



**TC07263**

**Appeal number: TC/2019/01851**

*PROCEDURE – Sch36 information notice– whether valid– yes – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JOLANDA CYBULSKA-SAPON**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO  
MS ELIZABETH BRIDGE**

**Sitting in public at Nottingham on 3 July 2019**

**The Appellant did not appear and was not represented**

**Mr Vallis, presenting officer, for the Respondents**

## DECISION

### Background

1. This is an appeal under para 29 of Schedule 36 of Finance Act 2008 (“Schedule 36”) against a taxpayer notice (“the Information Notice”) issued by HMRC under para 1, Schedule 36 on 29 August 2018.
2. The appellant did not attend the hearing. The court clerk telephoned the number provided on the appeal documentation and was advised that the appellant was at work and that she had asked for the matter to be considered on the basis of the documents already provided, as she did not consider that her English was good enough to enable her to represent herself before the tribunal.
3. The Tribunal had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). We decided that the appellant was clearly aware that the hearing was taking place and had chosen not to attend and that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules.
4. The Information Notice requested the following information:
  - (1) The appellant’s contract of engagement with Nationwide Healthcare Providers Ltd;
  - (2) For the tax years ended 5 April 2013 and 5 April 2016:
    - (a) A copy of all sales invoices to evidence the amount reported as turnover;
    - (b) A copy of all receipts/documents to evidence the amount claimed as other expenses;
    - (c) All bank statements, both personal and business
  - (3) For the tax year ended 5 April 2013, a full explanation of the circumstances that led the Appellant to:
    - (a) Make payments to HMRC in anticipation of an expected tax liability;
    - (b) Decide that the tax paid on account was not due and was correctly repayable
  - (4) In relation to the remuneration scheme used by the appellant:
    - (a) The name of the trust involved in the arrangements;
    - (b) Promotional material received concerning the arrangements;
    - (c) The name of the person who introduced the appellant to the trust;
    - (d) A copy of the signed trust deed;
    - (e) An analysis of all contributions made for each tax year;

- (f) Copies of all correspondence (including emails) where the setting up of the trust, the terms of the trust or sums to be contributed are discussed and/or referred to;
- (g) Copies of all subsequent correspondence (including emails) with the trust and/or anyone acting as a representative or on its behalf.

### **Appellant's case**

5. The appellant's case can be summarised as follows:

(1) The Information Notice was issued in the course of a Code of Practice 9 ("COP 9") investigation. It was submitted that a COP 9 investigation can only be in respect of tax affairs outside the tax return because, for matters relating to a tax return, a s9A enquiry is available and that the s9A enquiry route had been used by HMRC for the tax returns in other tax years. It was submitted that the COP 9 investigation cannot therefore validly be used to require the provision of information and documents relating to tax returns. As this Information Notice is seeking information in relation to the appellant's self-assessment tax returns and was issued in the course of a COP 9 investigation, it cannot have been validly issued. The appellant also requested that the Tribunal rule that the COP 9 investigation is invalid as it relates to tax returns, for which a s9A enquiry is the appropriate mechanism.

(2) HMRC had not demonstrated before the issue of the Information Notice that it had reasonable grounds for suspicion that income may not have been assessed because it was not declared on the return.

(3) The Information Notice is further invalid because none of the conditions required by para 21 of Schedule 36 for the issue of that notice have been met. It is common ground that Conditions A, C and D do not apply. It was submitted that Condition B (that HMRC has reason to suspect that amounts have not been assessed, or an assessment has become insufficient, or that relief from tax may have been or become excessive) had also not been met as HMRC were seeking the documents in order to satisfy Condition B, rather than satisfying Condition B to validly seek the documents (as in the case of *Betts* (TC02824)). Further, it was submitted that "excessive expenses" as stated by HMRC are not synonymous with "relief from relevant tax" and so as there was no relevant relief or assessment, Condition B had not been satisfied.

(4) Some of the documents required are accountants' link papers and so the Information Notice is ineffective in relation to these under para 26(1) of Schedule 36 as it is information which has been produced by a tax accountant assisting any client".

(5) HMRC has not shown that the appellant had more than one bank account yet is insisting that "all bank statements both personal and business" be provided. It was submitted that the burden of proof was on HMRC to show that other bank accounts exist in order for the request to meet Condition B and for the Information Notice to be valid.

(6) HMRC has stated that some of the information is requested to enable them to determine the behaviour leading to a repayment of tax for the year ended 5 April 2013 and so to be able to assess the level of penalties. This amounts to requesting the appellant self-incriminate as the repayment was made by HMRC rather than at the request of the taxpayer and so the repayment did not arise from the taxpayer behaviour.

(7) Some of the documentation required in relation to trust arrangements is generic information and is already in the possession of HMRC. As this is generic information it is not relevant paperwork for the purposes of supporting expenses claimed in the appellant's tax returns and is also not information relating to the appellant in her capacity as a dentist, in which capacity the tax return was filed and so does not meet the requirements of paragraph 21(9) of Schedule 36. These are also not documents relating to her trade or business and so are not required to be kept. Further, the appellant has never been the settlor of a UK trust and the documents are irrelevant to her tax position as the expenses claimed did not relate to her membership of a foreign trust's umbrella remuneration arrangements. HMRC have also not shown how the information requested in relation to the trust arrangements are relevant to showing insufficient assessment or excessive relief in relation to the appellant's business as a dentist, making them capable of being requested under an Information Notice. It was submitted that HMRC are making speculative enquiries hoping to find something relevant rather than being able to identify specific risks for which they sought information.

(8) It was also submitted that HMRC had accepted that the appellant could choose not to provide the non-statutory information such that non-provision of the information cannot be a failure to comply with the Information Notice.

(9) Even if the Information Notice is valid, the penalty notice is invalid because an appeal in relation to the Information Notice was submitted to HMRC on 24 September 2018. The appeal was acknowledged by HMRC on 1 December 2018. It was submitted that para 46(3) of Schedule 36 meant that, as the appeal notice had been given on 24 September 2018, the issue of a penalty notice on 19 December 2018 was invalid as the appeal had not been withdrawn or determined by the Tribunal at that date.

(10) It was submitted that as the Information Notice was invalid some of the information in HMRC's possession has been obtained unlawfully and should not be used by HMRC (per *PML (TC04612)*).

(11) It was submitted that the investigation and use of the Information Notice was in breach of Articles 3, 6 and 8 of the appellant's human rights as documents are being requested which HMRC has not shown exist and, as HMRC has not shown that it had "reason to suspect" the appellant's right to a fair hearing has been breached.

## HMRC's case

6. HMRC submitted that the Information Notice had been validly produced for the following reasons:

(1) The COP 9 investigation procedure is not limited to matters outside of tax returns;

(2) Information Notices under Schedule 36 may be used where the information is reasonably required to check a taxpayer's position (para 1 of Schedule 36) and so are not limited to use in s9A enquiries.

(3) HMRC had reason to suspect that an amount which ought to have been assessed to relevant tax for the chargeable period had not been assessed. The evidence of Officer Little was that for the tax years up to 5 April 2012, the appellant had claimed "other business expenses" of less than £1000 in each tax year. From the tax year 5 April 2013, the appellant began to claim large amount of "other business expenses", of up to 90% of her turnover. The appellant had not provided any explanation of these expenses and the appellant would not have had sufficient funds to meet daily living expenses. Further, in respect of 2012/13, the appellant had expected following the end of that tax year that she would make a profit as she made payments on account in excess of £17,000. Once the tax return was submitted, this changed without explanation as a result of the large claim for undefined "other business expenses". Correspondence received from the appellant's advisers also stated that she had participated in a remuneration trust scheme, which also gave HMRC reason to suspect that excessive relief for expenses had been claimed.

(4) The suspicions existed prior to the issue of the Information Notice; the information sought is not required to form the basis for suspicion but is instead required to check the tax position of the appellant. HMRC is not required to provide full details of the reasons for suspicion before issuing an Information Notice.

(5) HMRC submitted therefore that Condition B had been satisfied and the Information Notice was valid. Further, the appellant's contention that the items requested did not relate to the appellant in the capacity in which the return was made was incorrect. The return is made by the appellant as a taxpayer, not merely as a dentist and the items are required to check that return.

7. HMRC submitted that some of the items of information requested in the Information Notice are statutory records and that, under para 29(2) of Schedule 36, the appellant has no right of appeal against the requirement to produce such information. HMRC requested that the appeal in respect of these parts of the Information Notice should be struck out. These items are:

(1) 2(a),(b), (c): invoices and evidence of expenses are prime documents which are required to be kept. Bank statements are also required to be kept to confirm that records are complete and that amounts have been correctly accounted for.

4(a), (d): as the appellant has claimed that contributions to the trust are a business expense, HMRC considers requesting the name of the trust to be equivalent to the name of a supplier where there is no documentary evidence of an expense. The information is required to enable HMRC to verify information provided. The trust deed is, similarly, a record evidencing expense claimed and so is required to be kept.

8. With regard to the other documents, HMRC submitted that these are reasonably required to check the tax position of the appellant (as required by statute) as follows:

(1) Item (1) – contract of engagement – this is over six years old and so is not a statutory record. The request for this was approved by an authorised officer of HMRC. The document is required to determine the level of expenses likely to be incurred by the appellant in fulfilling this contract.

(2) Item (3) – explanations requested – these are required to enable HMRC to understand the appellant’s reasons for submitting a return showing nil tax due when the appellant had been of the view at the end of the tax year that tax was due. This will enable HMRC to ascertain what penalties are appropriate; under para 64(1) of Schedule 36, the “tax position” for which an Information Notice is issued to check includes penalties.

(3) Item 4(b) – promotional material – this is reasonably required to enable HMRC to ascertain what the appellant understood about the trust arrangements and how her tax affairs would be affected by such arrangements. This will also assist HMRC in assessing the behaviour of the appellant for penalty purposes.

(4) Item 4(c) – name of the introducer – this information is required to enable HMRC to ascertain whether steps taken by the appellant to check their tax position were reasonable, to assist in determining penalties.

(5) Item 4(e) – analysis of contributions to the trust – this is required to determine the pattern of contributions and to assist in understanding how the arrangements were intended to operate, and also to assist in determining whether contributions were actually paid.

(6) Item 4(f) and (e) – correspondence – this information is required to assist in verifying the existence of the trust, details of contributions to the trust, the operation and motive of the arrangements, including the appellant’s understanding of the arrangement to assist in determining penalties.

9. HMRC submitted that, for the reasons given, the Information Notice had been validly issued.

10. HMRC advised the Tribunal after the hearing that the penalty of £300 issued to the appellant for failure to comply with the Information Notice had been withdrawn pending the decision in this matter.

## **Discussion**

11. We do not agree with the appellant’s submission that a COP 9 investigation cannot relate to a tax return; in our view, the fact that there is an alternative enquiry

route under s9A does not preclude HMRC from opening an investigation into a tax return. Indeed, we consider that it would require clear express unequivocal language in the statute if it was intended that HMRC could not use criminal investigation powers where it suspects tax fraud in relation to a tax return.

12. With regard to the question of whether Condition B was satisfied, we consider that the requirement that “that HMRC has reason to suspect that amounts have not been assessed, or an assessment has become insufficient, or that relief from tax may have been or become excessive” was met. We find that on the evidence HMRC had such suspicion prior to the issue of the Information Notice, and that such suspicion arose from the fact that the appellant’s claimed “other business expenses” had increased markedly and represented an unusual proportion of turnover. We consider that there is nothing in the legislation that required that HMRC identify such suspicion to the appellant prior to the issue of the Information Notice; what is required is that HMRC *hold* such suspicion prior to the issue.

13. With regard to the information requested:

(1) We do not consider that the appellant has established that any of the information requested amounts to “accountants’ link papers”. The fact that some of the information requested may also be contained in such link papers does not mean that it cannot be disclosed;

(2) With regard to the bank statements, we do not consider that HMRC is required to show that other bank accounts exist in order to request bank statements for all of the appellant’s bank accounts. Such statements are required to be kept, and provided when properly requested, for tax purposes.

(3) With regard to information requested to assess penalties, we do not agree that this request requires the appellant to self-incriminate: we consider that such information is used to reduce or eliminate penalties, rather than increase or impose them. Further, we consider that the appellant’s argument that HMRC made the repayment without her request is not well-founded as the repayment was clearly made in response to her submission of a tax return containing an overpayment of tax.

(4) The trust documentation is, we find, required to evidence the claimed deduction by the appellant of contributions to the trust as “other business expenses” and is not a speculative request from HMRC.

(5) We consider that, for the reasons given by HMRC, the other information requested is also reasonably required to check the appellant’s tax returns for the relevant years and so meets the criteria for inclusion in the Information Notice.

(6) We do not consider that there has been any breach of the appellant’s human rights; as already discussed, we find that HMRC had reason to suspect that amounts which ought to be assessed had not been assessed. Further, we do not consider that a request for documents which are required by law to be kept, and produced, amounts to a breach of human rights. We note that the appellant

acknowledged that HMRC had agreed that the appellant could choose not to provide the non-statutory information.

14. As we have found that the Information Notice is valid, we do not agree that any information provided to HMRC in response to the Information Notice has been obtained unlawfully by HMRC.

15. As HMRC subsequently advised the Tribunal that the penalty notice referred to by the appellant had been withdrawn, we have made no findings or decision in relation to that penalty notice.

### **Decision**

16. We find that the Information Notice is valid and the appeal is dismissed.

17. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**RELEASE DATE: 24 JULY 2019**