



TC06167

Appeal number:TC/2017/02150

PROCEDURE – information notice – bank statement – statutory records – requirement to produce unredacted bank statement – non-compliance – penalty – whether HMRC entitled to require unredacted bank statement – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREASBERG DEVELOPMENTS LLP

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR JOHN AGBOOLA**

Sitting in public in Manchester on 22 August 2017

Mr Gary Rowson of OneE TDI Limited for the Appellant

Mr Christopher Shea of HM Revenue & Customs for the Respondents

DECISION

Background

1. This is an appeal against a penalty of £300 for alleged non-compliance with an information notice dated 15 June 2016, issued to the appellant pursuant to Schedule 36 Finance Act 2008 (“the First Appeal”). Pursuant to a direction of the tribunal released on 16 May 2017 the First Appeal was consolidated with another appeal under reference TC/2017/02151 against an information notice dated 9 September 2016 requiring copies of various items of correspondence (“the Second Appeal”).
2. At the hearing we were taken to documentary evidence and heard submissions in relation to the First Appeal. In relation to the Second Appeal it appeared to us that we would require further evidence as to precisely what documents the appellant had already provided in response to the information notice and what documents the appellant was arguing were not reasonably required. In the circumstances we informed the parties that we would adjourn and give further directions in relation to the Second Appeal and which would be re-listed before us. We informed the parties that the adjournment would not delay our decision in relation to the First Appeal.
3. In the circumstances therefore we set aside the direction consolidating the two appeals and this is our decision in relation to the First Appeal.

Findings of Fact

4. There was no factual dispute between the parties and the following findings are therefore not contentious.
5. The appellant is one of a number of LLPs which are unregulated collective investment schemes involved in a resort development in northern Germany. On 8 September 2015 HMRC opened an enquiry into the appellant’s partnership tax return for 2013-14. HMRC are concerned that the appellant is a vehicle for a tax avoidance scheme in which sideways loss reliefs are being claimed by corporate partners in the appellant. In the enquiry HMRC are concerned to establish whether the scheme was implemented correctly, whether or not it is effective and whether any additional tax liabilities arise. For present purposes we do not need to say anything more about the enquiry.
6. When the enquiry was opened HMRC requested various information and documents which included copies of the appellant’s bank statements for its accounting period ending 31 October 2013. In response to that request the appellant provided a copy of an account statement with Copex International Credit Limited. The statement was dated 1 November 2013 and covered the period 1 October 2013 to 31 October 2013. The account was shown to have been opened on 29 October 2013 and the statement identified two deposits and one withdrawal. These were significant sums, but the net effect was to leave the appellant with a balance on the account of £10.

7. The document provided by the appellant had been redacted so that the appellant's client number and account number were obliterated. Also obliterated were the account numbers of the party making the first deposit and the account number of the recipient of the withdrawal.

5 8. HMRC subsequently asked for an unredacted version of the bank statement. The appellant's response was that the redactions had been made "for confidentiality purposes" and asked HMRC why they required an unredacted copy of the statement. HMRC replied that they required the unredacted statement to check the appellant's
10 partnership return. The appellant maintained that the unredacted statement was not relevant for the purpose of checking the appellant's tax position, and that the redacted statement was sufficient for that purpose.

9. On 15 June 2016 HMRC issued an information notice requiring the appellant to provide all unredacted bank statements for the period 29 October 2013 to 31 October 2013 by 22 July 2016. At the same time HMRC indicated that there was no right of
15 appeal against the information notice because the bank statements were statutory records. There was no appeal against the information notice but on 18 July 2016 the appellant's representative stated in correspondence that they had provided "all documents that contain or may contain information showing the whole facts which are relevant to the tax liability of the LLP".

20 10. On 16 August 2016 HMRC issued a penalty notice to the appellant notifying a penalty of £300 for non-compliance with the information notice.

11. On 12 September 2016 the appellant gave notice of appeal to HMRC against the penalty on the ground that the only information it had redacted had no bearing on the
25 actual transactions that were subject to the enquiry. Otherwise HMRC could see the amounts, dates and parties for each transaction. The decision to notify a penalty was confirmed in a review dated 6 February 2017 following which the appellant notified its appeal to the tribunal on 7 March 2017.

Discussion and Reasons

12. The appellant's grounds of appeal may be summarised as follows:

30 (1) Unredacted statements are not relevant to or reasonably required for the purpose of checking the appellant's tax position. The redacted statements contain all the relevant information.

(2) The appellant accepts that the bank statements form part of the appellant's statutory records for the purposes of Schedule 36.

35 (3) However, the redacted account numbers are not necessary for the appellant to deliver a correct and complete tax return. The account numbers are therefore not part of the appellant's statutory records.

13. Before we consider the appellant's grounds of appeal we refer to the relevant provisions of Schedule 36.

14. Paragraph 1 Schedule 36 provides that an officer of HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer's tax position.

5 7. Paragraph 29 Schedule 36 provides that a taxpayer can appeal against an information notice or any requirement in an information notice unless the requirement is to "provide any information, or produce any document, that forms part of the taxpayer's statutory records".

8. Paragraph 62 Schedule 36 provides that information or documents will form part of a person's "statutory records" for present purposes if:

10 " ...it is information or a document which the person is required to keep and preserve under or by virtue of -

(a) the Taxes Act, or

(b) any other enactment relating to tax"

15 15. Section 12B(1) Taxes Management Act 1970 in so far as relevant for present purposes requires an LLP "to keep all such records as may be requisite for the purpose of enabling [it] to make and deliver a correct and complete return ...". Mr Rowson on behalf of the appellant agreed the finding in *Couldwell Concrete Flooring Ltd v HM Revenue & Customs [2015] UKFTT 136* at [43] that bank statements form
20 part of a taxpayer's statutory records. The reasoning was set out at [23-25] in the context of the record keeping requirements for companies:

25 " 23. In our view paragraph 21(1)(a) requires a company to keep all records which are necessary to establish, without doubt, that a return is accurate. That will include all documents and information necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period. The requirement that the return must be correct and complete implies a requirement that the documents and information to be kept must evidence that the return is correct and complete.

30 24. What is needed may depend to some extent on the nature of the company's business...

35 25. In our view it is plainly necessary for any company seeking to prepare a correct and complete tax return to have records of sales, purchases, receipts, payments, trade debtors and other debtors. If a business operates a bank account it will need to keep a record of transactions on the account and of the balance on the account at any particular time to ensure that receipts and expenditure have been properly recorded. Not just in the company's accounting records but also that the transactions and balance on the account have been properly recorded by the bank."

16. Mr Rowson accepts that the bank statement in the present case is a statutory record. However he seeks to distinguish and to treat separately the information contained in the bank statement. He argues that certain of that information is not required for the purpose of making a correct and complete return, and therefore such information is not a statutory record. Further, Mr Rowson argues that the information which has been redacted is not reasonably required by HMRC for the purpose of checking the appellant's tax position.

17. There is simply no basis for the appellant to argue that whilst the bank statement is a statutory record, the Appellant is entitled to redact information in the statutory record before providing a copy to HMRC. There is no authority to support such a submission and it is inconsistent with the scheme of Schedule 36.

18. We accept Mr Shea's submission on behalf of HMRC that where a document is a statutory record, HMRC are entitled to full unredacted copies of that document. Further, any argument about whether account numbers are reasonably required is completely irrelevant.

19. It is clear that Schedule 36 distinguishes the provision of information and the production of documents. In order to check the tax position of a taxpayer HMRC may require either the provision of information specified in a notice or the production of a document specified in a notice. In the present case HMRC have required the production of a document rather than the provision of information. In theory, they might have asked for the amounts, dates and parties for each transaction entered into by the appellant in October 2013. That would have been a request for information. However that is not what they asked for. What they required was production of the document itself, the unredacted bank statement.

20. Once it is accepted that a document is a statutory record, Schedule 36 provides no right of appeal against an information notice requiring production of that document. The reason for that is clear. If a taxpayer is legally required by the Taxes Acts to keep and preserve a document, there is no reason for the taxpayer to resist production of the document to HMRC. In those circumstances HMRC are entitled to production of the document as a matter of course. They are not required to justify to a tribunal that the document is reasonably required in order to check the taxpayer's tax position. The nature of the document, as one that is required to enable the taxpayer to make a correct and complete return, leads to what is in effect an irrebuttable presumption, at least as far as the tribunal is concerned, that it is reasonably required for the purposes of checking the taxpayer's tax position.

21. On that basis the appellant's grounds of appeal must fail.

22. Further, the present appeal is an appeal against a penalty imposed for non-compliance with the information notice. If a person fails to comply with an information notice, paragraph 39 (1)(c) and (2) Schedule 36 provide for a £300 penalty. Paragraph 45 provides that a penalty shall not arise under paragraph 39 in the event that the person has a reasonable excuse for the failure. Paragraph 46(1)(a) then

provides that where a person becomes liable for a penalty under paragraph 39, HMRC may assess the penalty.

23. Paragraph 47 Schedule 36 provides for a right of appeal to the Tribunal against a decision that a penalty is payable or against the amount of a penalty. On an appeal
5 against a decision that a penalty is payable, paragraph 48 provides that the tribunal may confirm or cancel the decision. On an appeal against the amount of a penalty, paragraph 48 provides that the tribunal may confirm the decision or substitute another decision that HMRC had power to make.

24. It is notable that the appellant did not seek to appeal the information notice. For
10 the reasons given above it was correct not to do so. The unredacted bank statement was a statutory record for the purposes of Schedule 36 and there was no right of appeal.

25. Indeed, there is authority that this tribunal has no jurisdiction to consider the
15 validity of an information notice on an appeal against a penalty. In *PML Accounting Limited v Commissioners for HM Revenue & Customs [2017] EWHC 733 (Admin)* the Administrative Court was concerned with penalties arising from non-compliance with an information notice. It held that the tribunal has no jurisdiction to consider the validity of the information notice on an appeal against penalties imposed for non-compliance. Sir Ross Cranston sitting as a High Court Judge stated as follows:

20 " 66. ...The right to appeal a penalty set out in paragraph 47 of Schedule 36 of the 2008 Act is against "(a) a decision that a penalty is payable by that person under paragraph 39, 40.." or against the amount (not relevant in this case). Under paragraph 48(3) the Tribunal is limited to confirming or cancelling the decision. In a penalties
25 appeal paragraph 39(1) of Schedule 36 applies "to a person who (a) fails to comply with an information notice" where there is liability to a penalty of £300. Paragraph 40(1) for daily default applies "if the failure or obstruction" continues.

67. Thus the issue on appeal whether a penalty is payable under both paragraph 39(1)
30 and 40(1) is the narrow one of whether, in the former case, the person has failed to comply with the notice, and with the latter, whether the failure or obstruction has continued. The validity of the information notice which gives rise to the imposition of a penalty simply does not arise. As the Upper Tribunal in *Birkett* held at paragraph [42], the right of appeal against the officer's decision to impose a penalty "is simply a
35 question of whether the requirements in para 40" – and by extension paragraph 39 – "have been satisfied"."

26. We are bound by that decision. As a result, the limit of our jurisdiction in the present appeal is to consider whether there was compliance with the information notice.

27. It is not suggested that there was any reasonable excuse for the non-compliance
40 and there is no challenge to the amount of the penalty. In correspondence the appellant argued that the redactions were made for purposes of confidentiality. Schedule 36 does not recognise confidentiality as a basis for non-compliance. No doubt that is because HMRC themselves owe a duty of taxpayer confidentiality.

28. Clearly there was non-compliance with the information notice. The appellant has not produced an unredacted copy of the bank statement which was required by the information notice. The penalty was therefore properly imposed.

Conclusion

5 29. For all the reasons given above we must dismiss the appeal.

30. 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
10 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.

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**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 16 OCTOBER 2017