mr Firth’s submissions rightly acknowledge, the decision letter may constitute evidence of that. Nevertheless, it can still be the case that, on the given facts of the case, a letter setting out the decision will represent a complete expression of the reasons. That is the position HMRC take here. I do not see that in the circumstances of this case that position falls short of HMRC’s duty of candour. They have explained in their grounds of resistance, as they are entitled to (according to the CPR Rule and the Administrative Court guidance referred to above) that the reasons for HMRC’s decision are set out in the 5 January 2024 letter. While Mr Firth emphasised the fact the duty covering the “decision making process” and the reference to “underlying” reasoning I do not consider these terms necessarily connote a duty to explain the considerations and discussions which took place prior to the decision to refuse. Rather, those terms are directed to the duty on the authority to explain what *the reasons* for the decision were together with any relevant facts. That is consistent with the reference endorsed in the *IAB* case to the “reasoning process” and to the CPR’s reference to “reasoning” (at [19] and [21] above). It is also consistent with the case-law seeking to capture the broad diversity of public decision making which might include decisions and measures where an action is taken but the reasons are not apparent and the public authority needs to identify and explain what they are. Similarly the reference to reasoning “underlying” the decision does necessarily cover a duty to explain what led to the decision (in terms of all the run up considerations and discussions). It can simply refer to having to explain what the reasons for the decision are. That is not to say there would not be cases where the duty to explain the decision making process or relevant facts would extend to needing to address the various steps taken, and discussions and considerations prior to the decision (for instance where there are allegations of bias, failure to consult, or improper purpose).

29. Mr Firth also suggested that HMRC’s position that it is was not necessary to provide a witness statement and their reliance on a briefly worded document recording the decision did not amount to compliance with their duty. However, consistent with the extract from *IAB* and the CPD and Administrative Court Guidance above, there is nothing which dictates that the defendant public authority’s compliance must involve preparing a witness statement. Also, if the actual reasons for the decision happen to be brief (I would not for my part describe those set out in the 5 January 2024 that way) that would not indicate the duty of candour had not been complied with. The duty would be to identify that those brief reasons were the reasons. (If the brevity of those reasons was so as to render them inadequate then that could then constitute a separate ground of challenge.)

Inconsistencies mean disclosure appropriate?

30. A fundamental point the claimant now raises, following production of Ms Murphy's witness statement in the weeks preceding this disclosure hearing, are the inconsistencies between that and the terms of the 5 January 2024 letter. Looking at the statement and the terms of the letter I agree that Mr Firth is right to identify the difficulties that he does in relation to a factual awareness test being adopted and whether the alternative condition in paragraph 10 was considered. I should emphasise that I make no findings of fact on what is said in the evidence but simply observe the inconsistencies Mr Firth raises as between the statement and letter are ones which are apparent from the face of those of two documents.

31. Mr Firth then argues it is sufficient that the apparent inconsistencies undermine the premise that the 5 January 2024 letter is a full record of the decision and that therefore and order for the disclosure sought is appropriate. It is suggested that this must follow as a matter of law. In support, Mr Firth relies on the discussion in *Tweed* (at [56]) which explained that while previous case-law had required it to be shown that there was an inconsistency, contradiction or incompleteness in the public authority's evidence before disclosure will be ordered, the time had come to do away with that and apply "a more flexible and less prescriptive principle". Mr Firth argues that *ex hypothesi* disclosure should be ordered if it can be shown the decision letter is inadequate or incorrect. I do not agree that necessarily follows. As made clear in the remainder of the extract relied on in *Tweed*, applying the "flexible and less prescriptive principle" meant "leaving the judge to decide upon the need for disclosure depending on the facts of each individual case." That does not suggest any automatic order for disclosure where inconsistencies were shown but reinforces the fact sensitive nature of the question of whether disclosure is necessary for the fair and just resolution of the matter in question. The fact there is an inconsistency would not remove the need to explain, *why* in the light of any inconsistency the disclosure sought would be necessary. It must also be recognised that, here, the statement on which it is said the decision is incomplete is one which the claimant has indicated it has concerns over and one which HMRC acknowledge is not admissible as regards the reasoning for HMRC's decision. Those circumstances are not ones which suggest to me disclosure should be ordered without further inquiry into whether the particular disclosure sought is necessary to resolve matters fairly and justly. That will require identification of the matter in question and analysis of what is in issue between parties as revealed by the parties' respective positions on the judicial review grounds (detailed above).

Whether disclosure necessary to resolve issues fair and justly in relation to issues raised

32. As regards **Ground 1**, it appears to me that the scope of dispute is very much centred on the correct *test* of awareness. It is this which HMRC's defence concentrates by disputing the claimant's interpretation of the test suggested by the SP (that it is to do with the taxpayer's "conviction" as to chargeability of tax) and instead advancing a "factual" basis test. HMRC do not appear to me to defend the case on the basis such test was actually applied by HMRC when making its decision (merely that it is clear the unawareness test is as a matter of fact not satisfied). Even if that were a basis of defence, then given the stance HMRC have taken they would have to rely on the terms of the 5 January 2024 letter to make that good (as mentioned they do not advance Ms Murphy's evidence for that purpose). If the Upper Tribunal panel hearing the substantive matter were to agree with HMRC's factual awareness test, the claimants in my view already have a good prospect, on the wording of the 5 January 2024 letter, of showing that that was not the test actually applied. I would not expect this to raise difficult questions of interpretation in relation to which the pre-decision communications and discussions to Ms Murphy would be needed to shed light. I am not accordingly persuaded that disclosure of the discussions and considerations in the run up to 5 January 2024 letter are necessary to resolve the matter of what test was in fact actually applied fairly and justly.

33. A very similar analysis applies for **Ground 2** and the factual issue raised there of whether the alternative condition was considered. HMRC's case is that the condition is not met on the facts. They do not appear to me to argue that the alternative condition was in fact considered. Again the absence of any mention in the letter of such consideration, and HMRC's position that they are only relying on the terms of the letter to evidence the reasoning process, mean that the claimant already has a good prospect of persuading the tribunal hearing the substantive matter that the alternative condition was not in fact considered. It is difficult therefore to see therefore how it can be said the disclosure sought is necessary to resolve the matter fairly and justly.

34. Mr Firth suggested it was wrong to interpret the reference in *Tweed* to "necessary" in this way. There was nothing different in judicial review proceedings when it came to establishing the relevant facts. The tribunal should be equipped with the best evidence, which on well-established authority, involved looking at the kind of contemporaneous documents informing the decision making process which the claimant now sought. In my view it is not possible to downplay the need to show the disclosure is necessary. It is notable that when, in *Friends of the Earth* the court was discussing the general principles set out by the *Tweed* test the court specifically emphasised the term "necessary" in the test (at [16]) (clarifying in subsequent passages the test was not one of determinacy ([19]) nor was it of relevance in the sense the claimant there suggested of being "related to the issue" (see [21])). The reference to disclosure being "necessary..." in my view can readily accommodate considerations of the likely significance the disclosure sought will make to resolution of the issues before the tribunal.

35. As regards any imperative to ensure the best evidence to resolve the issue of fact was obtained, that is not how the disclosure test has been expressed. So far as the particular issues for resolution here are concerned, the Upper Tribunal panel hearing the substantive matter will not be "speculating in a vacuum" but will have recourse to the letter of 5 January 2024 setting out HMRC's decision. That self-evidently is contemporaneous evidence of the decision. Mr Firth also highlighted statements by the Administrative Court in *R (oao Unison and others) v Secretary of State for Business and Trade* [2023] EWHC 1781 (Admin) (at [66]) where it was noted by way of criticism of the defendant public authority's evidence there that, given the duty of candour, it should not have been necessary for the court to carry out "detective work" or "reading between the lines" or make inference from silence. However as Mr Birdling indicated, those criticisms need to be seen in the particular context of the facts in that issue in that case (an alleged failure in consultation where a key issue was whether there had been consideration of the product of consultation by the Secretary of State personally). As explained later in [66], the duty of candour in that context "required a departmental witness statement to set out in clear terms what material was seen by the Minister and what was not". The witness statement the court was critical of did not provide that clarity however talking instead in general terms about matters seen or considered "the Government". Here, neither of the issues of fact under Grounds 1 and 2, in my view, taking account of the positions adopted by the parties on those issues, will involve the same kind of difficulties encountered in *Unison*.

36. Under **Ground 3** the claimant submits that HMRC's decision that the facts here did not fall within the SP was irrational and that any reasonable inspector diligently considering the would have to conclude the claim out to have been admitted in the light of various points the ground then goes on to elaborate. In their pleaded defence, HMRC disagree, responding to each of the claimant's points. The irrationality alleged is founded of number of facts in relation to which a reasonable inspector considering the SP would conclude the claimant's circumstances were ones in which HMRC ought to admit the claim. The ground does not rely on what was in fact considered by Ms Murphy and HMRC's response does not address the ground in those terms. HMRC's defence puts forward various points in respect of which it is said the threshold

for irrationality is not made out. Their response to the facts raised by the claimant is to dispute their relevance to HMRC's refusal. It is difficult to see therefore how discussions or input into the decision making process which led to Ms Murphy producing the 5 January 2024 letter would inform the separate questions of whether the facts relied upon by the claimant meant the conclusion to refuse the claim was irrational in the light of such facts.

37. **Ground 4** submits HMRC made errors of law in concluding that the claim could/should have been made earlier than it was. The claim could not be quantified until the foreign notional rate was agreed and there was nothing to set the NTLRD against until HMRC had brought the overseas dividends into account which they had not done. The ground also submits that HMRC's conclusion also failed to take into account various relevant considerations which are then further specified. HMRC's response is that all are irrelevant (albeit that in relation to one point regarding a Brief HMRC issued in January 2020, that point is made under Ground 3). Apart from mentioning that the date of the January 2020 Brief was referred to in the decision and therefore in contemplation there is no suggestion the various matters were considered.

38. The points for the Upper Tribunal to resolve will principally concern the relevance of the points advanced. To the extent it becomes necessary for the Upper Tribunal to reach a view on whether the January 2020 Brief was in fact considered, I do not see any great difficulty with it being able to reach a view on that on the basis of looking at the 5 January 2024 letter. It would certainly be open to the tribunal to conclude a reference without further mention did not mean it was considered. It is difficult to see that notes of internal communications preceding the 5 January 2024 will throw any further significant light on the fact.

39. **Ground 5** is that taking account the above factors HMRC reached an irrational conclusion and there was no breach of the requirement the claim should be made "as soon as possible". HMRC suggest does not come close to high threshold and irrationality challenge requires. Mr Firth submitted this arose out of whether HMRC took all relevant considerations into account and applied the right test. He argued the claimant needed to fully understand the decision making process and the reasons underlying the decision to properly put that into context. That does not reflect how the ground is put however. The irrationality is predicated on establishing various matters and then submitting that, given those, the conclusion is irrational. The irrationality is not dependent on showing whether or not in fact Ms Murphy considered such factors and what she made of them.

40. I am not therefore persuaded, as regards each of Grounds 3 to 5, the disclosure sought is necessary for the fair and just resolution of the relevant issue.

41. Finally, Mr Firth suggested refusal of the disclosure request would set a precedent that it would in future cases be sufficient to simply disclose the decision letter without any further evidence or explanation. I do not agree. I have already rejected the view that simply by virtue of reasoning being contained in a decision letter it will be enough to say that that is all that is relevant (particularly where there is no statutory duty to set full reasons out in such letter). Whether it is correct to say the reasoning is contained in a decision letter and the question of what facts are relevant will plainly need to be considered on a case by case basis by those charged with carrying out the "high duty" of candour.

CONCLUSION

42. For all the reasons above, the claimant's request for disclosure is refused.

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Release date: 07 October 2024