



TC04922

Appeal number: TC/2015/07003

INCOME TAX –Taxpayer notice under schedule 36 Finance Act 2008 – purchase of business-concerns over means of purchaser-information requested to establish purchase price and sources of funds-whether information requested reasonably required to establish the Appellant’s tax position.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LILA SHERCHAN

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE MARILYN MCKEEVER
 MR TOBY SIMON**

**Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 29
January 2016**

Mr Christopher Snell, Counsel for the Appellant

**Mr Anjun Khawar, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. *Background*

2. This appeal concerns an information notice issued under Schedule 36 Finance Act 2008. Mr Lila Sherchan was employed by Best Price Retail & Wholesale Ltd. (“the Company”). On 2 August 2012, Mr Sherchan purchased the Company and became a director of it. Following submission of Mr Sherchan’s 2012/13 tax return, HMRC had concerns about Mr Sherchan’s means and the sources of the funds used to buy the Company and on 13 May 2014 HMRC opened an enquiry into Mr Sherchan’s 2012/13 tax return. In the course of the enquiry, the Appellant appointed three different agents and although some information was provided, HMRC did not consider that this was sufficient to allay their concerns. HMRC issued an information notice on 10 September 2015. The Appellant requested a statutory review and the review letter, dated 28 September 2015 upheld the notice although stating that some of the information was not required. The Appellant appealed against the notice on 3 December 2015.

3. *The facts and evidence*

4. Mr Sherchan was employed by Best Price Retail & Wholesale Ltd. from the date of incorporation in October 2009, but the Company did not commence trading until May 2010. It seems that no salary was received in 2009/10 but Mr Sherchan’s salary from the Company in subsequent years was:

- 2010/11 £9,157
- 2011/12 £21,037
- 2012/13 £33,200

5. Mr Sherchan’s 2012/13 tax return also showed bank interest of £10, but no other income.

6. The Company’s Annual Return shows that on 2 August 2012, Mr Durga Sherchan transferred all the shares in the Company to Mr Lila Sherchan and that the Appellant was appointed as the sole director of the Company in place of Mr Durga Sherchan. We were informed that the seller and buyer are not related, otherwise than in their previous roles as employer and employee.

7. The Company accounts for the year to 30 April 2013 showed a turnover in excess of £8 million. The turnover for the previous financial year was over £7.5 million.

8. HMRC opened an enquiry into the Appellant’s tax return under s9A Taxes Management Act 1970 on 13 May 2014. Initially, they asked for information about Mr Sherchan’s salary, bank interest, details of the cost of the shares and how this was funded and copies of bank statements for the year to 5 April 2013. A copy of this letter was sent to Mr Sherchan’s then agent, Chiras & Co. The Appellant sent some information and HMRC requested further details and copies of the bank statements which had not been supplied. A response was received from a new agent, Ace

Professionals (UK) Ltd on 27 October 2014. This letter stated that the cost of the shares was £140,000 but the sale price for the business was based on the balance sheet value as at 31/07/2012 which included Mr Durga Sherchan's capital investment in the business. The letter stated that the total amount payable was £186,357.17. This was
5 later revised to take account of a "stock value revisit" to £170,000. The letter enclosed a copy of the balance sheet which was dated 4 August 2012. It was signed by Mr D Sherchan above the statement "Agreed and received/will be receive the sum of £186,357.17 as per agreed terms and condition" [sic]. The balance sheet was countersigned as approved by Mr Lila Sherchan.

10 9. The letter from Ace Professionals also stated that the price was to be paid by instalments, that payments were made by drawing against the director's loan account credit balance and that the full £170,000 had been paid

15 10. The letter further referred to the fact that Mr Lila Sherchan, along with several other individuals had lent money to Mr Durga Sherchan (in Mr Lila Sherchan's case, £20,000) in order to assist with a company cash flow shortage. As the Appellant's means were already a concern, HMRC wished to have an explanation of the source of the £20,000 payment and how this was paid to the Company. HMRC were informed that only £4,000 had been provided from the Appellant's own resources and the rest came from loans to him.

20 11. HMRC also had a second balance sheet, which Mr Lila Sherchan had sent them on 6 November 2012 in response to a request by an officer of the Customs International Trade and Excise team. This was also made up to 31/07/2012. It was also dated 4 August 2012 and signed by both Mr Lila Sherchan and Mr Durga Sherchan with the same statements about receipt of the funds and the agreed terms
25 and conditions. However, this balance sheet showed a significantly different figure for stock and a value/purchase price of £286,523.

30 12. Having analysed the information received, the conflicting balance sheets and the bank statements provided, HMRC set out their further concerns and listed the missing information in their letter of 24 November 2014. HMRC's concerns/ requests may be summarised as follows:

- How had the Appellant funded the purchase of the shares in the business?
- The movements on the director's loan account. £170,000 in total had been paid to Mr Durga Sherchan out of the Company's bank account. As these payments were to discharge Mr Lila Sherchan's personal debt, they should have been
35 debited to the director's loan account. Although the agent had stated the account had never been overdrawn, in fact, it appeared to be overdrawn by nearly £70,000. This had implications for the Appellant's tax liability.
- Deposits of nearly £50,000 had been paid into Mr Sherchan's bank account, far in excess of his declared income. HMRC required explanations of these
40 deposits and also the amounts needed to meet the Appellant's personal outgoings.
- HMRC made a further request for missing bank statements.

13. The Appellant changed his agent again to asmita & associates who provided further information on 19 February 2015. This letter stated that “the sale was agreed on mutual agreement at book value, therefore no external agent was used to prepare any valuation report”. An attached schedule, showed that Mr Durga Sherchan was still owed £68,757 of the purchase price, although Ace Professionals had indicated that the price had been paid in full.

14. There was further correspondence focussing on the Appellant’s employment history, the £20,000 loan to the seller, the valuation of the business and the terms of sale, the director’s loan account and the deposits in the private bank accounts. Some further information was provided.

15. On 23 July, HMRC requested further information, in particular, seeking copies of the formal valuation of the stock. HMRC assumed that there must be such a valuation because of the precision of the figures, despite the agent’s statement that “the sale was agreed on mutual agreement”.

16. HMRC also wanted to see the “agreed terms and conditions” referred to in the balance sheet and assumed that the parties must have obtained legal advice and drawn up proper written contracts in relation to a transaction of this size. We were, however, informed that there had been no written contract.

17. Mr Sherchan appointed a further new agent, Rainer Hughes, who responded to HMRC’s letter of 23 July on 10 August, pointing out that the information requested was not part of any statutory documents and asking for detailed reasons as to why the information and/or documents were required with reference to the relevant statutory provisions.

18. On 10 September 2015, HMRC issued a formal notice under Schedule 36 Finance Act 2008 (the “information notice”).

19. The information notice required the following information and documents:

20. Items i), ii) and iii) related to loans which Mr Sherchan said had been made to him to enable him to invest in the Company. Mr Snell agreed that this information should be provided. The contested items are set out below.

21. Item iv): Statements covering the year to 5 April 2011 in respect of the bank account from which the £4,000 deposited into the Company’s bank account on 6 May 2010 was withdrawn. This related to money provided by the Appellant personally to make the £20,000 loan required for cashflow purposes mentioned above.

22. Item v): Statements for the years ended 5 April 2010 and 5 April 2012 in respect of a personal bank account with the Halifax

23. Item vi): Statements for a further Halifax bank account for the periods:

- 12 April 2010 to 5 May 2010

- 30 September 2010 to 7 October 2010
- 30 November 2010 to 3 December 2010
- 28 January 2011 to 2 February 2011
- 28 February 2011 to 4 March 2011

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24. Item vii): Confirmation who prepared the balance sheet dated 31 July 2012 in respect of the Company.

25. Item viii): The stock takers' report from which the valuation of stock of £467,601.87 was established.

10 26. Item ix) A copy of the interim accounts for the period ending 31 July 2012 together with the accountant's link papers relating to the business records and those interim accounts.

27. Item x): All other documentation used to establish the sale price.

15 28. Item xi) A copy of the terms and conditions of sale referred to at the foot of the balance sheet signed by both Mr Durga Sherchan and Mr Lila Sherchan dated 4 August 2012.

Item xii) Copies of all correspondence received from Mr Durga Sherchan relating to the outstanding sum owed to him, £68,757, in respect of the sale of the Company to Mr Lila Sherchan.

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29. Rainer Hughes requested a statutory review of the information notice, on 18 September 2015.

25 30. On 28 September HMRC sent a current view of the matter, which stated that "most of the documentation and information requested on the notice is both reasonably required and proportionate for the purposes of the enquiry...". The exception was the request for the accountant's link papers relating to the preparation of the interim accounts to 31 July 2012.

31. The statutory review was completed on 4 November and the 28 September decision was upheld.

30 32. On 3 December 2015, Mr Sherchan appealed against the information notice to the Tribunal.

33. *The law*

34. Paragraph 1 of Schedule 36 Finance Act 2008 provides:

35 "(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")-

(a) to provide information, or

(b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

5 (2) In this Schedule, “taxpayer notice” means a notice under this paragraph.”

35. The information or document may only be required if it is both “reasonably” required and required “for the purpose of checking the taxpayer’s tax position”.

36. Paragraph 58 provides that “checking” includes “carrying out an investigation or enquiry of any kind”.

10 37. Paragraph 64 defines “tax position”:

“(1) In this Schedule, except as otherwise provided, “tax position”, in relation to a person, means the person's position as regards any tax, including the person's position as regards—

(a) past, present and future liability to pay any tax,

15 (b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with [the person's liability to pay]¹ any tax,

20 and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.”

38. Paragraph 21 sets out the conditions which must be satisfied for a taxpayer notice to be valid. So far as relevant, it provides:

25 “(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that

person's income tax position or capital gains tax position in relation to the chargeable period.

(2) ...

5 (3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of—

(a) the return, or

10 (b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates (“relevant tax”),

and the enquiry has not been completed.

(5) In sub-paragraph (4), “notice of enquiry” means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

15 (6) Condition B is that an officer of Revenue and Customs has reason to suspect that[, as regards the person,]¹

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

20 (b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive....”

39. Paragraph 29 of Schedule 36 sets out the taxpayer’s right of appeal. The taxpayer may appeal against the notice itself ie may challenge its validity and/or may appeal

against any requirement in the notice. There is no appeal against a requirement to produce statutory records.

40. The Tribunal's powers on appeal are set out in paragraph 32:

“(3) On an appeal the [that is notified to the tribunal, the tribunal]¹ may—

5 (a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

(4) Where the [tribunal]¹ confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or
10 requirement—

(a) within such period as is specified by the [tribunal]¹, or

(b) if the [tribunal]¹ does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the [tribunal's]¹ decision.”

15 41. So in order for a notice to be valid, there must be an open enquiry and an officer of HMRC must have reason to suspect that tax due has not been assessed or has been under assessed.

42. *The Appellant's Submissions*

20 43. Initially, the appellant submitted that the information notice was fatally flawed because, even after the review, it required the production of the accountant's link papers and interim accounts which HMRC had conceded were not required. Mr Snell submitted that, as a minimum, the notice should be varied in accordance with the Tribunal's powers in that respect.

25 44. The Appellant has already provided a great deal of information and documents which deal with HMRC's concerns and the information now required goes beyond what is reasonably required to check Mr Sherchan's tax position. Much of the information is directed at the company's tax position.

30 45. In particular, Mr Snell objected to the request for full, unredacted copies of the various bank statements for periods going back as far as 6 April 2009. The year under enquiry is 2012/13 and Mr Snell did not consider that information about much earlier years is reasonably required to check Mr Sherchan's tax position. Mr Snell points out

that Mr Sherchan is not required to keep records for more than six years so should not have been asked for statements which are more than six years old at the time the notice was given. HMRC indicated that they wished to see the older statements to see whether there was a trend of excess deposits over known income which would require explanation. Mr Snell considered that this represented a “fishing expedition” and that Schedule 36, being a power to assess, does not permit HMRC to use it for the purposes of discovery. Similarly, HMRC wished to see where the £4,000 used to make the loan to Mr Durga Sherchan came from, but had requested the bank statements for the full year. Mr Snell considered that the Appellant should be required only to show the source of this particular sum.

46. Further, Mr Snell submitted that if HMRC were concerned with deposits and the source of deposits, it was unnecessarily intrusive to demand unredacted statements which also showed personal expenditure. Our attention was drawn to the case of *Taylor v Bratherton* [2005] STC 230 which concerned a request for documents and relating to personal expenditure. The Special Commissioner held that the inspector’s request was intrusive and “the taxpayer should not be required to divulge details of his personal expenditure if that could be avoided”.

47. Leaving aside the interim accounts, which HMRC had already conceded were not required, Mr Snell submitted that the remaining items referred to in the notice did not relate to the Appellant’s personal tax position. Information about who prepared the balance sheet relates to the business. The purchase price was set out in the signed balance sheet and there is no need to provide information which shows how the price was arrived at such as the stocktaker’s report, the documents used to establish the sale price and the terms and conditions of the sale. Nor is it necessary to see the correspondence with Mr Durga Sherchan regarding the amount said to be outstanding. Either it is or it is not outstanding and the correspondence is not required to check the Appellant’s tax position.

48. *HMRC’s submissions*

49. HMRC submit that the conditions in paragraph 21 of Schedule 36 for issuing the information notice were satisfied, namely, there was an open enquiry and HMRC had reason to believe tax had been under-assessed. Further, the notice was valid as the information sought is “reasonably required for the purpose of checking the taxpayer’s tax position” in accordance with paragraph 1(1). The notice is not invalidated because HMRC have conceded that some of the information requested is not so required.

50. Information can only be “reasonably required” if it affects a person’s tax position but sometimes it is uncertain whether the information will affect the tax position until the information is obtained. Mr Khawar said that the key test is not whether, as a matter of fact, that information does change a person’s tax position, but if the information is reasonably required for checking the person’s tax position.

51. The information which HMRC already has gives rise to a number of concerns. In particular, Mr Lila Sherchan’s tax return and declared income does not explain how he has been able to acquire a substantial business and HMRC wish to establish his

means to do so. They contend that in order to do so, they need to understand, not only the actual amount of the purchase price, but also how this was arrived at, the terms and conditions of sale, how the purchase price was to be paid and whether it has been paid.

5 52. The purchase price seems to have been paid in instalments out of the business
bank account. The payments have not been subject to PAYE as salary and so must be
regarded as drawings from the director's loan account. If this is overdrawn, it affects
not only the Company's tax liability, but also gives rise to a personal liability on the
Appellant under the benefit in kind rules in the Income Tax (Employment and
10 Pensions) Act 2003.

15 53. There are unexplained deposits shown in Mr Sherchan's bank account, in excess
of his declared income and the source of the £4,000 of his own money which was
comprised in the loan to Mr Durga Sherchan has not been explained. HMRC need to
see the unredacted bank accounts as they need to establish where the money went as
well as where it came from. This is required to establish the Appellant's means and
how he financed the purchase of the company. This information is needed to check if
there is any additional income which should have been subject to tax and if the way in
which he funded the purchase may have affected his tax liability.

54. *Burden of proof*

20 55. The burden of proof lies on HMRC to show, on the balance of probabilities that
the information/documents are reasonably required.

56. *Discussion*

25 57. Mr Sherchan purchased a business turning over more than £7million a year. There
are two signed documents purporting to be the Company's balance sheet and showing
the agreed purchase price as being the net asset value. The documents are almost
identical, except that they show widely differing figures for the value of the stock
which results in net asset values (and therefore purchase prices) differing by
£100,000.

30 58. The Company's accounts show payments made out of the Company's money to
the former owner.

59. Mr Sherchan's tax return shows net employment income of approximately
£25,000 in the year in question (and it was less in previous years) and bank interest of
£10.

35 60. The bank statements already provided show unexplained deposits in excess of Mr
Sherchan's declared income.

61. In the light of these facts, it is unsurprising that HMRC wish to check Mr
Sherchan's "tax position" (which includes his past and future liability). The questions
for us to consider are:

(a) Whether the information notice is vitiated as a whole because it still requires some information which HMRC admits is not reasonably required; and if not

5 (b) Whether all of the information requested is “reasonably required” in order to “check the taxpayer’s tax position”.

62. We agree with Mr Khawar that the fact that not all of the information specified in the notice is reasonably required does not invalidate the notice, although it will need to be varied.

10 63. We accept that HMRC are entitled to information and documents which will establish what the actual purchase price of the Company was and how it was to be paid as this will affect the amount and timing of the payments which the Appellant would have needed to make. This is relevant in relation to the Appellant’s resources and the possibility that he has undeclared income and also affects whether the Appellant incurred any tax liability arising from the way in which the payments were
15 made.

64. We also accept HMRC’s concerns about Mr Sherchan’s means and the need to establish the sources of his funds, We agree that a proper assessment of resources requires an understanding of where the money goes, as well as where it came from and information about expenditure is therefore important in this context. *Taylor v*
20 *Bratherton* did not say that a taxpayer should not be required to produce details of personal expenditure, but that this should not be required if it could be avoided. In that case, it was anticipated that the information could be provided in other ways, but it was left open for HMRC to reapply to the tribunal for the information about personal expenditure sought if they could not otherwise ascertain what they needed. It
25 has not been suggested here that the information can be provided in another way. We therefore consider that the Appellant should provide unredacted copies of the bank statements.

65. We do not consider that HMRC is entitled to a wider range of documents and information which relate to the finances of the business and the computation of the
30 purchase price which are relevant to the tax position of the Company and/or the seller of the Company, but not that of the Appellant. We do, however, consider that the stocktaker’s report is relevant to the taxpayer’s tax position as it is the difference in the two stock figures which has such an impact on the amount of the purchase price.

66. We also consider that it is reasonable for HMRC to ask for financial information
35 relating to years before the year under enquiry as this is relevant to establishing the resources available to acquire the Company and to the Appellant’s past tax liabilities (which are within the definition of “tax position”).

67. *Decision*

68. We find that the information notice was validly issued and is not invalidated
40 because not *all* of the documents and information referred to in it are reasonably required to check the tax position of Mr Sherchan.

69. However, for the reasons set out above, we propose to vary the information notice in accordance with our power to do so set out in paragraph 32(3) of Schedule 36 Finance Act 2008.

5 70. Accordingly, we confirm the information notice except for the variations set out below:

71. Item v) is amended to require statements for Halifax Account number ending 683 for the period 11 September 2009 to 5 April 2010 and the year ended 5 April 2012

72. Item ix) (interim accounts and accountant's link papers) is deleted.

73. Item x) (other documents used to establish the sale price) is deleted.

10 74. As the terms and conditions of sale referred to in the balance sheets may have been oral, item xi) is amended to read "evidence of the terms and conditions of sale referred to at the foot of the balance sheet signed by both Mr Durga Shechen and Mr Lila Shechen dated 4 August 2012"

15 Item xii) (correspondence about the alleged outstanding sum owed to Mr Durga Shechen) is deleted.

20 75. 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.

25 **MARILYN MCKEEVER**
TRIBUNAL JUDGE

RELEASE DATE: 25 FEBRUARY 2016

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