

Timing matters

Cider of Sweden Ltd shows that the timing of a third party's application for disclosure of documents relating to a case before the FTT will be important to its chances of success.

When third parties can get hold of documents in tax cases is often a key consideration for clients. The decision of Tribunal Judge Kevin Poole, sitting in the FTT in *Cider of Sweden Ltd v HMRC and Ernst & Young LLP* [2022] UKFTT 76 (TC), is likely to be welcomed. The FTT dismissed EY's third party application for disclosure of documents (including the notice of appeal and supporting grounds, HMRC's statement of case and any further pleadings) that EY had identified following disclosure of court documents in parallel High Court proceedings (using CPR 5.3C(1)). In rejecting EY's arguments, the FTT applied the leading Supreme Court decision of *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 and summarised certain general principles, including:

- The 'open justice' principle applies to all courts and tribunals exercising the judicial power of the state, including the FTT.
- All courts and tribunals (including the FTT) have inherent jurisdiction to determine what the principle requires in terms of access to documents or other information;
- The extent of any access permitted by procedure rules is not determinative (unless they contain a valid prohibition).
- When access is sought, the court or tribunal must consider whether granting the access sought would advance the overall purpose of enabling the public to understand and scrutinise the justice system of which the courts are the administrators. This has two main facets (which are not mutually exclusive): (i) to enable public scrutiny of the way in which courts and tribunals decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly; and (ii) to enable the

public to understand how the justice system works and why decisions are taken. For this, they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.

- It is for the third party to explain why they seek access and how granting access will advance the principle of open justice. There is no 'right' to access (except where the rules provide it) and the third party must show a legitimate interest in doing so.
- Upon a third party request for access, the court or tribunal should carry out a fact-specific balancing exercise including (i) how the grant of access will advance the open justice principle; (ii) the risk of harm to an effective judicial process or to the legitimate interests of others; and (iii) the practicalities and proportionality of granting the request.
- The timing of any request will also be relevant, as Judge Poole noted in this case, with the open justice principle potentially being more obviously served by allowing access to documents once proceedings were further progressed and/or there had been a substantive hearing (or one had been listed).
- In applying the general principles to the facts, the FTT did not consider that granting EY access to the documents at that early stage of the FTT proceedings (i.e. with no hearings yet listed) would advance the purpose of the open justice principle, but it did note this conclusion may have differed if the FTT proceedings were more progressed. Nevertheless, even if EY being granted access to the documents sought would have advanced the open justice principle, Judge Poole considered that the appellant and HMRC's own legitimate interests in keeping those documents confidential (at that stage of the FTT proceedings) outweighed EY's interest (as a third party adviser) on the facts.

In summary then, the FTT has provided further helpful clarification (in addition to *Hastings Insurance Services Ltd v HMRC and KPMG LLP* [2018] UKFTT 478 (TC)) as to the exercise of its inherent jurisdiction to grant third

parties access to documents relating to FTT appeals. The FTT has confirmed that the timing of such third party applications will be an important consideration in its assessment of the advancement of the open justice principle. Further, to the extent a fact-specific

balancing exercise is then conducted, the principle of taxpayer confidentiality (and HMRC's statutory duties in respect of the same) will be weighed against open justice advancement.

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