[2018] UKFTT 297 (TC)

TC06527

Appeal number: TC/2017/07569

INCOME TAX – Notice to provide information and documents under FA 2008, Sch 36 – three Notices in issue – identifying the Notice under appeal – "old documents" – statutory records definition at TMA s 12B – meaning of "relevant day" when taxpayer received TMA s 8 notices to file but did not comply – requirement in the Notice to provide CGT computation – whether reasonable to require – two Items withdrawn by HMRC – Notice upheld other than those Items, the CGT computation and any old documents.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KHALID MAHMOOD **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

Ms Pallavika Patel, Litigator for HM Revenue and Customs, for the Respondents

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DECISION

1. On 11 October 2017, Mr Mahmood's agent, Mr Vyse of Pearl, Lily & Co, notified an appeal to the Tribunal against a Notice issued on 14 April 2016 by HM Revenue & Customs ("HMRC") under Finance Act 2008, Sch 36, para 1 ("Sch 36 Notice" or "Notice"), requiring the provision of certain information and documents ("Items").

2. We upheld all Items in the Notice other than:

(1) Items 8 and 11, which were withdrawn by HMRC;

(2) Item 5, which asked Mr Mahmood to provide capital gains tax computations; and

(3) any Item(s) which satisfy the statutory description of "old documents", see §§55-59.

3. **Under Sch 36, para 32(4) the Tribunal directs that Mr Mahmood is to comply with the Notice issued on 14 April 2016 by 30 days after the date of issue of this decision, in relation to all the Items other than Items 5, 8 and 11, and any old documents**.

4. As well as the Notice under appeal, HMRC issued two further Notices, with almost identical Items. The original Notice[1] ("the First Notice") was not cancelled, and the simultaneous existence of three almost identical Notices caused some confusion.

5. There was further confusion over the penalties. On 10 February 2017 HMRC issued Mr Mahmood with a £300 penalty for refusing to comply with the First Notice. That penalty was cancelled on 20 April 2017 by HMRC's Review Officer. Ms Patel told the Tribunal and Mr Vyse that there was no extant penalty.

6. However, the Tribunal subsequently identified from the Bundle that a further £300 penalty had been reissued on 11 August 2017. No appeal against a penalty has been notified to the Tribunal and so we were unable to consider it.

Preliminary procedural issues

7. Mr Mahmood did not attend the hearing. Mr Vyse said that he was elderly and did not wish to attend. We considered Rules 2 and 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). It was not in dispute that Mr Mahmood had been notified of the hearing and we decided it was in the interests of justice to proceed in his absence.

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[1] When it is necessary in this decision to distinguish the Notice which is under appeal from the subsequent Notices, we have used the term "the First Notice" for the former, and the Second Notice and the Third Notice for the subsequent Notices. Where there is no risk of confusion, we have referred to the First Notice (the one with which this appeal is concerned) simply as "the Notice".

8. Mr Vyse initially said that he had not received the Bundle from HMRC. Ms Patel provided evidence that the Bundle had been sent to his office, and Mr Vyse then said that he was very busy with a number of similar cases, and it was very likely that the it had been delivered to his office, but then been overlooked. We provided Mr Vyse with one of the Tribunal copies of the Bundle, and asked if he would like an adjournment to consider its contents. Mr Vyse looked at the Bundle briefly and identified that it contained only the correspondence between the parties. He said that he did not require any time to consider it as he was already familiar with that correspondence.

9. For her part, Ms Patel initially said that she had not received a copy of Mr Vyse's Statement of Case on behalf of Mr Mahmood. However, it was clear from the Tribunal file that she had however been sent a copy by email some two weeks previously. Ms Patel apologised and said that she had been out of the office attending hearings and had been unable to access her email during the previous two weeks. She asked for an adjournment to consider the Statement of Case. When we resumed, Ms Patel confirmed that she had had sufficient time to consider the Statement of Case.

The legislation and the evidence

10. The relevant legislation is in the Appendix. Where the detailed wording of a particular provision is under consideration, for ease of reference we have reproduced that wording in the main body of this decision.

Difficulties with the Bundle

11. The Bundle of documents was prepared by HMRC, and contained the correspondence between the parties. However, it was difficult to follow, largely because it contained numerous copies of emails between the parties. This was caused by the full email chain invariably being incorporated in the Bundle, including not only the text but also multiple copies of addresses and disclaimers. In our view, a single copy of each email, filed in date order, is normally sufficient. The Bundle also contained several copies of the same letters sent between the parties, some of which were not filed in date order. When the Tribunal filleted the Bundle after the hearing, we removed 138 duplicate pages out of the 243 pages originally provided.

12. Despite the volume of material, some relevant documents were omitted. We noted the following:

(1) in his statutory review of the Notice, the HMRC Review Officer referred to the earlier "view of the matter" letter sent to Mr Vyse on 23 August 2017, but that letter was not in the Bundle. Fortunately, we able to infer its contents from other correspondence; and

(2) HMRC's Statement of Case said that self-assessment ("SA") returns had been issued to Mr Mahmood, and included a table showing the dates of issue, and their filing dates. However, a Statement of Case is not evidence but a submission. No evidence was included in the Bundle to support either the issuance of the SA returns, or the dates on which they were submitted HMRC; there was also no copy of the SA returns themselves. In making findings on the issues about receipt and filing, we instead relied on:

(a) Mr Vyse's evidence in chief that Mr Mahmood had been issued with SA returns by HMRC for every year from 2006-07 onwards; and

(b) a letter in the Bundle dated 10 January 2017 which referred to the filing of those SA returns.

The oral evidence

13. Mr Vyse gave evidence about being instructed by Mr Mahmood, and communications between them and HMRC. That was first-hand evidence, it was unchallenged and we accepted it. Mr Vyse also gave evidence about Mr Mahmood's origins; about the shop he opened in 2006 when he first engaged Mr Vyse's firm, about the subsequent closure of that business, and about the commencement of his letting business. That was hearsay evidence, but Rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") allows the Tribunal to accept hearsay evidence if it is in the interests of justice to do so. The evidence about Mr Mahmood's origins and his businesses was unchallenged, and we decided it was in the interest of justice to accept it.

14. Mr Vyse also gave evidence about the information contained in Mr Mahmood's self-assessment returns. That too was hearsay evidence. We decided not to accept that evidence because the accuracy and completeness of those returns was under challenge by HMRC, and as Mr Vyse himself accepted, they did not explain how Mr Mahmood had supported himself during the period after the closure of his shop.

The facts

15. From the correspondence and from the evidence given by Mr Vyse which we accepted, we make the findings of fact in this part of our decision.

16. Mr Mahmood came to the UK at some point before 2006 from Pakistan. He initially opened a small shop and Mr Vyse was his accountant. He registered with HMRC as self-employed and filed an SA tax return for 2005-06. After around a year, Mr Mahmood sold the shop and ceased to instruct Mr Vyse. He invested in properties which he let out.

17. From 2006-07 onwards, HMRC sent Mr Mahmood SA returns issued under Taxes Management Act 1970 ("TMA") s 8 every year, but they were not submitted to HMRC.

18. At some point before 9 February 2016, HMRC became aware of Mr Mahmood's lettings business and identified that he had not notified chargeability in relation to that business. On 9 February 2016, Mr Ibrahim of HMRC's Local Compliance-Small and Medium Enterprises Unit wrote to Mr Mahmood, warning that he could be liable to penalties for failing to notify chargeability, and asking him to provide the information and documents set out on an attached list.

19. On 23 February 2016, Mr Mahmood reappointed Pearl, Lily & Co to act for him, and on 24 February 2016, Mr Vyse emailed Mr Ibrahim and asked for a 30 day extension.

20. On 14 April 2016, Mr Ibrahim issued Mr Mahmood with a Sch 36 Notice containing 11 Items ("the First Notice"). The deadline for compliance was 15 May 2016. On 9 May 2016, Mr Vyse asked for that deadline to be extended to 90 days. On 6 June 2016, Mr Ibrahim gave him a 30 day extension to allow him time to reply; in the same letter, he also said that there was no need for Mr Mahmood to comply with Item 8 of the Notice.

21. On 24 June 2016, Mr Vyse informed Mr Ibrahim by email that Mr Mahmood had disposed of two capital assets, one in 2013-14 at a loss, and one in 2015-16 at a gain. He said that the gain was covered by (a) the loss carried forward, and (b) the annual exemption. The letter did not give any figures, or details of the assets.

22. Mr Vyse did not provide the information required under the First Notice, but continued to ask for more time. On 15 August 2016 he filed Mr Mahmood's 2014-15 SA tax return. On 27 October 2016 he sent Mr Ibrahim the following information about Mr Mahmood's taxable income:

Tax Year	£tax	Comments
2006-07	nil	
2007-08	(£6,338)	
2008-09	(£13,085)	
2009-10	(£3,271)	
2010-11	£6,475	After losses b/fd of £1,188
2011-12	£7,475	After losses b/fd of £3,647

23. Mr Vyse asked Mr Ibrahim to "accept these figures in lieu of our client incurring the expense of us preparing paper returns for these six years".

24. On 17 November 2016 Mr Ibrahim wrote to Mr Vyse, asking for "the records used to draw up the accounts along with supporting documents and bank statements for all tax years concerned and how the property was acquired". He added "can you also advise how Mr Mahmood has been supporting himself as his profits have been very low". He gave Mr Vyse a new deadline of 8 December 2016. No reply was received by that deadline.

25. On 21 December 2016, Mr Ibrahim issued Mr Mahmood with a further Sch 36 Notice ("the Second Notice"). The Items on the Second Notice were the same as those on the First Notice, other than the omission of Item 8, so there were now 10 Items. On 10 January 2017, Mr Vyse appealed the Second Notice and said he was preparing to file SA returns for the years set out in the Table above, and that SA returns had already been filed for 2012-13 through to 2015-16. He asked for a further 90 days to respond to the Second Notice.

26. On 26 January 2017, Mr Ibrahim asked Mr Wickham, an "authorised officer" as defined in Sch 36, para 59, to approve the issuance of a £300 penalty for failure to

comply with a Notice. From this we find as a fact that Mr Ibrahim was not himself an authorised officer.

27. Mr Wickham approved the issuance of the penalty. On 10 February 2017 Mr Ibrahim issued Mr Mahmood with a £300 penalty notice for refusing to comply with the First Notice[2]. Coincidentally, on the same day, Mr Vyse submitted paper tax returns for Mr Mahmood for 2006-07 through to 2011-12.

28. On 13 February 2017, Mr Ibrahim wrote to Mr Vyse, refusing the appeal made on 10 January 2017 against the Second Notice, and sending him a copy of the penalty he had imposed for failure to comply with the First Notice.

29. On 17 February 2017, Mr Vyse appealed against the penalty, on the grounds that he had submitted tax returns for Mr Mahmood. On 23 February 2017, Mr Ibrahim refused the appeal, saying that "sending in tax returns does not comply with the information notice that was sent to your client". On 3 March 2017, Mr Vyse asked for a statutory review of the £300 penalty.

30. On 20 April 2017, Mr Crawley, an HMRC Review Officer, issued his review of the £300 penalty. He took into account the fact that there were two separate Sch 36 Notices, saying "these are separate notices and do not relate to each other (even if both contain similar content)". He cancelled the penalty. Although his letter is not entirely clear, our understanding is that he did so because the First Notice had, in effect, been supplanted by the Second Notice, so that it was inappropriate to issue a penalty when the underlying Notice had been replaced.

31. On 12 June 2017, Mr Ibrahim opened an enquiry under TMA s 9A into Mr Mahmood's SA return for 2015-16, and attached a list of information which he required; this was the same as that in the Second Notice.

32. On 28 July 2017 Mr Vyse requested a statutory review of the Second Notice.

33. On 11 August 2017, Mr Ibrahim issued a further Sch 36 Notice ("the Third Notice"). The Items are identical to the Second Notice, but the wording of the Notice itself states that Mr Ibrahim needed the information "so I can complete my check into your Self-Assessment Tax Return for the year ended 5 April 2016".

34. Also on 11 August 2017, Mr Ibrahim issued a further penalty notice charging Mr Mahmood £300 for a failure to comply with the First Notice ("the Second Penalty").

35. On 11 September 2017, a different HMRC Review Officer, Mr Potts, issued the conclusions of his statutory review. It begins (emphasis added):

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[2] HMRC's Statement of Case says that this was issued for failure to comply with the Second Notice, but it is clear from the wording on the Penalty Notice that this is incorrect.

> "I wrote to you on 23 August advising that I was carrying out the statutory review of the Notice to Provide information and Produce Documents, issued by HMRC and dated 14 April 2016."

36. It is therefore clear that this statutory review was of the First Notice. Furthermore, Mr Potts noted that on 6 June 2016 Mr Ibrahim had informed Mr Vyse that it was not necessary to provide the information in Item 8, and that was a reference to Mr Ibrahim's email of 6 June 2016 which related to the First Notice. Mr Potts made no reference to the subsequent issuance of the Second and Third Notices. He upheld the First Notice, with the exception of Item 8.

37. On 11 October 2017, Mr Vyse notified an appeal to the Tribunal, attaching the HMRC review letter of 11 September 2017.

The issue before the Tribunal

38. It is clear from the above findings of fact that there is significant confusion in this case. Based on our findings of fact we summarise the position as follows:

(1) there are three extant Notices, each with the same content, except that the First Notice includes Item 8. Mr Potts, HMRC's Review Officer upheld the First Notice, other than in relation to Item 8;

(2) on 14 April 2016 Mr Mahmood's appeal against Mr Potts' review decision was notified to the Tribunal; and

(3) HMRC cancelled the original penalty, but on 11 August 2017 Mr Ibrahim issued the Second Penalty, for the same amount of £300.

39. HMRC's Statement of Case was singularly unhelpful in that:

(1) it did not specify which Notice was under appeal;

(2) stated at paragraph 29 that a penalty of £300 had been notified to the Tribunal (when no penalty had been notified); and

(3) concluded at paragraph 63 that Mr Mahmood "is liable to a penalty of £300 and further penalties of £60 per each day of failure as failures have continued" (although no daily penalties had been charged).

40. The Tribunal asked Ms Patel what she understood to be in issue. She said that the Second Notice had replaced the First Notice, and there was no extant penalty as the penalty charged had been cancelled. Mr Vyse did not disagree.

41. However, the First Notice has not been cancelled. HMRC's Review Officer, Mr Potts, carried out a statutory review of that Notice after both the Second and Third Notices had been issued, and Mr Vyse attached that review letter to Mr Mahmood's appeal notification.

42. Rule 20 of the Tribunal Rules is headed "starting appeal proceedings", and provides that the notice of appeal must include "details of the decision appealed against" and attach a "written record of any decision appealed against". The decision attached to Mr Mahmood's appeal notification is Mr Potts' review letter of 11

September 2017, which explicitly relates only to the First Notice. The matter before the Tribunal is therefore Mr Mahmood's appeal against the First Notice, but without the inclusion of Item 8.

43. We make the following observations about the Notices and the penalties:

(1) Issuing Notices in series without the earlier Notice(s) being cancelled, as has happened here, causes confusion both for the taxpayer and for HMRC.

(2) Although Mr Crawley cancelled the original penalty for the First Notice on statutory review, Mr Ibrahim subsequently issued the Second Penalty for the First Notice. According to the papers in the Bundle, that penalty has not been appealed by Mr Mahmood; it has not been notified to the Tribunal and in consequence it cannot be considered by us as part of this appeal.

(3) However, HMRC may wish to confirm to Mr Mahmood and Mr Vyse what the position is in relation to the Second Penalty for the First Notice. In considering the position, HMRC may wish to take into account that Ms Patel gave both Mr Vyse and the Tribunal the understanding that there was no extant penalty.

The burden of proof and the parties' submissions

44. Ms Patel 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.

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

Mr Vyse's overall submissions

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

46. Mr Vyse said that his "main submission" was that Sch 36 does not provide HMRC with a "stand-alone" power to require the provision of information. Instead HMRC's powers under Sch 36 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

47. 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 which are found in TMA s 9A, and the restrictions on discovery assessments set out in TMA ss 29 and 36.

48. Mr Vyse said that a stand-alone approach would subject taxpayers, particularly those who were not in self-assessment, to an "all pervasive procedure", which was far more extensive than would be the position in any TMA s 9A enquiry, and this could not have been intended by Parliament.

49. He also referred to Sch 36, para 21(1), which is headed "Taxpayer notices following tax return" and 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."

50. In reliance on that provision, he submitted that "information notices cannot be issued when a tax return has been filed, subject to four exclusions labelled A-D". He went on to say that a person cannot simultaneously be the subject of a "check" allowing the issuance of a Sch 36 Notice, and a s 9A enquiry.

51. The Tribunal rejects these submissions, for the following reasons:

(1) there is no statutory requirement for HMRC to notify a taxpayer that they are subject to a "check" in advance of asking for information or documents, although as a matter of practice they usually first ask for that material informally, as happened here – see Mr Ibrahim's letter of 9 February 2016;

(2) 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; and

(3) HMRC's powers are circumscribed by Sch 36 itself, and in particular by the requirement that the information and documents are reasonably required, so those powers are not unlimited.

52. To the extent that Mr Vyse was 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 the Notice is invalid because Mr Ibrahim was not an "authorised officer"

53. Mr Vyse submitted that Mr Ibrahim was either not an "authorised officer" or had provided no evidence that he was, and he therefore had no power to issue the Notice.

54. We have found as a fact that Mr Ibrahim was not an authorised officer, see §26, but that does not mean he was unable to issue the Notice. Para 36, Sch 1 allows a Notice to be issued by "an officer". Some information powers are reserved to authorised officers, such as *ex parte* notices (para 3(3)(a)); notices to "identity unknown" persons (para 5), or requiring the provision of "old documents" (para 20). Issuing a first-party Sch 36 Notice is not one of those reserved powers. We therefore reject Mr Vyse's submission.

Old documents

55. 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."

56. He said that it was not in dispute that Mr Mahmood 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.

57. We have already found that Mr Ibrahim was not an authorised officer, and we agree that there is no evidence an authorised officer was asked to agree to the issuance of the Notice. Thus, if "the whole of" any of the documents requested by the Notice originate more than 6 years before the date of the notice, they cannot be required. However, that does not invalidate the Notice as a whole, because:

(1) para 20 says that "an information notice may not require a person to produce a document". It does not say that if such a document is included in a Notice, the entire Notice is invalidated, and there is no reason to read the provision in that way. That was also the decision of Judge Thomas and Mr Law in *Laxmi & Bhupatrai Chohan v HMRC* [2017] UKFTT 0779 (TC) at [73]-[74] with which we agree;

(2) the Notice asks for information and documents "from the date the property was first owned" but continuing to the date the Notice was issued, so it clearly extends into a period after that six year cut off period; and

(3) para 20 refers only to "documents", not to "information". HMRC can therefore ask for information which goes back more than six years before the date of the Notice, without needing the approval of an authorised officer;

(4) in relation to documents, para 20 is only engaged if "the whole of" the document originates more than 6 years before the date of the Notice. Thus, it might apply, for example, to completion statements where the property transaction took place more than six years before the date of the Notice. But it would not apply to ledgers or books of account which cover periods both before and after that six year point; and

(5) for the avoidance of any possible doubt, schedules which Mr Mahmood is required to prepare to satisfy the Notice are not within the "old documents" provision.

58. If any document required by the Notice meets the statutory description of an "old document", namely one where "whole of the document originates more than 6 years before the date of the notice", it does not have to be provided. The Tribunal had no information about which (if any) documents meet that description, so we make this part of our decision in principle only.

59. If, when Mr Mahmood and Mr Vyse are complying with the Notice, they identify any such documents, Mr Vyse will need to explain to HMRC the basis on which they are old documents. If the parties cannot agree, they can ask the Tribunal to list a further hearing.

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

60. Mr Vyse submitted that the Notice 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, and it is not in the grounds of appeal, but we nevertheless considered it.

61. Mr Mahmood has not been charged with tax evasion; he has been issued with a Notice under Sch 36. Were he to be charged with tax evasion, he 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 648k, with which both Black LJ and Floyd LJ concurred. We therefore reject Mr Vyse's Article 6 submission.

Conclusions on Mr Vyse's overall submissions

62. 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

63. 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.

64. 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.

The Items which were agreed to be statutory records

65. The parties agreed (subject to the caveat for "old documents" set out at §55-59) that the following Items or part-Items were statutory records:

(1) Item 1: the date the first property owned was made available for letting;

(2) Item 2 (part): the post code of all the properties owned which had been made available for letting; and any rental accounts prepared showing the rental income, expenses, and any profit or loss;

(3) Item 3 (part): the purchase price of the let properties and the date the properties were acquired; completion statements from the solictor(s) detailing property purchases and sales; the amount of any deposit together with documentary evidence to support that;

(4) Item 4: the full address of any properties sold, the sale price and date sold;

(5) Item 6 (part): a schedule of all rental income received for each tax year since the first property was let;

(6) Item 7: a schedule of all property expenditure being claimed for each tax year, highlighting any estimated expenses not verified by bills or invoices;

(7) Item 9: all mortgage statements for any mortgage on any of the properties to support any mortgage interest claimed;

(8) Item 10: all property income and expense books, records, bank statements reflecting the property income and expenses, to include bank cheque book stubs and expenses bills and invoices.

Whether part of Item 2 is a statutory record

66. The parties disagreed as to whether part of Item 2 was a statutory record, namely the full address of all the properties owned which had been made available for letting. Mr Vyse submitted that only the postcode was a statutory record. Ms Patel said the full address was a key identifier for the property; in contrast the postcode commonly relates to more than one property on a street. In addition, there might be several separate flats within a single building, and a landlord would need to know the flat number and not just the postcode. Mr Vyse said that HMRC could find that information using other sources, and did not need to know the full address in order to check the taxpayer's tax position.

67. We agree with Ms Patel. In order for a taxpayer "to make and deliver a correct and complete return for the year", he has to know the full address of each property which was let in that year. Although Mr Vyse did not agree that this was a statutory record, his detailed submissions focused on whether the information was "reasonably required" and not whether the information was needed by Mr Mahmood to complete his tax return. We add that, had we been required to decide whether the full address was reasonably required, we would have found that it was.

How TMA s 12B applies where no SA return filed by fifth anniversary

68. Although the parties agreed that the Items set out in §65 were statutory records subject to the caveat about old documents, the Tribunal also considered TMA s 12B, the relevant statutory records provision for a person in Mr Mahmood's position. This 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."

69. It was not in dispute that property letting is a business, see the Income Tax (Trading and Other Income) Act 2005, s 264. Mr Mahmood is therefore a person "carrying on a …business alone" who has been issued with an SA tax return for all years from 2007-08 onwards. It was also not in dispute that an SA tax return constitutes a notice to file under TMA s 8. Mr Mahmood was thus obliged to keep and preserve "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" until "the end of the relevant day". In the case of a person in business, such as Mr Mahmood, 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 enquiries are made into the return under TMA s 9A, the day on which those enquiries are completed (s 12B(1)(b)(i)); and

(3) where no enquiries into the return are so made, the day on which such an officer no longer has power to make such enquiries (s 12B(1)(b)(ii)).

70. Under TMA s 9A(2)(b), set out in the Appendix, HMRC has the power to enquire into a return "up to and including the quarter day next following the first anniversary of the day on which the return was delivered". Thus, the time when an officer "no longer has power to make such enquiries" does not begin to run until the SA return is delivered.

71. We therefore find that a person (such as Mr Mahmood) who has received a notice to file an SA return, but has not done so by the fifth anniversary of the 31st January next following the year of assessment, has a continuing obligation to retain statutory records under TMA s 12B until the latest of:

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

(2) where enquiries are made into the return under TMA s 9A, the day on which those enquiries are completed (s 12B(1)(b)(i)); and

(3) where no enquiries into the return are so made, the period "up to and including the quarter day next following the first anniversary of the day on which the return was delivered" (s 12B(1)(b)(ii) and s 9A(2)(b).

72. Thus, if HMRC have opened enquiries into any of Mr Mahmood's SA returns, the documents and information relevant to that year remain statutory records until the conclusion of the enquiry. If no enquiry has been opened by "the quarter day next following the first anniversary of the day on which the return was delivered", the documents and information cease to be statutory records on the fifth anniversary of the 31st January next following the year of assessment.

73. We have found as facts that Mr Vyse filed Mr Mahmood's SA returns, and that HMRC had opened an enquiry into the return for 2015-16, but we have no information as to whether HMRC has opened enquiries into the returns for earlier years, so as to extend the statutory records periods, or whether some Items have ceased to be statutory records because of the interaction of TMA ss 12B and s 9A. We therefore assumed that some Items have ceased to be statutory records, and have included those Items in the next part of our decision. But we emphasise that we are not making a finding that any Items have ceased to be statutory records. That will depend on the interaction of the provisions at §71.

74. It is implicit in the analysis set out above that time limits are not frozen at the date an Item is included in a Notice, but continue to run. The statutory underpinning for that conclusion was explained in *Duncan v HMRC* under reference

TC/2017/07568 at [83]-[89], also a decision of Judge Redston and Mr Simon and is not repeated here.

The other Items

75. As already noted, Item 8 was withdrawn by Mr Ibrahim and so was not considered by Mr Potts when he carried out his statutory review, see §36. In the course of the hearing, Ms Patel said that HMRC were also withdrawing Item 10 from the Notice. As those Items have been withdrawn, we say no more about them.

76. This part of the decision considers whether the remaining Items are "reasonably required…for the purpose of checking [Mr Mahmood's] tax position". These are:

(1) Items which were never statutory records, other than "old documents", see §55-59; and

(2) Items which were statutory records but are no longer in that category because (a) no enquiry has been opened into the relevant return by "the quarter day next following the first anniversary of the day on which the return was delivered", and (b) the fifth anniversary of the 31st January next following the year of assessment has already passed; again excluding any "old documents".

Item 3 (part)

77. The remaining part of Item 3 asked for the source of any deposit used to purchase a let property, together with documentary evidence. Ms Patel said that it was reasonable for Mr Ibrahim to require this information and the related documents, because Mr Mahmood had no declared source of income. She submitted that this had been further reinforced by the SA returns subsequently submitted, which show either losses or very low income figures. After some consideration, Mr Vyse conceded this point. We agree that this part of Item 3 is reasonably required.

Item 5

78. Item 5 asked for "the capital gains tax computation on the disposal of any sold properties". Ms Patel said that this was reasonably required, because it would show the component parts of the calculation. Mr Vyse said that it was not the sort of information which it was reasonable to require under Sch 36.

79. We were surprised by this Item. It is correct, of course, that Sch 36, para 1 allows HMRC to obtain information or documents if they are "reasonably required…for the purpose of checking the taxpayer's tax position" and that:

(1) "checking" is defined in Sch 36, para 58 as including "carrying out an investigation or enquiry of any kind"; and

(2) "tax position" is defined in Sch 36, para 64 as "the person's position as regards any tax" including his "past, present and future liability to pay any tax".

80. HMRC are therefore not prevented by the wording of Sch 36 from asking a taxpayer to produce tax computations, because they are documents which HMRC may use to check his liability to pay tax. However TMA s 9 makes clear that computations are part of the normal self-assessment process. Although there may be situations in

which it would nevertheless be reasonable for HMRC to require a taxpayer who is within self-assessment to provide a computation independently of the SA process, we think those situations will be rare. In Mr Mahmood's case, we find that Item 5 is not reasonably required, and we set it aside.

Item 6 (part)

81. The remaining part of Item 6 asked for "the signed tenancy agreements for all years for all properties". Ms Patel said that this would provide independent evidence of the rent payable and whether the tenant had to pay a deposit, which would be a reasonable check for HMRC to carry out. Moreover, it would include information about whether the property was furnished, which was relevant to any wear and tear allowance. Mr Vyse accepted that this Item was reasonably required for those reasons, and we agree.

Items where the information is also held by the Land Registry

82. Mr Mahmood's grounds of appeal, submitted by Mr Vyse, said that Mr Mahmood "is not obliged to copy public records" such as those at the Land Registry and send them to HMRC, and that it was unreasonable for HMRC to require their provision. That submission was relevant to the following Items:

(1) Item 3 (part): the purchase price paid for each of the properties and the dates they were acquired; and

(2) Item 4 (part): the sale price of any of the properties, and the date sold.

83. We have already found that these Items were statutory records, see §65. However, it is possible that this may no longer be the case, see §72-73. We therefore considered whether they were "reasonably required". Although the addresses of the properties have been required 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 his properties, because they do not have that basic data. We therefore find that, to the extent that the Items listed in the previous paragraph are no longer statutory records, their provision by Mr Mahmood is reasonably required.

Other Items which have ceased to be statutory records

84. As already noted, other Items may no longer be statutory records because of the passage of time. However, they are each important in enabling HMRC to understand Mr Mahmood's property business, and how he supported himself, despite having nil or very low profits. In our judgment it is reasonable for HMRC to require that Mr Mahmood provide the information or documents required by the Items in the Notice even where an Item is no longer a statutory record.

Other matters

85. Mr Vyse also submitted that:

(1) 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";

(2) HMRC had wrongly refused to process Mr Mahmood's SA returns for 2007-08 and 2008-09;

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

(4) HMRC cannot issue Mr Mahmood with failure to notify penalties for any year.

86. We advised Mr Vyse during the hearing that we could consider none of these submissions. Issues (1) and (2) are entirely outwith the jurisdiction of the First-tier Tax Tribunal. Issues (3) and (4) 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 Mr Mahmood's appeal against the Notice.

In conclusion

87. The Notice is upheld other than in relation to Item 5, which was set aside by the Tribunal, and Items 8 and 11 which were withdrawn by HMRC, and any old documents.

88. This document contains full findings of fact and reasons for the decision. There is no right of appeal, see Sch 36, para 32(5).

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[3]

(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.

9 Returns to include self-assessment

(1) Subject to subsections (1A) and (2), every return under section 8 or 8A of this Act shall include a self-assessment, that is to say

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source…

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

(1A) …

(2) A person shall not be required to comply with subsection (1) above if he makes and delivers his return for a year of assessment

(a) on or before the 31st October next following the year, or

(b) where the notice under section 8 or 8A of this Act is given after the 31st August next following the year, within the period of two months beginning with the day on which the notice is given.

(3) Where, in making and delivering a return, a person does not comply with subsection (1) above, an officer of the Board shall if subsection (2) above applies, and may in any other case

(a) make the assessment on his behalf on the basis of the information contained in the return, and

(b) send him a copy of the assessment so made…

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;

(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).

INCOME TAX (TRADING AND OTHER INCOME) ACT 2005

264 UK property business

A person's UK property business consists of

(a) every business which the person carries on for generating income from land in the United Kingdom…

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.

58. General interpretation

In this Schedule--

"checking" includes carrying out an investigation or enquiry of any kind…

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…

64. Tax position

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

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

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

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

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