[2018] UKFTT 296 (TC)

TC06526

Appeal number: TC/2017/07568

INCOME TAX – Notice to provide information under FA 2008, Sch 36 – whether invalid because issued by ITSA Enquiry team – submission of SA returns on a voluntary basis – whether statutory records requirements apply where no notice to file under TMA s 8 – whether Items cease to be statutory records with the passage of time – whether reasonably required – one Item and one part Item withdrawn by HMRC – Notice otherwise upheld other than one further Item – penalty of £300 upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

SARAH DUNCAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR TOBY SIMON

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 24 April 2018

Mr Jonathan Vyse of Pearl Lily & Co, Accountants, for the Appellant

Mrs Bisi Sanu, Litigator for HM Revenue and Customs, for the Respondents

DECISION

1. This was Ms Duncan's appeal against: a Notice issued by HM Revenue & Customs ("HMRC") under Finance Act 2008, Sch 36, para 1 ("Sch 36 Notice" or "Notice"), requiring the provision of certain information ("Items"), and a fixed penalty of £300 for failure to comply with the Notice.

2. Mr Vyse's submissions about the Notice included the following:

(1) it was invalid because it had been issued by the Income Tax Self Assessment ("ITSA") Enquiry Team, not by an individual HMRC officer, see §36;

(2) it should be set aside because:

(a) Ms Duncan had subsequently submitted self-assessment ("SA") returns on a voluntary basis, and HMRC must use their enquiry powers under Taxes Management Act 1979 ("TMA") s 9A, and not their information powers under Sch 36, see §38;

(b) the voluntary SA returns show nil liability, see §48;

(c) HMRC already had the information being required in the Notice, because of its "Connect" system, see §55; and/or

(3) it should be set aside to the extent that it covers years outside the four year ordinary time limit, because HMRC could not issue Ms Duncan with assessments outside that time limit, see §57.

3. Mr Vyse also submitted that the requirement to keep statutory records at TMA s 12B only applied to taxpayers who had been issued with notices to file SA returns under TMA s 8, and so did not apply to Ms Duncan, see §74.

4. The Tribunal rejected the submissions set out above, as well as Mr Vyse's further submissions set out in the main body of this decision. However, we did find that some of the Items may no longer be statutory records, because of the interaction of the statutory provisions, see §83.

5. However, even if that was the position, we found that the Notice was nevertheless valid and enforceable, other than in relation to Item 2 (for the reasons at §98), and in relation to Item 3 and part of Item 4, which were withdrawn by HMRC.

6. For reasons given in the main body of this decision the Tribunal also upheld the penalty of £300, see §108ff.

7. Under Sch 36, para 32(4) the Tribunal therefore directs **Ms Duncan to comply with the Notice by 30 days after the date of issue of this decision, in relation to all the Items other than (a) Item 2 and (b) Item 3 and the part of Item 4, which were withdrawn by HMRC.**

The legislation and the evidence

8. The relevant legislation is in the Appendix. Where the detailed wording of a particular provision was under consideration, it has also been cited in the main body of this decision.

9. HMRC provided the Tribunal with a helpful Bundle of documents, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) tax returns filed by Ms Duncan for 2007-08 through to 2014-15; and

(3) HMRC's SA Notes for Ms Duncan.

10. Shortly before the beginning of the hearing, Mrs Sanu provided the Tribunal and Mr Vyse with Statements of Account for Ms Duncan for 2007-08 through to 2016-17 and HMRC's SA Return summaries for 2010-11 through to 2015-16. At the same time, Mr Vyse supplied a number of documents, some of which were the same as those in the HMRC Bundle. In addition, he provided a letter from the Pensions Service dated 26 May 2016, together with a number of documents which were not relevant to the issues before the Tribunal, but instead relate to the other matters set out at the end of this decision notice.

11. Ms Duncan attended the hearing but, on Mr Vyse's advice, declined to give evidence. The Tribunal pointed out that if Ms Duncan did not give evidence, there may be issues on which there was no evidence, or limited evidence, and that might disadvantage her. Mr Vyse said that his client understood and accepted that.

12. Mr Vyse gave evidence about his correspondence with HMRC. That evidence was unchallenged and we accepted it. He also gave evidence about information contained in Ms Duncan's returns, which was challenged by Mrs Sanu. We decided not to accept that evidence because Mr Vyse was reliant on what he had been told by Ms Duncan, and so was hearsay. Although Rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") allows us to accept hearsay evidence, we decided that it was not in the interests of justice to do so in this case, because (a) Ms Duncan was present at the hearing, but had declined to give evidence, and (b) the only information contained in her returns about which we were provided with supporting documentary evidence was that related to her state pension, and Mr Vyse's oral evidence about that income was contradicted by the documentary evidence, see §25.

13. Mrs Sanu gave evidence about the structure and operations of HMRC's ITSA Enquiry Team. She confirmed to the Tribunal that she was giving that evidence from her own knowledge. Mr Vyse did not challenge her evidence and we accepted it.

The facts

14. Ms Duncan owns and lets a number of properties. At some point before 29 July 2016, HMRC became aware of her lettings business and identified that she had not notified chargeability or filed SA tax returns.

15. On 29 July 2016, HMRC sent Ms Duncan a letter asking for information about the let properties. The letter was sent from the "ITSA Enquiry Unit". It was common ground that ITSA stands for "Income Tax Self Assessment". Ms Duncan was asked to respond by 28 August 2016.

16. Ms Duncan appointed Pearl Lily & Co to act for her, and on 23 August 2016, Mr Vyse of that firm replied to HMRC's letter. He (a) asked for further time to respond, and (b) stated that his letter was an appeal against HMRC's letter of 29 July 2016 in so far as that letter asked for information or documents which were not statutory records. On 14 September 2016, the "ITSA Team" replied to Mr Vyse, agreeing to an extension until 14 October 2016.

17. On 16 September 2016, Ms Duncan completed form SA1 headed "Registering for Self-Assessment and getting a tax return". In answer to the question "why do you need to complete a tax return" she wrote "Notice under TMA 1970 s 7(1) of chargeability to income tax for 2015/16 tax year". On 30 September 2016, having received the SA1 form, HMRC set up an SA file for Ms Duncan, and on 6 October 2016 issued a notice to file an SA return for 2015-16 under TMA s 8. Ms Duncan was informed that if a paper return was filed, it had to be received by 13 January 2017; if an electronic return was filed, the deadline was 31 January 2017.

18. Neither Ms Duncan nor Mr Vyse responded to HMRC's letter of 29 July 2016 by the extended deadline of 14 October 2016. On 17 November 2016 the Sch 36 Notice was issued by "the ITSA Enquiry Team". Its wording is in the first person throughout: for example "I wrote to you on 29 July 2016…I believe this is reasonably required…I need it so that I can check…I have not received any of the items I asked for…" and "I am issuing this notice under paragraph 1 of Schedule 36 to the Finance Act 2008".

19. Mrs Sanu's evidence was that the ITSA Enquiry team is made up of a pool of individual officers, and that each Notice is issued by one of those officers, although they do not sign the letters with their own names. We accept that evidence, which was not only unchallenged but is consistent with (a) the use of the first person in the Notice and (b) the references made by the person issuing the Notice to the fact that he had also written HMRC's earlier letter of 29 July 2016.

20. On 13 December 2016, Mr Vyse wrote to HMRC asking for "closure" of the "information check" into Ms Duncan's tax position, on the basis that she had notified chargeability for 2015-16, and his calculations showed that no tax was due for that year. On 14 December 2016, HMRC received Ms Duncan's 2015-16 SA return.

21. On 12 January 2017, HMRC wrote to Mr Vyse, saying they had received his letter and Ms Duncan's 2015-16 SA return but that "our information states that your client has registered as a landlord for several properties in the London area since 2007". The letter also said that HMRC still needed the information and documents required by the Notice, and warned that if Ms Duncan did not comply by 26 January 2017, a penalty of £300 would be issued without further notice. A copy of that letter

was sent to Ms Duncan. On 13 March 2017, having not had any response, HMRC issued a reminder letter, again with a copy to Ms Duncan.

22. On 17 March 2016, Mr Vyse submitted voluntary SA returns for Ms Duncan for 2007-08 through to 2014-15 inclusive. Each of those returns included UK Property pages, but the box on each return which asked for the number of properties rented out was left blank.

23. The voluntary SA returns contain the following information about Ms Duncan's let property business:

(1) in 2007-08, rental income of £20,648 was exceeded by the expenses, so a loss of £14,493 was carried forwards;

(2) subsequent years also showed no profit, because of expenses and/or losses carried forwards;

(3) loan interest was claimed as deductible each year. This was £25,804 in 2007-08 and £16,909 in 2014-15, with varying amounts in the other years;

(4) in 2014-15 the capital gains tax ("CGT") summary page was completed showing no liability. No CGT pages were completed for other years.

24. From that information, the Tribunal finds that Ms Duncan has had a property lettings business since at least 2007-08. We make no finding about when her property business started or as to whether the correct figures have been included in her SA returns for that property business or for any related capital gains.

25. In each of the seven years from 2007-08 through to 2014-15, Ms Duncan's voluntary SA returns stated that she had received state pension income of exactly £2,000. The Tribunal expressed some surprise at the repetition of the same round number in each year. Mr Vyse said it could be explained by the fact that she had deferred some of her pension income, and drew the Tribunal's attention to the letter from the Pensions Service dated 26 May 2016. However, this did not assist Mr Vyse, because it reads "you put off claiming your State Pension from 18/9/2006 to 26/5/2015 and you chose to receive a lump sum payment" and went on to inform Ms Duncan that she was shortly to be paid a lump sum of £28,293.57, from which PAYE of £5,670.80 was to be deducted.

26. The Tribunal finds as facts, in reliance on that letter, that (a) Ms Duncan deferred all her state pension until 26 May 2016; (b) had no state pension income during the period 2007-08 through to 2014-15, and (c) it was incorrect to include £2,000 of state pension income in her voluntary SA returns for each of those years.

27. We make the following further findings about the contents of Ms Duncan's voluntary SA returns:

(1) for 2007-08 through to 2011-12, they disclose no income other than that from property and the £2,000 of state pension;

(2) for 2012-13 an employment page was completed showing an employment with a company called "Team Sales Ltd" and employment income of £1,728;

(3) for 2013-14, income from that employment is shown as £642; a second employment page states that Ms Duncan was also employed by High Flyers Emp Ltd, but no earnings figure is given for that employment;

(4) for 2014-15 the same two employers are shown, but the income from each is stated to be nil; and

(5) Mr Vyse has added a note in the "white space" of all the returns saying "PAYE/Pension history requested 1/3/2017 from HMRC but not received in fourteen days. Taxpayer believes HMRC already holds all relevant information".

28. The Tribunal finds as a fact that the information about earnings in Ms Duncan's tax returns is incomplete. We come to this finding in reliance on (a) Mr Vyse's "white space" note, and (b) the naming of employers in the returns for 2013-14 and 2014-15, without any related employment income being identified. It appears from the white space note that Ms Duncan may also have undisclosed pension income, but as we have no further information, we make no finding as to whether or not this is the position.

29. On 12 April 2017, HMRC issued the penalty notice. On 4 May 2017 Mr Vyse appealed that penalty on Ms Duncan's behalf. HMRC refused the appeal on 6 June 2017; the letter was sent from HMRC's office in Bootle. On 30 June 2017 Mr Vyse wrote to HMRC's "legal operations and change review team" based in Newcastle. He asked for a statutory review of the penalty decision and also said:

> "on 23 August 2016 we appealed against HMRC's information check letter of 29 July 2016 on various grounds; this appeal has not been settled…or withdrawn…"

30. On 14 July 2017, Mr Vyse forwarded that letter to HMRC's office in Bootle, and on 24 August wrote a further letter, asking for a statutory review of the penalty decision and of the "validity of the original information request".

31. On 29 September 2017, Ms Andrea Smith, the HMRC Review Officer, issued a review conclusion letter. It began by setting out the "matter under appeal" as being "Schedule 36 Finance Act 2008-Notice to provide information. Penalty Failure to comply with an information notice".

32. Mrs Sanu said that, although there had been no appeal against the Notice, but only a purported appeal on 23 August 2016 against HMRC's informal request for information dated 29 July 2016, it was clear from the "matter under appeal" heading of the review conclusion letter that HMRC had accepted that Ms Duncan had appealed against the Notice as well as against the penalty. As this was not in dispute, we have not considered it further.

33. Ms Smith's review conclusion letter upheld both the Notice and the penalty. On 11 October 2017, Mr Vyse notified Ms Duncan's appeal against both the Notice and the penalty to the Tribunal.

The burden of proof and the parties' submissions on the Notice

34. Mrs Sanu accepted that HMRC had the burden of showing that (a) the Notice was validly issued and (b) the Items required under the Notice were reasonably required. As the burden of proof was not in dispute, the Tribunal proceeded on that basis. We also noted that it was consistent with Judge Nicholl's careful analysis in *Cliftonville Consultancy Ltd v HMRC* [2018] 0231 at [39].

35. Although HMRC accepted they had the burden of proof, we nevertheless decided to structure this part of our decision by setting out each of the challenges Mr Vyse raised to the Notice, because that reflects the way in which the parties approached the case.

Mr Vyse's overall submissions on the Notice

Whether the Notice is invalid because it was issued by the ITSA Enquiry Team

36. Mr Vyse submitted that Sch 36, para 1 gives power to "an officer of Revenue and Customs" to issue a Sch 36 Notice. The Notice was therefore invalid because it had been issued by the ITSA Enquiry Team, not by an individual HMRC officer.

37. We have already found as facts (see §19) that the ITSA Enquiry Team is made up of a pool of individual officers, and that the Notice was issued by one of those officers. There is no requirement in Sch 36 that the name of the issuing officer be stated on the Notice, and the failure to name that officer does not invalidate the Notice.

Whether the Notice should be set aside because HMRC must use their enquiry powers

38. Mr Vyse submitted that HMRC's powers to issue information notices are subordinate to their enquiry powers, so that once an SA return has been filed, HMRC must use TMA s 9A to open an enquiry into that return. They cannot rely on Schedule 36.

39. The Tribunal drew the parties' attention to Sch 36, para 21. This is headed "Taxpayer notices following tax return" and subpara (1) reads:

> "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."

40. The paragraph then sets out a number of conditions which provide exceptions to para 36(1), including where the SA return is under enquiry and where the officer has "reason to suspect" that the tax assessed was incorrect.

41. Mr Vyse said that it was clear from para 21 that a Sch 36 Notice cannot be given when the taxpayer has filed an SA return, unless one of the further conditions set out in that paragraph was met. In Ms Duncan's case none of those conditions applied. In particular, none of the returns was under enquiry, and HMRC had not

shown they had any "reason to suspect" that the tax shown as due on those returns was incorrect.

42. Mrs Sanu emphasised that para 21 reads "Where a person has made a tax return…a taxpayer notice may not be given". The Notice had been issued before the SA returns had been filed, so the paragraph was not engaged.

43. We agree with Mrs Sanu that the paragraph only applies where, at the time a Sch 36 Notice is issued, the recipient has made a return under TMA s 8. At the time the Notice was issued to Ms Duncan, she had made no SA returns, so para 21 was not in point. No statutory provision requires HMRC to cancel a Sch 36 Notice if an SA return is subsequently filed.

44. There is a further reason why we reject Mr Vyse's submission. The status of voluntary returns, such as those sent to HMRC on behalf of Ms Duncan, has been considered in several recent judgments, particularly *Bloomsbury Verlag GmbH v HMRC* [2015] UKFTT 660 (TC) (Judge Gammie and Mr Presho) ("*Bloomsbury"*); *Revell v HMRC* [2016] UKFTT 97 (TC) (Judge Herrington and Ms Debell) ("*Revell*"); *Wood v HMRC* [2018] UKFTT 74 (TC) (Judge Popplewell and Mr Silsby) ("*Wood*") and *Patel and Patel v HMRC* [2018] UKFTT 0185 (TC) (Judge Brannan) ("*Patel*").

45. Apart from *Bloomsbury*, all these judgments concerned voluntary returns sent in by individuals, in other words, exactly the position with which we are here concerned. *Bloomsbury* concerned a voluntary return sent in by a company. All the judgments come to the same conclusion, namely that voluntary returns are not "returns" for the purpose of TMA s 8 (or the equivalent company tax provisions). Instead, the statutory code imposes an obligation to report chargeability under TMA s 7, and it is then for HMRC to issue a notice to file under TMA s 8.

46. In *Revell* the tribunal suggested at [42] that a voluntary return could be characterised as a notice reporting chargeability under TMA s 7. In *Wood* and *Patel* the tribunals found that using a form which had been downloaded from the HMRC website did not change the position. If HMRC wish to activate the statutory procedure, they must issue a notice to file; taxpayers who have sent in voluntary returns must comply with that notice, even if that means that they send in a further copy of the return they previously sent to HMRC on a voluntary basis. As the tribunal said in *Revell* at [43] and in *Patel* at [43], one of the consequences of the statutory framework is that HMRC cannot open an enquiry under TMA s 9A into a voluntary return.

47. We agree with the analysis in the above cases, and therefore reject Mr Vyse's submission that "that once an SA return has been filed, HMRC must use TMA s 9A to open an enquiry into that return" for the further reason that HMRC has no power to open an enquiry into the voluntary returns submitted by Ms Duncan, because they are not "returns" for the purpose of TMA s 8.

Whether the Notice should be set aside because the SA returns show nil tax liability

48. Mr Vyse submitted that, for a Sch 36 Notice to be valid, HMRC had to be able to assess the taxpayer for the year in question. For 2007-2008 onwards, Ms Duncan's SA returns showed she had no tax liability, and HMRC should therefore have cancelled the Notice once they received the SA returns. As they had failed to do so, the Tribunal should set the Notice aside. The Tribunal has taken Mr Vyse's submission as being, in terms, that HMRC were acting unreasonably in requiring the information and documents because voluntary SA returns had now been filed, which showed that Ms Duncan had no net profits from her property lettings business.

49. Mrs Sanu pointed out that at the time the Notice was issued, HMRC had no information from Ms Duncan about her lettings business. When the SA returns were filed, they were incomplete because they did not show how many properties were being rented out. Moreover, they did not provide answers to many of the Items set out in the Notice.

50. We agree with Mrs Sanu that a Sch 36 Notice is valid if the information required is "reasonably required by the officer for the purpose of checking the taxpayer's tax position" at the time that notice was issued. As Mrs Sanu said, at the time the Notice was issued, no information had been provided to HMRC about Ms Duncan's letting business.

51. However, the Tribunal has the jurisdiction to uphold, vary or set aside the Notice, see Sch 36, para 32(3). This is an appellate not supervisory jurisdiction, so our task is not only to assess whether HMRC acted reasonably at the time the Notice was issued, but also to decide whether to require the appellant to comply with the Notice. In order to do this, it seems to us that we must consider whether the Items continue to be reasonably required. In coming to our conclusions on that issue, we take into account all the circumstances, including the fact that voluntary SA returns have now been filed.

52. Mrs Sanu did not disagree. However, she reiterated that the voluntary SA returns were incomplete, and did not provide all the information which HMRC required under the Notice. In her submission, it was therefore reasonable for HMRC not to cancel the Notice simply because these returns had now been sent in by Mr Vyse.

53. We again agree with Mrs Sanu. Although there may be cases when the submission of an SA return – whether under TMA s 8, or on a voluntary basis – means that it is no longer reasonable for the Items in a Notice to be required, this is not such a case, because:

(1) Ms Duncan's voluntary SA returns do not give the number of let properties, and they are thus incomplete;

(2) they report the receipt £2,000 of state pension income in each of the years 2007-08 through to 2014-15, despite Ms Duncan having no state pension income during that period;

(3) the information about earnings in the returns is incomplete, and that relating to pensions may be incomplete;

(4) according to Ms Duncan's voluntary SA returns, her rental properties are a drain on her resources, and she has no taxable income or gains. However:

(a) she deferred her state pension, so did not need that income during the years 2006 through to 2015; and

(b) it is not possible to know, from those returns, how she funds the business which she says is loss-making, or how she covers the costs of her own lifestyle.

54. Ms Duncan elected not to give evidence, and the Tribunal can only find the facts on the evidence provided to us. On the basis of our findings, we consider it entirely reasonable for HMRC not to regard the voluntary SA returns as displacing the requirements in the Notice for Ms Duncan to provide more detailed information about her rental income and expenses.

Whether the Notice should be set aside because of the HMRC "Connect" system

55. Mr Vyse submitted that HMRC already have all the information requested by the Notice, because of its new computer system, called "Connect". Mr Vyse submitted (but without providing any evidence) that the Connect system provides HMRC with extensive information from banks, other financial institutions and government bodies. As a result, he said, the Notice is "a vexatious request for information already known to HMRC".

56. Although the parties had accepted that HMRC had the burden of showing that the information was "reasonably required", that does not in our judgment extend to requiring HMRC to disprove matters of fact which an appellant alleges are true. In *Sadovska v SSHD* [2017] UKSC 54 at [14], Lady Hale said that "one of the most basic rules of litigation" is the principle that "he who asserts must prove". Mr Vyse asserted that HMRC already have all the information required under the Notice, but he has provided no evidence as to the classes of information held by HMRC's Connect system, how the system operated or whether there was, as a matter of fact, any overlap between the type of information on that system and the Items in the Notice. We reject his submission.

Whether the Notice should be set aside for years outside the 4 year time limit

57. Mr Vyse also submitted that the Notice was too widely drawn, covering the period from the date Ms Duncan began to receive rents, until 5 April 2015. It should, he said, be limited to the four year "ordinary time limit" in TMA s 34. That was because HMRC could only use the information requested by the Notice to assess an earlier year by relying on the discovery provisions in TMA s 29 read with TMA s 36. Those provisions only apply if (a) there is further tax to assess and (b) the taxpayer has been careless, acted deliberately, or failed to notify chargeability under TMA s 7. In Mr Vyse's submission, none of those conditions were met. It was clear from Ms Duncan's voluntary SA returns that she had no tax to pay; she was not careless and

had not acted deliberately, and there was no failure to notify chargeability, because she was not chargeable to tax at all.

58. Mrs Sanu submitted that it was too early to know whether HMRC were in a position to make a discovery assessment under TMA ss 29 and 36. The SA returns are incomplete, and HMRC needs the information in the Notice to inform any decision on whether to make assessments.

59. We agree with Mrs Sanu that, at the time the Notice was issued, it was not possible for HMRC to know whether they would be able to issue Ms Duncan with discovery assessments for years outside the ordinary time limit. As to the current position, we reject Mr Vyse's submission that it is not reasonable for HMRC to require the information requested in relation to periods outside the 4 year time limit. This is because there are errors and omissions in those returns.

Whether the Notice is invalid because it was issued in breach of the HRA

60. Mr Vyse filed a Statement of Case for Ms Duncan's appeal in which he submitted that the request for information which preceded the Notice (and by implication, the Notice itself) was invalid because it does not "make clear that 'tax evasion' is a crime", and that failure "prejudices the Appellant's right to a fair trial under Article 6 of the Human Rights Act [sic] by soliciting information without notifying due caution". We have taken this to be a reference to Article 6 of the European Convention on Human Rights ("Article 6"). Mr Vyse did not refer to this argument in his oral submissions, but we nevertheless considered it.

61. Ms Duncan has not been charged with tax evasion; she has been issued with a Notice under Sch 36. Were she to be charged with tax evasion, she would have rights under Article 6. Unless or until that happens, there is no criminal charge, and Article 6 is not engaged. This is clear from *Ferrazini v Italy (App no 44759/98)* [2001] STC 1314, in which the European Court of Human Rights held at [29] that tax disputes fall outside the scope of Article 6. The Court of Appeal recently reiterated that conclusion, see the leading judgment of Vos LJ at [68] in *R (oao APVCO 19) v HMT* [2015] EWCA Civ 648, with which both Black LJ and Floyd LJ concurred. We therefore reject Mr Vyse's Article 6 submission.

Whether the Notice is invalid because Sch 36 is not a "stand-alone" power

62. Mr Vyse submitted that Sch 36 does not provide HMRC with a "stand-alone" power to require the provision of information, but instead can only be exercised:

(1) in the context of an existing enquiry or investigation; and then only

(2) if HMRC have notified the taxpayer they are carrying out such an enquiry or investigation, and explained the powers under which they are operating.

63. He submitted that if HMRC fail to comply with those requirements, as happened in this case, the Notice is invalid. As we understand it, Mr Vyse derived this submission indirectly from the time limit restrictions on self-assessment enquiries in TMA s 9A, and on the restrictions on discovery assessments in TMA ss 29 and 36.

64. Mr Vyse said that a stand-alone approach would subject taxpayers, particularly those who were not in self-assessment, to wide-ranging, all-encompassing notices to provide information, which were far more extensive than those which HMRC could deploy when a person was subjected to a TMA s 9A enquiry. That difference could not have been intended by Parliament.

65. We do not accept this submission. HMRC's powers are circumscribed by Sch 36 itself, and in particular by the requirement that the information and documents are reasonably required. Moreover, when an SA return is under enquiry, HMRC are expressly authorised to use their Sch 36 powers as well as those available under TMA s 9A, see Sch 36 para 21 at Condition A.

66. To the extent that Mr Vyse is making a wider submission about the scope of the powers given to HMRC under Sch 36, that is not something over which the Tribunal has any jurisdiction. Challenges of that nature can only be made by judicial review.

Whether some or all of the Notice is invalid because of the "old documents" provision

67. Mr Vyse referred to Sch 36, para 20, which provides:

> "An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer."

68. He said that it was not in dispute that Ms Duncan had received rental income for a period which went back for "more than 6 years before the date of the notice". However, HMRC had not proved that the Notice was given "by, or with the agreement of, an authorised officer", and the Notice was therefore invalid. Mrs Sanu accepted that HMRC have not proved that an authorised officer either gave or approved the Notice.

69. However, Sch 36, para 20 refers only to "documents", not to "information". HMRC can therefore require information which goes back more than six years, without needing the approval of an authorised officer. All of the Items required by the Notice are "information" and not "documents", with the exception of schedules of income and expenses. Those are documents which Ms Duncan is required to prepare to comply with the Notice and are not "old documents". As a result, no old documents are required by the Notice, so Mr Vyse's submission cannot be sustained.

Conclusions on Mr Vyse's overall submissions

70. For the reasons explained above, we do not accept that the Notice as whole is invalid or should be set aside for any of the reasons put forward by Mr Vyse. We move on to consider statutory records.

Statutory records

71. It is important to establish whether any of the Items in a Sch 36 Notice are statutory records, because Sch 36, para 29(2) provides that a taxpayer does not have a right of appeal to the Tribunal against "a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory

records". In other words, the Tribunal can only consider whether to uphold, vary or set aside Items in a Notice if they are not statutory records.

72. Our analysis of the Items is on the basis that information (as well as a document) can be a statutory record, for the reasons given in *Goldnuts v HMRC* [2017] UKFTT 84(TC) at [132]-[136], also a decision of Judge Redston.

73. Mr Vyse submitted that Ms Duncan had no obligation to keep statutory records. We first consider that submission, and then consider whether any of the Items are statutory records.

Whether statutory records provisions apply if no notice to file issued

74. Statutory records are defined by Sch 36, para 62(1) as being "information or a document which the person is required to keep and preserve under or by virtue of (a) the Taxes Acts, or (b) any other enactment relating to a tax". Mr Vyse said that the statutory records obligation which applies to individual taxpayers is at TMA s 12B, which reads:

> **"12B Records to be kept for purposes of returns**
>
> (1) Any person who may be required by a notice under section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment or other period shall—
>
> (a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and
>
> (b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—
>
> (i) where enquiries into the return are made by an officer of the Board, the day on which, by virtue of section 28A(1) or 28B(1) of this Act, those enquiries are completed; and
>
> (ii) where no enquiries into the return are so made, the day on which such an officer no longer has power to make such enquiries.
>
> (2) The day referred to in subsection (1) above is—
>
> (a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company the fifth anniversary of the 31st January next following the year of assessment or (as the case may be) the sixth anniversary of the end of the period;
>
> (b) otherwise, the first anniversary of the 31st January next following the year of assessment
>
> or (in either case) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases).
>
> (2A) Any person who—
>
> (a) is required, by such a notice as is mentioned in subsection (1) above given at any time after the end of the day mentioned in

subsection (2) above, to make and deliver a return for a year of assessment or other period; and

(b) has in his possession at that time any records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period,

shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before the day mentioned in subsection (2) above, would have been the relevant day for the purposes of subsection (1) above."

75. Mr Vyse submitted that s 12B only apply to "any person who may be required by a notice under section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment or other period". He said that, for the periods covered by the Notice, Ms Duncan had not been issued with a notice to file SA returns under TMA s 8. As a result, the statutory records provisions in TMA s 12B did not apply to her.

76. The Tribunal does not agree. The section begins (our emphasis) to "any person who may be required by a notice under section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment". It does not say "any person who has been issued with a notice under section 8…of this Act". Thus, TMA s 12B will be engaged if HMRC "may" issue the person with notice to file an SA return under TMA s 8, 8A or 12AA; the obligation to keep statutory records therefore does not arise only where a notice to file has actually been issued.

77. That this is correct can be seen from the "relevant day" provisions in later subsections:

(1) TMA 12B(1)(b) read with (2)(a) requires a person running a business to preserve the records until the fifth anniversary of the 31st January next following the year of assessment.

(2) However, that subparagraph goes on to say that "where a return is required by a notice given on or before that day", the relevant day is extended to the latest of:

(a) the original "relevant day", ie the fifth anniversary of the 31st January next following the year of assessment;

(b) the date on which an enquiry could be opened into the return filed as the result of that SA notice (subparagraph (ii)); and

(c) the date on which any enquiry opened into the return is concluded (subparagraph (i)).

(3) In other words, where HMRC issue an SA notice to a taxpayer during the period during which records must be kept, the retention period can be extended to allow the enquiry process to operate.

(4) If, as Mr Vyse submits, it is only those who have been issued with a notice to file who have the obligation to keep statutory records, taxpayers who had not been issued with a notice to file would have had no obligation to keep

records up to that point, so the obligation to keep records would need to be imposed, not extended.

78. Furthermore, TMA s 12B(2A) requires a taxpayer who receives an SA notice after the end of the specified period for keeping records, and has at that point any records in his possession which were previously statutory records, to preserve those records till the end of the period for which he would have had to retain them had the return been issued before the relevant day. If Mr Vyse were correct in his submission, that taxpayer would have been under no obligation to keep business records at all, and so could not have a renewed obligation to retain them after the fifth anniversary of the 31st January following the year of assessment.

79. The Tribunal therefore finds that that the obligation to keep records applies to a person who "may be required" to deliver a return, and not only to those who have actually received a notice to file.

Whether statutory records provisions apply when voluntary returns sent to HMRC

80. We went on to consider whether there was any change to this position when a person submits SA returns on a voluntary basis. In other words, as HMRC had now received completed returns, was it still the case that the sender "may be required by a notice under section 8…to make and deliver a return for a year of assessment"?

81. As already explained at §44, recent judgments have held that voluntary returns are not "returns" for the purpose of TMA s 8. If HMRC wish to activate the statutory procedure, they must issue a notice to file under TMA s 8, and taxpayers who have sent in voluntary returns must comply with that notice, even if that means that they send in a further copy of the return they previously sent to HMRC.

82. When that analysis is considered in the context of Ms Duncan's case, it follows that the voluntary returns have changed nothing of relevance to TMA s 12B. Ms Duncan may still "be required by a notice under section 8…to make and deliver a return for a year of assessment", and on the basis of the cases listed in §44, HMRC will have to do this before it can open a valid enquiry or issue penalties for late filing. It follows that we do not agree with Mr Vyse that the statutory records provisions do not apply to Ms Duncan because she has filed voluntary SA returns.

Whether the statutory records rules are tied to the date of the Notice?

83. Ms Duncan is thus obliged to keep and preserve "all such records as may be requisite for the purpose of enabling [her] to make and deliver a correct and complete return for the year" until "the end of the relevant day". In the case of a person in business, such as Ms Duncan, TMA s 12B therefore provides that the relevant day is the latest of:

(1) the fifth anniversary of the 31st January next following the year of assessment (s 12B(2)(a));

(2) where HMRC issue her with a notice to file an SA return and enquire into the return, the date on which those enquiries are closed (s 12B(1)(b)(i));

(3) where HMRC issue her with a notice to file an SA return and do not enquire into the return, the date on which HMRC can no longer enquire into that return (s 12B(1)(b)(ii)).

84. Unless HMRC issue Ms Duncan with notices under TMA s 8 before the fifth anniversary of the 31st January following each year of assessment, her obligation to keep statutory records will come to an end. If an SA notice to file is subsequently issued, that re-establishes the obligation in relation to any records remaining in her possession, see TMA s 12B (2A).

85. Unless and until a notice to file is issued, for which years does Ms Duncan have an obligation to keep statutory records? The Notice was issued on 17 November 2016. Working backwards, the 31 January next following the 2010-11 tax year was 31 January 2012, and the fifth anniversary was 31 January 2017. It follows that, when the Notice was issued, Ms Duncan had to keep statutory records for 2010-11 and later years.

86. However, time has passed between the date of the Notice and this hearing. As already noted, statutory records are defined by Sch 36, para 62(1) as being "information or a document which the person is required to keep and preserve under or by virtue of (a) the Taxes Acts, or (b) any other enactment relating to a tax". Sch 36, para 62(3) then provides:

> "Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired."

87. Our understanding of the interaction of those provisions is that, after the issuance of the Notice, time continues to run in accordance with the applicable statutory records provision, because para 62(3) explicitly provides that the time limits in the statutory records provision(s) continue to be effective. If, instead, those time limits were frozen following the issuance of a Sch 36 Notice, so that items which were statutory records on the date of the Notice retained that character, we would expect there to have been a provision to that effect in Sch 36, and there is not.

88. We find this to be a surprising conclusion, as it means that administrative delays by the parties, or in the hearing of an appeal by the tribunal, can change the items in a Notice over which the tribunal has jurisdiction. There are other complications: for example, if an appeal is heard by a tribunal in October, but the decision is issued in February, some Items may no longer be statutory records by the date of the decision, because of the interposition of 31 January between the hearing and the decision.

89. Despite those difficulties, it seems to us to be what is required by the provisions. As a result, in order to work out which documents and information are statutory records for the purposes of this appeal, we need to consider the position as at June 2018, when this decision will be issued. The key year is thus 2012-13, because the 31 January next following that tax year was 31 January 2014, and the fifth anniversary will be 31 January 2019. Thus, the statutory records requirements currently apply to 2012-13 and later years. When HMRC issue a notice to file under TMA s 8, that will

re-establish the obligation in relation to any records remaining in Ms Duncan's possession, see TMA s 12B (2A).

90. To the extent that any of the Items are not statutory records because of the operation of these time limits, the Tribunal considers at §101-§106 below whether those Items should be upheld, set aside or varied.

The Items in the Notice

91. The first 8 of the Items in the Notice are numbered, but the last two Items are not. For the purposes of this decision we have numbered these as Items 9 and10. Both are preceded by a lengthy explanatory rider, which the parties agreed was part of both Items.

92. In the course of the hearing, Mrs Sanu said that HMRC were withdrawing Item 3 and part of Item 4 from the Notice. Item 3 related to whether the properties were jointly owned. The withdrawn part of Item 4 asked whether the property was purchased, inherited or acquired in some other way. As those Items have been withdrawn, we say no more about them.

93. Subject to Mr Vyse's caveat that some of the information may no longer be within the statutory records definition at TMA s 12B because of the passage of time, see §83ff, the parties agreed that the following Items or part-Items were statutory records:

(1) Item 1: the address of each of the properties;

(2) Item 4 (part): the date of acquisition for each of the properties;

(3) Item 5 (part): the purchase price of each of the properties;

(4) Item 6: in relation to each property, whether it was let fully furnished or unfurnished;

(5) Item 7: in relation to each property, the date it was first let and when each of the lettings ended; whether there were any void periods, and if so, the dates of those void periods;

(6) Item 8: if any of the properties have been sold, the date of sale, the sale price and the purchase price;

(7) Item 9: a schedule of the gross rental income for each property from the date the property was first let to 5 April 2015, split by tax year;

(8) Item 10: a schedule of all expenses which are claimed to be allowable for tax purposes, split by tax year, for all periods from the date the letting business began to 5 April 2015.

Conclusions on statutory records

94. The Items listed at §93 are statutory records to the extent that they relate to 2012-13 or later years. The Tribunal has no jurisdiction over those Items.

95. All other Items, including those listed at §93 which are not statutory records because of the passage of time, fall within our jurisdiction. We move on to consider those Items.

Whether the Items are reasonably required

96. Sch 36, para 32(3) allows us to confirm, vary or set aside any of the Items. There are many possible reasons why a tribunal might decide to set aside an Item – it might be privileged (para 23), or an old document (para 20). However, in Ms Duncan's case, the only remaining issue in dispute was whether each of the Items was "reasonably required…for the purpose of checking [Ms Duncan's] tax position."

Item 2

97. Item 2 asked Ms Duncan to provide information, for each let property, as to its type, such as "flat, detached house, and so on". Mrs Sanu said that this was to allow HMRC to assess whether the amount of rent said to arise from the letting was credible. Mr Vyse said that this information was not reasonably required as it was irrelevant in the context of the actual rent paid to Ms Duncan.

98. We agree with Mr Vyse and set aside this Item of the Notice. The relevant test is whether the Item is "reasonably required…for the purpose of checking the taxpayer's tax position". In other words, HMRC has the power to obtain information to allow it to assess the tax which is due. In the context of a property business, that involves information about the rent actually charged. Numerous factors determine the rental income which could be charged for a property, of which the property type is only one. We do not consider that information about whether the property is a flat or a house will give HMRC any reliable indication as to whether the rental income disclosed is credible.

Item 5 (part)

99. This part of Item 5 asked how each purchase was financed. Mrs Sanu said that, as Ms Duncan had not declared any taxable income in the relevant years, it was reasonable for HMRC to be informed as to the source of the money used to purchase the properties. Mr Vyse submitted that this Item would only be reasonable if Ms Duncan was claiming tax relief for mortgage interest. By this we understood him to mean old-style mortgage interest relief, or MIRAS.

100. We agree with Mrs Sanu that, in the context of Ms Duncan's declared income and gains, it is reasonable for HMRC to require information about the source of the money used to purchase the properties. As for Mr Vyse's submission, MIRAS is clearly irrelevant, and we have already found as a fact that Ms Duncan claimed tax relief for loan interest in each of the relevant years, see §23. Therefore, the interest paid on part or all of the money used to purchase the properties was direct linked to the expenses claimed in Ms Duncan's property business.

Items where the information is also held by the Land Registry

101. Mr Vyse submitted that Ms Duncan was "not obliged to copy public records" such as those at the Land Registry and send them to HMRC, and it was therefore

unreasonable for HMRC to require their provision. That submission was relevant to the following Items:

(1) Item 4 (part): the date of acquisition for each of the properties;

(2) Item 5 (part): the purchase price of each of the properties; and

(3) Item 8: if any of the properties have been sold, the date of sale, the sale price and the purchase price.

102. As already noted earlier in this decision, (a) Mr Vyse accepted during the hearing that these Items were statutory records, but (b) TMA s 12B is unlikely to apply for the earlier years covered by the Notice, unless or until HMRC issue Ms Duncan with a notice to file her SA returns for those years.

103. To the extent that these Items are no longer statutory records, we considered whether they were "reasonably required". Mrs Sanu said they were reasonably required because Ms Duncan would have this information in any event, and it was easier for her to provide them to HMRC, than for HMRC to seek it out on the Land Registry site.

104. The Tribunal finds that there is another, more fundamental, reason why it is reasonable for HMRC to ask Ms Duncan for this information, rather than relying on the public data held by Land Registry. Ms Duncan has so far refused to provide even the number of properties which make up her letting business (see §22). Although the addresses of the properties has been asked for as part of the Notice, there has as yet been no compliance. HMRC are therefore unable to access the Land Registry to seek details of all Ms Duncan's properties, because they do not have that basic data.

105. We therefore find that, to the extent that the Items listed at §93 are no longer statutory records, their provision by Ms Duncan is reasonably required within the meaning of Sch 36, para 1.

Other Items which have ceased to be statutory records

106. As already noted, it is likely that some Items are no longer statutory records because of the passage of time. However, we have found as facts that Ms Duncan has filed incomplete and incorrect SA returns, and there is no explanation before the Tribunal as to how she has funded her lifestyle, and no evidence as when her property business commenced. In our judgment it is reasonable for HMRC to require that Ms Duncan provide the information required by the Items in the Notice, despite that information no longer being a statutory record.

Conclusion on Ms Duncan's appeal against the Notice

107. Item 2 of the Notice is set aside. Item 3 and part of Item 4 were withdrawn by HMRC. Items which are statutory records are outwith the jurisdiction of the Tribunal. The remaining Items are upheld in their entirety because they are reasonably required.

The appeal against the penalty

108. The penalty was imposed under Sch 36 para 39. This reads:

"**Penalties for failure to comply or obstruction**

(1) This paragraph applies to a person who—

(a) fails to comply with an information notice…

(2) The person is liable to a penalty of £300."

109. Sch 36, para 45 provides that:

> "(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.
>
> For the purposes of this paragraph—
>
> (a) …,
>
> (b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction…"

110. Sch 36, para 47(a) allows a person to appeal against "a decision that a penalty is payable by that person under paragraph 39…".

The parties' submissions

111. Mrs Sanu said that as there was no pleaded reasonable excuse, the only issue to be decided was whether Ms Duncan had failed to comply with the Notice. If the answer to that question was yes, the Tribunal had to confirm the penalty.

112. Mr Vyse's position was that a penalty should not have been charged because, at the time it was issued:

(1) the Notice itself was under appeal;

(2) Ms Duncan was in the process of complying with the Notice; and

(3) sufficient information had been provided in the SA returns.

113. Mrs Sanu's response to those three points was that:

(1) the Notice was not appealed until 4 May 2017, after the issuance of the penalty. Mr Vyse's earlier letter, of 23 August 2016, purported to appeal against the informal request for information contained in HMRC's letter of 29 July 2016;

(2) when the penalty was issued, Ms Duncan was not in the process of complying with the Notice. Instead, on 13 December 2016 Mr Vyse had asked for "closure" of the information check; and

(3) it was clear that the information provided in the SA returns fell well short of that required by the Notice.

Discussion

114. Mrs Sanu's understanding of the law is correct, see the judgment of the Upper Tribunal ("UT") in *Birkett v HMRC* [2017] UKUT 89 (TCC) (Nugee J and Judge Greenbank). In *Birkett,* HMRC had imposed daily penalties under para 40. The

appellant submitted that the penalties should not have been imposed because the initial fixed penalty was under appeal. The UT held at [38] and [39] that the Tribunal's jurisdiction in an appeal under para 47(a) is "confined to asking whether the statutory requirements under para 40(1) are met" and it could not consider any other matters.

115. Ms Duncan's appeal is against a fixed penalty rather than the daily penalty in *Birkett*, but the jurisdiction is the same. The Tribunal can only consider whether or not Ms Duncan failed to comply with the Notice. It is clear she failed to comply. Ms Duncan was not required by the Notice to submit voluntary SA returns, and in any event those returns were incomplete, inaccurate, and failed to contain the information required under the Notice. In short, the submission of those voluntary returns did not amount to compliance with the Notice.

116. For completeness, we also agree that Mrs Sanu is factually correct in the response she gave to each of Mr Vyse's three reasons as to why, in his submission, no penalty should have been levied.

117. Mrs Sanu is also right that no explicit reasonable excuse defence has been pleaded. However, it was in the interests of justice for us to consider whether any of Mr Vyse's submissions at §112 should be read as being, in terms, a submission that Ms Duncan had a reasonable excuse.

Reasonable excuse: the statutory test

118. In *Perrin v HMRC* [2018] UKUT 0156 (TCC) ("*Perrin*") the Upper Tribunal (Judges Herrington and Poole) held at [70]:

> "the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence."

119. The UT went on to say at [71]:

> "In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times."

120. Although *Perrin* was published after the hearing of Ms Duncan's appeal, in that judgment the UT also confirmed the formulation of the reasonable excuse test previously set out in the first instance decisions of *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 (Judge Medd QC) and *Coales v HMRC* [2012] UKFTT 477 (TC) (Judge Brannan).

Does Ms Duncan have a reasonable excuse?

121. The only one of Mr Vyse's submissions which could possibly be read as being a reasonable excuse defence is that Ms Duncan had complied with the Notice by filing the voluntary returns.

122. However, there are a number of problems with reading that submission as being a reasonable excuse. The first is that we had no evidence from Ms Duncan. The Tribunal simply does not know whether she believed she had complied with the Notice by filing the voluntary SA returns.

123. Secondly, even if we were to assume she held that belief, it would only provide her with a reasonable excuse if it was "objectively reasonable" taking into account her particular attributes. We had little information about Ms Duncan's attributes. We know she runs a property business, and her 2014-15 SA return stated that this gave rise to income of £37,103. We know that she decided to delay taking her state pension from 2006 to 2015. From those facts we make the further finding that she has a reasonable level of financial and commercial acumen. In our judgment, the reasonable person in Ms Duncan's position would not have considered that, by filing voluntary SA returns, she had provided the information required under the Notice. That is because only very limited information was provided in the voluntary SA returns, and some of that limited information was incorrect. There was an enormous gulf between that information and the detail required by the Notice.

124. Thirdly, we cannot square the circle by finding that Ms Duncan had a reasonable excuse because she relied on Mr Vyse's advice that filing voluntary returns was sufficient. Sch 36, para 45(2)(b) provides that where a person "relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure". We would therefore need evidence that Ms Duncan had taken the necessary "reasonable care", and we have no such evidence.

Conclusion on the penalty

125. For the reasons set out above, we uphold the £300 penalty and refuse Ms Duncan's appeal.

Other matters

126. Mr Vyse also submitted that:

(1) the informal information request issued on 29 July 2016 was "invalid" for various reasons;

(2) the Notice was invalid because HMRC had breached the second data protection principle in the Data Protection Act 1988 by failing "to make clear the uses to which the information [required by the Notice] would be put";

(3) HMRC had wrongly refused to process the voluntary SA returns for 2007-08 and 2008-09;

(4) the tax deducted from the lump sum pension payment should be allocated to Ms Duncan's SA account so as to prevent late payment penalties arising;

(5) HMRC could not issue assessments for years before 2015-16 for various reasons; and

(6) HMRC cannot issue Ms Duncan with failure to notify penalties for any year.

127. We advised Mr Vyse during the hearing that we could consider none of these submissions. Issues (1) to (3) are entirely outwith the jurisdiction of the First-tier Tax Tribunal. Issues (4) to (6) may be within that jurisdiction, but cannot be considered by this Tribunal, because we are only able to consider the appeal notified to us, namely Ms Duncan's appeal against the Notice and the £300 penalty.

Full decision and appeal rights

128. This document contains full findings of fact and reasons for the decision.

129. There is no right of appeal against the Tribunal's decision on the Notice, see Sch 36, para 32(5).

130. Under Rule 39 of the Tribunal Rules, Ms Duncan has a right to apply for permission to appeal against the Tribunal's decision to uphold the penalty. Any such 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 6 JUNE 2018

APPENDIX: LEGISLATION

TAXES MANAGEMENT ACT 1970

7 Notice of liability to income tax and capital gains tax[1]

(1) Every person who

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) or (1B),

shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the persons total income and chargeable gains.

(1B) …

(1C) In subsection (1) "the notification period" means

(a) in the case of a person who falls within subsection (1A), the period of 6 months from the end of the year of assessment…

8 Personal return

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board

(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;

[1] The wording of this section changed during the relevant period but the changes are not material to the issues raised by the appeal.

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;…

12B Records to be kept for purposes of returns

(1) Any person who may be required by a notice under section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment or other period shall—

(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—

(i) where enquiries into the return are made by an officer of the Board, the day on which, by virtue of section 28A(1) or 28B(1) of this Act, those enquiries are completed; and

(ii) where no enquiries into the return are so made, the day on which such an officer no longer has power to make such enquiries.

(2) The day referred to in subsection (1) above is—

(a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company the fifth anniversary of the 31st January next following the year of assessment or (as the case may be) the sixth anniversary of the end of the period;

(b) otherwise, the first anniversary of the 31st January next following the year of assessment

or (in either case) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases).

(2A) Any person who—

(a) is required, by such a notice as is mentioned in subsection (1) above given at any time after the end of the day mentioned in subsection (2) above, to make and deliver a return for a year of assessment or other period; and

(b) has in his possession at that time any records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period,

shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before the day mentioned in subsection (2) above, would have been the relevant day for the purposes of subsection (1) above.

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax….

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates…

34A Ordinary time limit for self-assessments

(1) Subject to subsections (2) and (3), a self assessment contained in a return under section 8 or 8A may be made and delivered at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) Nothing in subsection (1) prevents

(a) a person who has received a notice under section 8 or 8A within that period of 4 years from delivering a return including a self-assessment within the period of 3 months beginning with the date of the notice,

(b) a person in respect of whom a determination under section 28C has been made from making a self-assessment in accordance with that section within the period allowed by subsection (5)(a) or (b) of that section.

(3) Subsection (1) has effect subject to the following provisions of this Act and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case.

(4) This section has effect in relation to self-assessments for a year of assessment earlier than 2012-13 as if

(a) in subsection (1) for the words from "not more" to the end there were substituted "on or before 5 April 2017", and

(b) in subsection (2)(a) for the words "within that period of 4 years" there were substituted "on or before 5 April 2017."

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates

(subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax

(a) brought about deliberately by the person [or]

(b) attributable to a failure by the person to comply with an obligation under section 7

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

FINANCE ACT 2008, SCHEDULE 36

1. Power to obtain information and documents from taxpayer

(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.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

6. Notices

(1) In this Schedule, "information notice" means a notice under paragraph 1, 2 or 5.

(2) An information notice may specify or describe the information or documents to be provided or produced.

20. Old documents

An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer.

21. Taxpayer notices following tax return

(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) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(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

(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.

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

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

(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.

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking the person's position as regards any tax other than income tax, capital gains tax or corporation tax.

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments of tax or withholding of income referred to in paragraph 64(2) or (2A) (PAYE etc).

(9) In this paragraph, references to the person who made the return are only to that person in the capacity in which the return was made.

29. Right to appeal against taxpayer notice

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

32. Procedure

(1) Notice of an appeal under this Part of this Schedule must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(3) On an appeal that is notified to the tribunal, the tribunal may—

(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 confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—

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

(b) if the tribunal 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 decision.

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

39. Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who—

(a) fails to comply with an information notice, or…

(2) The person is liable to a penalty of £300.

44. Failure to comply with time limit

A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

45. Reasonable excuse

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

(2) For the purposes of this paragraph—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having

continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

47. Right to appeal against penalty

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

(a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

48. Procedure on appeal against penalty

(1) Notice of an appeal under paragraph 47 must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

49. Enforcement of penalty

(1) A penalty under paragraph 39, 40 or 40A must be paid—

(a) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, or

(b) if a notice of an appeal against the penalty is given, before the end of the period of 30 days beginning with the date on which the appeal is determined or withdrawn.

(2) A penalty under paragraph 39, 40 or 40A may be enforced as if it were income tax charged in an assessment and due and payable.

59. Authorised officer of Revenue and Customs

A reference in a provision of this Schedule to an authorised officer of Revenue and Customs is a reference to an officer of Revenue and Customs who is, or is a member of a class of officers who are, authorised by the Commissioners for the purpose of that provision.

60. Business

(1) In this Schedule (subject to regulations under this paragraph), references to carrying on a business include--

(a) the letting of property,…

62. Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

(2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—

(a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of [any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

63 Tax

(1) In this Schedule, except where the context otherwise requires, “tax” means all or any of the following—

(a) income tax,

(b) capital gains tax…

and references to “a tax” are to be interpreted accordingly…