



TC01280

Appeal number TC/2010/4718

Penalty for failure to comply with information notice – para 39 Sch 36 FA 2008 – whether reasonable excuse – whether documents in possession or power of taxpayer

FIRST-TIER TRIBUNAL

TAX

P C CLARKE

Appellant

- and -

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

Respondents

**TRIBUNAL: CHARLES HELLIER
JOHN CHERRY**

Sitting in public in Brighton on 14 February 2011

Mr Clarke in person

Karen Weare, for HM Revenue and Customs, for the Respondents

DECISION

1. Mr Clarke appeals against a penalty of £300 imposed on him for failure to comply with an information notice given on 23 March 2010 to produce certain documents and information. In this appeal Mr Clarke does not dispute the validity of the notice, but says that the state of his health made it unreasonable for him to comply with it, and that in his circumstances the location of the documents sought by HMRC meant that they were not within his possession or power.

The Legislation

2. Section 9A Taxes Management Act 1970 (“TMA”) provides that an officer of HMRC may enquire into a taxpayer’s return made under section 8 of the Act.

3. Section 19A provided that, where an enquiry has been opened, an officer could require a taxpayer to produce documents and particulars for the purpose of the enquiry.

4. Section 19A was repealed from 1 April 2009 and replaced with provisions in Sch 36 Finance Act 2008. Paragraph 1 of that schedule provides that an officer may by notice in writing require a taxpayer to produce documents or provide information reasonably required for the purpose of checking his tax position. Such a notice is called an information notice (para 6). Paragraph 7 provides that “where a person is required by an information notice to provide information or to produce a document, that person must do so (a) within such period, and (b) at such time...as is reasonably specified or described in the notice...”.

5. Part 4 of sch 36 contains restrictions on these provisions. By Para 18:

“An information notice only requires a person to produce a document if it is in that person’s possession or power.”.

6. By Para 21, where a tax return has been made an information notice may not be given unless an enquiry has been opened into the return and has not been completed.

7. Part 7 deals with penalties. Para 39 provides that “a person who fails to comply with an information notice is liable to a penalty of £300.”

8. Paragraph 44 provides that if an officer allowed further time to do what was required a penalty does not arise under para 39 if what was required to be done was done within the extended time.

9. Paragraph 45 provides:

“(1) Liability to a penalty under paragraph 39...does not arise if that person satisfies [HMRC] or (on appeal) the First-tier tribunal that there is a reasonable excuse for the failure...”

“(2)...(c) where the person had a reasonable excuse for the failure...but that excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied ...without unreasonable delay after the excuse ceased.”

5 10. Para 47 provides for a right to appeal to this tribunal against a penalty under para 39, and para 48 provides that on appeal against the amount of a penalty under paragraph 39 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.”

10 11. We should also note two provisions of TMA. Section 102 provides that “The Board may in their discretion mitigate any penalty...”. There is no definition in TMA of “penalty” although that Act provides itself for certain penalties. Section 118(2) provides that “where a person had a reasonable excuse for not doing anything
15 required to be done he shall be deemed not to have failed to do it unless the excuse ceased, and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse ceased.”

12. Mr Clarke suggested that section 118(2) provided a wider defence than para 46. In our view it does not. Both provisions exculpate a taxpayer during the currency of a reasonable excuse, and both continue that exculpation for a period of reasonable delay
20 after the excuse ceases.

The Facts

13. From Mr Clarke’s evidence and the documents before us we find the following facts.

Communications with HMRC

25 14. Mr Clarke submitted a tax return for 2005-06 under section 8 TMA.

15. On 10 October 2007 an enquiry into that tax return was opened. The enquiry has not been closed.

16. An information notice under the old section 19A was issued on 14 November 2007. Mr Clarke appealed against the notice. The appeal was heard by the Special
30 Commissioners. The notice was confirmed with minor changes.

17. On 25 March 2009 Mr Alexander, the officer of HMRC dealing with the enquiry into Mr Clarke’s return wrote to Mr Clarke requesting various documents.

18. On 20 May 2009 Mr Alexander gave a formal information notice to produce certain documents and information within 30 days (by 19 June 2009).

35 19. On 26 May 2009 Mr Clarke wrote to Mr Alexander to say he was unwell. Mr Alexander responded on 1 June 2009 to say that he would hold the matter in abeyance until 13 July 2009.

20. On 8 July 2009 Mr Clarke provided some of the information sought.
21. On 24 July 2009 Mr Alexander wrote to pursue his other requirements.
22. On 13 August 2009 Mr Clarke provided further information.
23. On 11 September 2009 Mr Alexander wrote to repeat his request of 20 May 2009
- 5 24. On 2 October 2009 Mr Alexander wrote to ask for information requested on 20 May 2009 to be provided by 16 October 2009.
25. On 7 October 2009 Mr Clarke wrote to say that his hips had deteriorated and that he could not access the documents sought.
26. On 16 October 2009 Mr Alexander extended the time limit to 7 December 2009.
- 10 27. On 4 November 2009 Mr Clarke wrote to say that he would let Mr Alexander know when he would be fit enough to access the documents sought.
28. On 9 December 2009 Mr Alexander issued a penalty notice. Mr Clarke appealed.
29. On 23 March 2010 Mr Alexander, saying that there were concerns that the previous information notice had been too vague, withdrew the penalty notice and
15 issued a fresh information request. The new notice required the information and documents within 30 days, namely by 22 April 2010. This is the notice relevant to the appeal. The information and documents sought are more tightly defined, but fall within the compass of those sought in the notice of 20 May 2009 less what had been provided. This notice sought (i) sales, purchases, and legal costs invoices; (ii) a
20 reconciliation of the nominal ledger to the tax return, (iii) a print out of nominal ledger accounts, and (iv) the matching of invoices with nominal ledger entries. Although the notice does not adopt this terminology we call these elements (i), (ii), (iii), (iv) of the notice.
30. No appeal was made against this notice, but Mr Clarke wrote to say that he now
25 also had problems with his back and could not comply with the notice.
31. Mr Alexander sent a letter warning of a penalty for failure to comply with the information notice of 23 March 2010 on 26 April 2010 and, after a further letter on 29 April 2010, issued a penalty notice on 19 April 2010. It is against that penalty that Mr Clarke appeals.
- 30 32. Mr Clarke suffered a stroke in 2007. By 2009 he was suffering from atrial fibrillation, had an ulcer, and was suffering pain from decaying hip joints. In November 2009 he had a hip replacement, and by February 2010 he was able to walk with only one stick. But he then developed back problems. On 25 March 2010 –
35 appeal – a consultant rheumatologist diagnosed a fractured spine and osteoporosis. He is now taking more drugs in an endeavour to improve his bone quality. He hopes to improve over the next year. He had been advised not to lift heavy weights.

33. We find Mr Clarke's recent unwillingness to crawl into a small loft space reasonable.

The location of the documents

34. The invoices Mr Alexander sought have not been provided to him.

5 35. Mr Clarke told us that those invoices were stored in the loft space above his office. They had been put there after his tax return had been completed. It was, he said, a space about 12 ft square and about 3 or 4 feet high. The floor was 1/8 inch harboard laid over steel girders about 6 feet apart.

10 36. Mr Clarke told us that he had asked his handyman whether he would go into the loft, and he refused. His wife had also refused. His builder offered to take the roof off to access the records.

37. We make no finding on these issues. Whilst we are inclined to believe Mr Clarke, if the location of the documents was essential to our conclusions we would have directed a site visit or photographic evidence.

15 *Compliance with the information notice.*

38. None of the requirements of the information notice have been complied with

20 39. Mr Clarke keeps his records on a computer with a SAGE accounting package. He told us that he could have provided the reconciliation required by the information notice (see 28 (ii) above) but that it would not have helped because Mr Anderson would have come back for the rest of what he sought.

The Parties' arguments

(i) Mr Clarke

25 40. First, Mr Clarke says that there is no statutory definition of "possession". The records sought by HMRC are in his possession only if he can put his hands on them. He is not able to do so. He asks whether, if a taxpayer owned a field in which somewhere there were buried records, those records could properly be regarded as in the taxpayer's possession.

30 41. Second, he says that in a year or so's time he should, all being well, be able to get into the loft. He is quite willing to provide the records when he is able. He just asks HMRC to wait until he is.

42. Third, the notice must be taken as a whole. Although he could have complied with the requirement to provide the reconciliation to the nominal ledger, he could not have provided the invoices. He has a reasonable excuse for his failure.

35 43. Generally Mr Clarke asks whether the tribunal has power to defer the operation of the penalty in some way – perhaps the tribunal could adjourn the hearing for a while.

44. Mr Clarke drew our attention to the mitigation provisions of section 102 and suggested that, pursuant to para 48(4)(b) we might mitigate the penalty.

(ii) Mrs Weare

5 45. Mrs Weare says that the information notice has not been challenged. There is thus no question that what is sought is reasonably required.

46. She says that the records sought in element (i) of the notice are in Mr Clarke's possession even though they may be difficult for him to get hold of.

10 47. Lastly she says that even if Mr Clarke's health problems mean that he has a reasonable excuse for his failure to comply with elements (i) and (iv) of the notice, they do not provide a reasonable excuse for his failure to comply with elements (ii) and (iii) of the notice. The notice is not complied with if one element of it is not complied with and there is no reasonable excuse for that non compliance.

48. Discussion

(1) *Failure to comply*

15 49. The provisions in Sch 36 for an appeal against an information notice indicate to us that in relation to an appeal against a penalty for failure to comply with an information notice, the tribunal is bound to treat the requirements of the notice as having statutory force if the notice can properly be said to be an information notice within the statute: the tribunal is not entitled to reopen the question which could have
20 been debated in an appeal against the notice itself, as to whether the requirements of the notice are reasonably necessary for their purpose. The tribunal may allow an appeal against a penalty if there has been no notice, if the notice has not been given in writing, or where there is a reasonable excuse, but not otherwise.

25 50. Mr Clarke did not appeal against the information notice. The question therefore of whether it was reasonable in Mr Clarke's circumstances for Mr Alexander to ask for the invoices etc is not relevant to this appeal. (Although we may legitimately be concerned instead with whether Mr Clarke had a reasonable excuse for any failure to comply.)

30 51. In our view, there is a failure, within the meaning of para 39 (1), to comply with a notice which requires production of one or more things if any one of those things is not produced. That is the only natural meaning of the provisions of para 1, 6, 7, 8, and 39.

35 52. As a result: if Mr Clarke failed to provide the reconciliation required in element (ii) and/or the print out required in element (iii) of the notice then he failed to comply with the notice whether or not he failed to comply with any other element of it; and if the documents were in his possession or power, then because Mr Clarke did not provide the documents in element (i) of the notice he failed to comply with the notice.

53. We set out our views on the question of possession below, but they are not, for the reasons in the following section strictly relevant to our decision.

(2) *Reasonable excuse*

5 54. If there is a failure to comply with, say, two requirements of a notice, but there is a reasonable excuse for one (only) of those failures, is there then a reasonable excuse for the failure to comply with the notice? In our view there is not. The failure is a failure to do A *and* B: leaving aside de minimis considerations, there is in our view a reasonable excuse for that failure only if there is such an excuse for the failure to do A *and* the failure to do B.

10 55. Thus it is only if Mr Clarke has a reasonable excuse for both his failure to provide elements (ii) and (iii) and the other elements of the notice that he can have a reasonable excuse for his failure to comply with the notice.

15 56. We find there was no reasonable excuse for Mr Clarke's failure to provide elements (ii) and (iii) of the notice. There was therefore no reasonable excuse for his failure to comply with the notice.

57. His appeal therefore must fail.

20 58. We now set out, because these issues were a large part of the debate before us our conclusion as to whether Mr Clarke had a reasonable excuse for his failure to provide element (i) of the notice, the invoices, and element (iv) of the notice, the matching of invoices to nominal ledger entries. In our view, for the reasons below, he just about did; but we emphasise that this finding does not permit us to allow his appeal or to reduce the penalty.

25 59. We accept that Mr Clarke had serious health problems. We also accept that at the time of the notice and up to the time of the tribunal hearing he was unable safely to crawl into a small ill supported loft to obtain the invoices. We assume for this purpose that the loft was so inaccessible throughout the relevant period although, as we say above, if this finding were crucial to our decision we would have directed a site visit or sought photographic evidence.

30 60. But, as the chronology above shows, Mr Clarke had long notice of HMRC's wish to see these documents. Even though it may have been reasonable at a particular time for Mr Clarke not to produce the documents because he could not crawl into a loft, there comes a time when even if he could not do it himself it becomes reasonable to expect him to find a way for someone else to do it on his behalf. At some time it could well become reasonable for him to have the underlying room scaffolded to support the loft floor so that it would be safe for someone else to crawl into the loft.

35 40 61. The question is when that time comes. That depends in part on the exact configuration of the loft space (hence another need for a site visit or equivalent evidence), it also depends upon the amount of time which had passed since Mr Clarke became aware of HMRC's desire to see the documents, and it depends on the progress of Mr Clarke's health.

62. Given that Mr Clarke's back problems started at about the time of the giving of the notice, it seemed to us that it was reasonable to allow some time for the progress of his health to improve, but that there would come a time, when if it had not improved sufficiently, the excuse would run out. In our view he had a reasonable
5 excuse for his failure to provide the invoices and that excuse was continuing at the time of the tribunal hearing, but, although we could not bind another tribunal, had we heard this case in January 2012 on the facts as we understand or assume them to be, we may well not then find that a reasonable excuse existed.

(3) Possession or power

10 63. Again this issue is not, given our findings above strictly relevant to our decision. We set out our conclusions because the issue was debated, and in case we are wrong in those conclusions.

15 64. It seems to us that the phrase "possession or power" in para 18 is not a composite phrase but involves two separate concepts. Thus a person may be compelled to produce a document if it is in his possession but not his power, or if it is in his power but not his possession, or if it is in both his power and his possession. This is the construction which has been applied in many cases to the phrase "possession custody or power" in the civil procedure rules in relation to disclosure and discovery, and it
20 seems to us that neither the language nor its context requires a different approach in para 18.

65. Those cases also indicate that a document is in a person's possession if a person has both physical possession of it and a right to that possession; and is in his power if he has a right to direct how it shall be dealt with. The invoices in Mr Clarke's loft were in our view both in his possession and in his power.

25 66. It seems to us that difficulties in relation to the finding of a document go to the question of whether it is reasonable for a person to produce it, not to whether or not it is in his possession or power. Thus in Mr Clarke's example of a document buried in a field, the document is in the possession of the possessor of the field even if he cannot easily find it, but whether it is reasonable to require him to dig up the whole field to
30 produce it is another question.

(4) Mitigation

67. Is it open to us to mitigate the penalty imposed? It would be possible for us to do so on an appeal against the amount of a penalty if it were possible for an officer of the Board to do so (para 48(4)(b)).

35 68. The power to mitigate is in section 102 TMA 1970; the penalty under appeal is imposed by FA 2008. There is no explicit provision in FA 2008 which treats sch 38 as being part of TMA. But we note that there is no definition of penalty in section 102 or in the TMA, and that section 103 imposes time limits for the imposition of penalties and section 103 provides for interest on unpaid penalties. It seems to us that these
40 provisions are intended to apply both to penalties arising under TMA but also under other tax acts. We conclude therefore that the Board does have power to mitigate a

penalty imposed under para 39 Sch36 FA 2008, and that an authorised officer would also have such a power. It follows that the tribunal would have power to apply mitigation to any such penalty. However, we would not in these circumstances exercise such power to reduce the penalty. We concluded that the penalty liability
5 arose because Mr Clarke had failed to comply with certain requirements of the information notice and that he had no reasonable excuse for that failure. If the failure had related solely to the documents in Mr Clarke’s loft, and had we found that he had no reasonable excuse for the failure to supply them, then we might have found that the state of his health was a reason for mitigating any penalty to some extent. However,
10 the failure extends to other requirements of the information notice, where no such reason applies.

Disposal

69. We dismiss the appeal.

Rights of Appeal.

15 70. 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
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

CHARLES HELLIER

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**TRIBUNAL JUDGE
RELEASE DATE: 29 JUNE 2011**

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