

Analysis

You're barred: failure to disclose in the FTT

Speed read

The case of *Ebuyer v HMRC* shows the FTT taking a tough approach to HMRC's failure to comply with an unless order requiring the disclosure of documents, resulting in HMRC being barred from proceedings. The taxpayers' ability to apply for specific directions for disclosure is an important strategic step in the context of the relatively limited disclosure obligations in the FTT. Taxpayers will be reassured by the strict approach taken by the FTT when HMRC fails to comply with directions for specific disclosure. Ultimately, the decision serves as a reminder of the importance of respecting disclosure obligations.



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It is unusual to see the FTT take a hard line against failure by HMRC to comply with directions and bar them from participating in proceedings. However, this is what happened in the recent case of *Ebuyer (UK) Ltd v HMRC* [2023] UKFTT 611 (TC) when HMRC breached an 'unless order' requiring them to disclose certain documents. As a result, although proceedings will continue, HMRC cannot play an active role and their case will be seriously disadvantaged.

It goes without saying that in most circumstances breaching an unless order is a significant matter, and where that breach involves a failure by HMRC to comply with disclosure obligations, it is particularly serious. Usually in the FTT, the parties are only obliged to disclose documents on which they rely, but it is not uncommon for the FTT to require a party to disclose documents in order to deal with cases fairly and justly.

If, as in *Ebuyer*, HMRC is directed to provide additional documents and they fail to do so, the obvious question for taxpayers is: if HMRC are not providing relevant documents when directed to do so, what relevant documents are being withheld when HMRC are under no such obligation to disclose them?

Debarring and BPP

Although it does not happen often, a decision to debar HMRC has precedent. The most well-known case is *BPP University College of Professional Studies v HMRC* [2014] UKFTT 644 (TC), in which the FTT barred HMRC from proceedings

owing to repeated failures to comply with directions, including an unless order. The case made it to the Supreme Court ([2017] UKSC 55) where it was determined that, although the debarring order was 'tough', it was not unreasonable.

Since *BPP*, there has not been a surge of cases in which the FTT taken debarring action. Although *BPP* may have prompted HMRC to take directions much more seriously, it appears that the FTT continue to reserve this power for the most egregious of cases. For instance, in *Sweby v HMRC* [2022] UKFTT 122 (TC), the FTT refused HMRC a retrospective extension of over three years to file their statement of case (which had the same effect as debarring them). This begs the question: what did HMRC do that was so serious in *Ebuyer*?

Disclosure in the FTT

First, it is helpful to understand how disclosure works in the FTT, as it is different from standard CPR disclosure.

Subject to any contrary direction, the position under the FTT rules (SI 2009/273) in standard or complex cases is that each party must list the documents on which they intend to rely or produce in the proceedings (FTT rule 27). This obligation is limited compared with standard CPR disclosure, which requires parties to disclose adverse documents.

However, this must be viewed against the wider context of the tax disputes process, in which litigation follows an enquiry by HMRC, in which documents will be obtained informally or, if necessary, formally under FA 2008 Sch 36. HMRC's powers are broad and require taxpayers and third parties to produce a document if it is reasonably required in order to check the taxpayer's position.

The assumption is, therefore, that when a dispute reaches the FTT, HMRC will have seen the relevant documents during their investigation and the more limited disclosure obligations on taxpayers will be adequate. However, this also assumes it is the taxpayer who holds the relevant documents. While that is typically the case, there are situations in which HMRC will have relevant documents that the taxpayer has not seen. This could be where HMRC have obtained documents from third parties, or where the burden is on HMRC and there are relevant internal documents, such as in cases involving discovery assessments.

Exceptions to rule 27

There are some situations where HMRC have wider disclosure obligations. A common scenario is when HMRC's decision-making is challenged by way of judicial review. In that case, the matter is outside the FTT's jurisdiction and parties are subject to a duty of candour requiring them to disclose all relevant information (including adverse documents).

Within the FTT, there are specific instances where wider disclosure may be required of HMRC. For example, the Court of Appeal has held that an amended form of standard CPR disclosure is appropriate in cases involving appeals to the FTT of decisions made by HMRC under the alcohol wholesaler registration scheme (*HMRC v Smart Price Midlands Ltd and another* [2019] EWCA Civ 841). Of wider application, the Court of Appeal has confirmed that a more general disclosure obligation may be appropriate where HMRC alleges fraud or dishonesty (in *HMRC v Citibank NA* [2017] EWCA 1416 (Civ), which was an appeal of a case-management decision in the *Ebuyer* case).

Outside of these exceptions, there are limited obligations on HMRC and so, in other cases where HMRC may have relevant documents, it can be left to the taxpayer to ask HMRC to provide relevant documents voluntarily and, if they refuse, to apply to the FTT for an order requiring disclosure (FTT rules

5(3(d) and 16(1)(b)). Although the FTT has the power to make wide orders for disclosure, in most circumstances, the request will need to be specific in order to succeed.

What happened in *Ebuyer*?

The underlying appeal in *Ebuyer* related to decisions by HMRC challenging Ebuyer's right to deduct input VAT on the basis that it knew, or should have known, that its transactions were connected with the evasion of VAT as part of a missing trader intra-community fraud. The relevant decisions were made in 2013/14, but the appeal's lengthy procedural history meant the parties were still dealing with disclosure issues in 2023.

By way of summary of the disclosure issues, Ebuyer initially applied for a direction for CPR standard disclosure. The FTT refused this application, finding that the proper course was for Ebuyer to apply for a focused direction requiring HMRC to provide certain documents. While the FTT's decision was being appealed, Ebuyer asked HMRC for disclosure of specific documents including progress logs, which were relevant to the question of whether HMRC had evidence sufficient to make the assessments over a year before they were issued (the 'time bar defence'). HMRC refused to provide the progress logs, and Ebuyer applied to the FTT for their disclosure. However, this was stayed pending determination of the outstanding appeal.

It is concerning – and can undermine trust in the system – if HMRC are taking a laissez-faire attitude towards a process that is the cornerstone of legal proceedings

Following the Court of Appeal's judgment in September 2017 (which determined that HMRC were not alleging fraud and CPR style disclosure was not appropriate), Ebuyer failed to comply with a number of directions (including an unless order), and its appeal was consequently struck out. Ebuyer applied for reinstatement and made a disclosure request on 8 March 2021. The request, again, asked for HMRC's progress logs, and also sought various categories of 'relevant' documents (defined as documents relevant to the time bar defence as well as HMRC's knowledge or communication of issues in dispute). Ultimately, Ebuyer's appeal was reinstated, and the disclosure request was endorsed by the FTT.

HMRC missed the deadline of 26 August 2021 for complying with this disclosure direction and, on 7 September 2021, made a late application for an extension to 26 October 2021. HMRC explained that there had been a change of solicitors and a lack of counsel availability. Ebuyer consented to the extension. HMRC then applied for a further three-month extension on the basis that the officer with conduct of the case was sick. Ebuyer consented so long as no further extensions were required by HMRC. The FTT was concerned about the repeated delays and issued an unless order requiring HMRC to comply with the disclosure direction by 31 January 2022.

On 31 January 2022, HMRC disclosed a number of documents to Ebuyer. However, in their accompanying letter, HMRC made it clear they had interpreted the disclosure direction narrowly and were only disclosing documents relevant to the time bar defence. As a result, Ebuyer applied for HMRC to be barred from the proceedings for breach of the unless order.

HMRC admitted that there were seven documents that should have been included in its disclosure, but that were missed as a result of the illness of the paralegal collating the

documents shortly before the deadline. HMRC otherwise maintained that the disclosure request could be reasonably interpreted as only requiring disclosure of documents relevant to the time bar defence.

The FTT was unimpressed with both HMRC's omission of the seven documents (which were progress logs) and their narrow interpretation of the disclosure direction, finding that they constituted serious and significant breaches. It was noted that Ebuyer had sought the progress logs since 2015 and HMRC were nearly nine months late under the terms of the disclosure request. As for HMRC's self-certification of 'relevance', the FTT saw little basis for HMRC restricting relevance to only one of the issues.

The FTT had little sympathy for HMRC's explanations, noting that HMRC's compliance with directions should not turn on the health of one individual days before the deadline. In considering all the circumstances, the FTT took into account Ebuyer's own failure to comply with an unless order for Covid-related reasons, but found that it had little bearing on HMRC's ongoing breach relating to the other documents.

In concluding that HMRC should be barred from the proceedings, the FTT also took into account the numerous failures by HMRC to meet the disclosure direction deadline and the poor quality of the reasons given, along with the impact the failure to disclose had on the timetable of proceedings.

Significance of *Ebuyer*

In a case like *Ebuyer* where HMRC's knowledge of certain facts is relevant but there is no allegation of fraud, it can be difficult for taxpayers to ensure they have all the relevant information.

The parties have a duty to help the FTT to further the overriding objective of enabling it to deal with cases fairly and justly (rules 2(1) and 2(4)(b)). In an ideal world, HMRC would disclose all relevant adverse documents in order to assist the FTT. In practice, taxpayers are unlikely to rely on this.

This leaves the option of asking HMRC for the documents. Our experience is that this can be effective – and it is certainly worth attempting, particularly where the taxpayer knows that HMRC has third party documents they have not been provided with. However, as *Ebuyer* shows, the documents will not necessarily be willingly provided.

The only option remaining to the taxpayer is to apply to the FTT for an order requiring HMRC to disclose documents. As can be seen in *Ebuyer*, to stand the greatest chance of success, a request needs to be specific. Of course, it can be difficult to specify a document when a taxpayer has little knowledge about what HMRC holds.

With all this in mind, once HMRC have been directed to provide disclosure, and they fail to do so, it is obvious why it is a serious and significant breach. This is particularly true of HMRC's decision in *Ebuyer* to interpret 'relevance' unreasonably narrowly. Whether or not this failure stems from HMRC being unaccustomed to disclosing documents, it is concerning – and can undermine trust in the system – if HMRC are taking a laissez-faire attitude towards a process that is the cornerstone of legal proceedings.

The FTT's decision to take the significant step of barring HMRC from participating in the proceedings shows that the FTT takes compliance with disclosure obligations very seriously. Of course, it remains to be seen if HMRC will appeal the decision and, if so, what the Upper Tribunal will have to say about the matter. ■

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► Cases: *Ebuyer (UK) Ltd v HMRC* (25.7.23)